IN THE SUPREME COURT OF FLORIDA

OLEN GORBY,

Appellant,

v. CASE NO. 95,153

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee does not accept Appellant's Statement of the Case and Facts, which is largely argumentative and lacking discussion of many of the facts which this Court will need to resolve this appeal. Accordingly, the State presents the following relevant facts of record.

Trial Proceedings (1990 - 1991):

Gorby was charged by indictment dated July 27, 1990, with one count of premeditated murder, one count of armed robbery with a deadly weapon, one count of grand theft auto, and one count of burglary of a dwelling in which a battery had occurred, in regard to the May 5, 1990, murder of W.J. Raborn (OR XII 1849-1850).[1] The public defender was initially appointed to represent Gorby, but withdrew on the basis on conflict, and Attorney Paul Komarek was appointed on November 19, 1990 (OR XII 1883). Following his appointment, Komarek filed a number of pretrial motions, including a motion to suppress photographic line-up identification, motion for appointment of confidential expert for use in the penalty phase, and a motion for appointment of an independent investigator (OR XII 1940-6). On January 30, 1991, Judge Sirmons appointed Dr. Clell Warriner as a confidential defense expert, and Gene Roy and Lee Norton as investigators, Ms. Norton to assist Gorby's counsel

[1] (OR ___) represents a citation to the original record on appeal, Florida Supreme Court Case Number 79,308, whereas (PCR ___) represents a citation to the postconviction record in this case, which has been supplemented several times.

"for the purposes of penalty phase investigation" (OR XII 1998-2000).

On February 21, 1991, Attorney Komarek filed a notice of intent to rely on insanity defense, and additional experts, Drs. Annis and McClaren, were appointed for the purposes of determining Gorby's competence and sanity (OR XIII 2064-5). A formal competency hearing was held on April 19, 1991, at which both experts testified that Gorby was competent, and reports to that effect were likewise introduced (Defense exhibits #17, tab 3, tab 4, tab 25). Attorney Komarek then moved for the appointment of a neuropsychologist, in that despite the findings of competency, both experts had indicated the "strong probability of some degree of neurological impairment or organicity" (OR XII 2181-2); the motion was granted, and Dr. John Goff was appointed (OR XIII 2216-17). On June 17, 1991, defense counsel requested that the Court authorize skull x-rays and an EEG, in that Dr. Goff had already determined that Gorby suffered from frontal lobe brain damage, and such motion was granted (OR XIV 2396-2403). On June 24, 1991, counsel formally withdrew the notice of intent to rely on an insanity defense (OR XV 2456).

Gorby's trial commenced on June 24, 1991. In his opening statement, Attorney Komarek reminded the jury of the prosecutor's burden of proof, and stated that the jury would hear evidence that Gorby had been heavily under the influence of alcohol, and that, as a child, he had sustained a severe head or brain injury; expert testimony would be presented to the effect that Gorby was very suggestible and that his capacity to make judgments and think

rationally would be severely reduced by the alcohol (OR IV 531-7). The prosecution presented the testimony of twenty-five (25) witnesses. These witnesses included Robert Jackson, who had met Gorby in El Paso, Texas in April of 1990, and given him a ride to Panama City; he testified that he saw Gorby at the Rescue Mission on the night of May 6, 1990, at which time Gorby stated that he was checking out of the Mission (OR IV 538-9; 552-4). The State also called Fred Grice and Michael Bennett, who testified that they had seen Gorby in the company of the victim, W.J. Raborn, on the evening of May 6, 1990, down by the marina; both witnesses testified that Gorby did not appear to be intoxicated at this time, as did another witness who had seen Gorby at the Mission (OR IV 631, 639, 705; V 710). Raborn had told his neighbors that he was going to find someone to help him fix a broken toilet seat; Ms. Zagorski testified that Raborn, who was partially crippled, sometimes picked up persons from the Rescue Mission to do odd jobs for him around the house (OR V 714, 721).

On May 7, 1990, Ms. Zagorski went over to check upon her neighbor and found a note on the front door saying, "Will be back Tuesday;" handwriting analysis confirmed that Gorby wrote this note (OR VIII 1249). Ms. Zagorski nevertheless unlocked the front door, and found that the living room had been disarranged. Stepping into the hall, she encountered a pool of blood, and opening the bathroom door, found the victim lying on the floor (OR V 717-18). Law enforcement witnesses testified that Raborn was found lying face down with an extension cord and telephone cord wrapped around his

neck (OR V 732). Subsequent testimony was presented to the effect that Raborn had initially been assaulted in the hallway and then dragged into the bathroom (OR VIII 1373). The victim had been struck in the head seven times with a claw hammer (a hammer was found on the floor of the master bedroom between the bed and closet [OR VIII 1120]), five of the blows in a circular pattern or grouping (OR VIII 1380). The claw hammer had gotten caught in the victim's skull at one point, and the bone had been driven into the victim's brain by the force of the blows (OR VIII 1381, 1383-4). The medical examiner testified that Raborn had died from a cortical hemorrhage and contusion of the brain (OR VIII 1394). The medical examiner identified the number of other wounds to the victim's body – on the bridge of the nose, the left cheek, over the left eyebrow, the inner side of the left elbow, and on the right knee (OR VIII 1379-1382), and stated his opinion that the victim had lived from between 10 and 15 minutes after the initial attack, given the amount of blood (OR VIII 1387-8); Dr. Sybers, however, testified that Raborn could have been rendered unconscious after the first or second blow (OR VIII 1388). The forensics expert, Jan Johnson, testified that, from the location of the blood stains, the victim had been lying on the floor at the time that "forceful impact" produced the blood spatters, and stated that Raborn's head had been about nine inches above the floor (OR VIII 1292-3).

Gorby's fingerprint was found on a glass jar in the kitchen (OR VIII 1218), and the victim's automobile (a 1985 silver Buick with a dark top) was missing, as were a number of other items

including an answering machine (OR VIII 1953). The victim's gasoline credit cards were utilized in various locations in Louisiana and Texas, and, on May 7, 1990 Gorby registered as "W.J. Raborn" at the Downtown Motel in San Antonio, Texas (OR V 737-743; VII 1103-8); Gorby paid with the victim's stolen Discover Card and used a doctored drivers license for identification. While in San Antonio, Gorby came into contact with two friends of his, Allan and Marissa Brown, both deaf mutes. The witnesses testified, through an interpreter, that they had seen Gorby driving a grey Buick and had witnessed Gorby remove the Florida license plates and replace them with a license plate from Louisiana (OR V 791-3; 856). Allan Brown also testified that Gorby had told him that he had committed murder in Florida and had stolen the car and credit cards; Gorby opened his wallet to display the stolen credit cards (OR VII 791-2). Gorby, using the alias, "Charles Knott," sold the stolen car to Cleo Calloway (OR VI 1001-3).

Following Gorby's arrest in San Antonio, he gave a statement to the authorities. At this time, Gorby contended that Robert Jackson had introduced him to the victim in this case, and that Gorby had in fact done some odd jobs for him - fixing his lawn mower, cracking some walnuts and crushing some beer cans (OR VII 1203). The next day, Jackson had pulled a gun on Gorby, and stated that he had already killed one person and would kill another if he had to (OR VII 1204). Despite this treatment, Gorby accepted a ride to Texas from Jackson (who was driving the victim's car) (OR VIII 1704-5). Gorby also told the authorities that he had never

killed anyone (OR VII 1211). While he was awaiting trial for this offense, however, Gorby told another inmate, Jerry Wyche, that he did not like homosexuals and that he had "beat a dude down with a hammer" (OR VIII 1302).

Attorney Komarek presented eight (8) witnesses in Gorby's defense (OR IX 1407-1531). In addition to presenting inmate witnesses to impeach Wyche (OR IX 1517-1531), to cast doubt as to Jackson's whereabouts (OR IX 1513-17), and to imply that the victim had made a habit of picking up hitchhikers (OR IX 1509), the defense strategy focused upon Gorby's ability to premeditate. Thus, the defense presented the testimony of Michael Krall, the bartender at a Panama City gay bar, who testified that Gorby had been at the bar on the evening of May 6, 1990, and had been "fairly drunk" (OR IX 1419). Attorney Komarek also presented the testimony of Gorby's mother, Wanda Garrison, who stated that Gorby had called her that night from a bar and that he had sounded like he had been "drinking some" (OR IX 1413-14). Ms. Garrison also told the jury about Gorby's childhood head injury, stating that he had been hit by a car and dragged for forty-five (45) feet, as a young child (OR IX 1409-1410). Gorby's mother stated that he had been in and out of consciousness for days, and had experienced headaches and was never the same afterwards (OR IX 1411-13).

The primary defense witness was Dr. John Goff, a clinical neurologist (OR IX 1425-1506). Goff testified that he had interviewed Gorby and talked with his mother, in addition to receiving background records (including those from the Wheeling

Clinic) and administering a battery of neuropsychological tests, such as the Halsted-Reitan, the revised Wexler Adult Intelligence Scale and the MMPI; a CAT scan and EEG were also performed (OR IX 1433, 1453, 1487, 1495-6, 1505). Goff stated that Gorby suffered from organic personality disorder and alcohol dependence, both chronic conditions (OR IX 1434). The expert stated that these conditions, in conjunction with consumption of alcohol on the night in question and a history of head injury, would mean that Gorby would have had trouble controlling his inhibitions or temper, and would have had a negative impact on his ability to form an intent to do an act or see its consequences (OR IX 1435-6); he also stated that Gorby would have been very suggestible (OR IX 1437-8). On cross-examination, however, Goff concluded that he had no specific opinion as to Gorby's mental state at the time of the murder "outside of his general presentations," in that Gorby had stated that he was not present at the time of the murder (OR IX 1438-9). He also noted that, while Gorby had stated that he had a steel plate in his head, he had found such not to be the case (OR IX 1440). Goff testified that neither the EEG or CAT scan had indicated any organic brain damage or abnormality (OR IX 1445-7). Goff testified that his diagnosis was consistent with the history received and the test results and that he had no doubt or hesitancy as to his findings (OR IX 1499-1500).

In his closing argument, defense counsel contended that the State had not proven that Gorby committed the murder, but that if he had, such had not been a premeditated offense (OR X 1644-1651).

Attorney Komarek reviewed the evidence presented to the jury, suggesting that Robert Jackson, rather than Gorby, had committed the offense (OR X 1599, 1611-1617), and additionally emphasized the testimony presented concerning Gorby's head injury, intoxication and alleged inability to premeditate (OR X 1606, 1646-1651). Komarek pointed out that the crime appeared to be an unplanned or spontaneous one, noting that valuables had been left behind and that the victim could have provoked the assault by an improper advance (OR X 1602, 1634-6). Counsel also argued against felony murder, suggesting that at most a lesser degree of homicide had occurred (OR X 1610), and highlighted what he perceived to be weaknesses or contradictions in the testimony of the state witnesses (OR X 1624-1635).

Following the jury's verdict of guilty on all counts, the penalty proceedings began several days later. At this proceeding, the State introduced documentary evidence concerning Gorby's prior crimes (OR XI 1754-8).[2] Attorney Komarek presented the testimony of Gorby's mother and two of his sisters (OR XI 1764-1788). Gorby's mother testified that Gorby had been born in a small West Virginia town and again recounted the events surrounding his head injury as a young child; she stated that he had a quicker temper after the accident (OR XI 1766-7). She stated that the family had

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[2] As this Court noted in its direct appeal opinion in this case, Gorby v. State, 630 So.2d 544, 545, n.1 (Fla. 1993), "Gorby has an extensive criminal history dating back to 1968 with multiple convictions of, among other things, burglary, robbery, armed robbery, and attempted homicide. He committed various crimes in six states under at least a dozen different names."

not "had much" when Gorby was growing up, and that they had lived in a poor area (OR XI 1766). Ms. Garrison testified that Gorby's father had been an alcoholic and "pretty highly tempered;" they divorced in 1958, when Gorby was 8 (OR XI 1767-8). She stated that he ex-husband fought her for custody of Gorby, whom she called "Bucky," but that Gorby had not wanted to live with him (OR XI 1768-9). Ms. Garrison testified that Gorby had been married and had a son and daughter (OR XI 1769-1770). She also testified that Gorby had been traumatized by the shooting of his two sisters, and that he was an alcoholic (OR XI 1770-5). Defense counsel specifically asked Gorby's mother if his children would be upset if he were executed, and whether she thought that her son should be (OR XI 1770, 1774). Asked to explain why her son should live, Ms. Garrison detailed Gorby's love for his family and their love for him (OR XI 1775-6). Gorby's two sisters, Garnet Butcher and Mary Jane Cain, testified about the shooting incident and Gorby's reaction to it (OR XI 1783), as well as Gorby's love for his family and their love for him (OR XI 1779-80, 1785-7). Attorney Komarek asked each witness if Gorby should live, and each of his sisters broke down and wept on the witness stand (OR XI 1780, 1786).

In his closing argument, Attorney Komarek argued against the death penalty, both as a general proposition, and within the context of Gorby's case. He consistently reiterated that the law favored a life sentence, rather than death, that life was sacred and that the death penalty was only for those who were beyond redemption (OR XI 1805, 1809-10, 1812-13, 1817, 1822). Counsel

specifically disputed the prosecutor's contention that the heinous, atrocious or cruel aggravator applied, given Dr. Sybers' testimony that Raborn may not have suffered, and could have lost consciousness after the first or second blow (OR XI 1815-16). Counsel specifically argued that both statutory mitigating circumstances pertaining to mental state applied, and reminded the jury of the "catch all" mitigating circumstance, pointing to the testimony presented relating to Gorby's brain damage, intoxication and deprived background (OR XI 1821, 1819). Attorney Komarek reminded the jury that evidence had been put on "so that you would know that there were people out there who care about Olen," and "that he's not just an evil monster or something to be treated in the abstract." (OR XI 1806). Attorney Komarek argued that, if given life imprisonment, Gorby would never again "see the light of day," as he was now 41 and would be 66 at the end of the mandatory 25 years, suggesting that Gorby could receive additional time as a result of his sentences for the non-capital offenses; counsel advised the jury that Gorby would suffer in prison, in that "those cesspools that we call our prisons are a den of suffering." (OR XI 1808, 1813-14).

Following the jury's recommendation of death (by a vote of 9 to 3), Judge Sirmons sentenced Gorby to death on August 30, 1991. At the sentencing proceeding itself, Attorney Komarek introduced letters from Gorby's family and friends, as well as Dr. Goff's report (OR XI 2730-3). The judge found four aggravating factors to apply - that Gorby had been under sentence of imprisonment at the

time of the murder, under §921.141(5)(a), Fla. Stat. (1989); that Gorby had previously been convicted of crimes of violence, under §921.141(5)(b), Fla. Stat. (1989); that Gorby had committed the murder for pecuniary gain, under §921.141(5)(f), Fla. Stat. (1989); and that the murder had been especially heinous, atrocious and cruel, under §921.141(5)(h), Fla. Stat. (1989). In his sentencing order (OR XV 2621-9), the judge discussed in some detail those matters in mitigation for which Gorby had presented evidence - both statutory mental mitigating factors relating to mental state, §§921.141(6)(b) & (f), Fla. Stat. (1989), as well as such non-statutory factors as Gorby's love for his family and their love for him; the effects of the car accident upon Gorby when he was a child; Gorby's childhood development and the poverty he was exposed to; Gorby's failed marriage and the testimony that he suffered when his sisters were shot. As to the first matter, Judge Sirmons found that although neither statutory mental mitigating circumstance was established, he would consider Gorby's use of alcohol and organic personality syndrome as non-statutory mitigation (OR XV 2625-26). The sentencer likewise found in mitigation the fact that Gorby's family loved him, that he had come from a poor background, that he had an absent father and a failed marriage, that he had been in a car accident at age four and that he was affected by his sisters being shot (OR XV 2626). On appeal, Gorby's sentence of death was affirmed on all respects. Gorby v. State, 630 So.2d 544, 547-8 (Fla. 1993).

Postconviction Proceedings (1995-1999):

Gorby filed a motion for postconviction relief, pursuant to Fla.R.Crim.P. 3.850, raising thirty-five (35) claims for relief; despite its length, the pleading requested further leave to amend, and, after several years of public records litigation, an amended motion, now presenting thirty-six (36) claims, was filed on May 30, 1997 (PCR 309-521). Following response by the State, and a hearing pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), Judge Costello held that, while the vast majority of the claims were either procedurally barred or legally insufficient, Gorby would be afforded an evidentiary hearing upon the properly pled and presented allegations of ineffective assistance of counsel at the guilty and penalty phases, as well as alleged violations of Brady v. Maryland, 373 U.S. 72 (1962); the hearing was afforded on all or parts of claim VII, VIII, IX, XI, XIII, XVI and XVII. (PCR IV 594-5). The hearing was continued to accommodate Gorby's counsel, and formally commenced on July 13, 1998. At this hearing, Gorby introduced voluminous documentary exhibits, and presented the testimony of nine (9) witnesses; the State likewise introduced documentary exhibits, and presented the testimony of four (4) witnesses. The hearing was reconvened on October 9, 1998 to allow Gorby to present the testimony of another witness, Dr. Barry Crown. On December 2, 1998, Judge Costello rendered her final order denying relief (PCR V 675-7). Gorby subsequently attempted to reopen the proceedings and seek rehearing (sending such pleadings to the circuit court, but never filing them with the clerk or

serving opposing counsel) (PCR V 768, 741-2), and a hearing was held on February 15, 1999; at this hearing, Jerry Wyche, a witness whom collateral counsel allegedly wished to present, declined to testify and invoked his rights under the Fifth Amendment (PCR XIII 1533). The motion for rehearing was subsequently denied (PCR V 814).

Gorby's former trial attorney, Paul Komarek, was the primary postconviction witness, and, indeed, was called by both the prosecution and defense (PCR IX 949-1076; XI 1358-1373). Komarek testified that he had been an attorney practicing law in Panama City since his admission to the bar in 1975, and that he had been appointed to represent Gorby following the public defender's withdrawal (PCR IX 950-1). Komarek testified that he deposed all state witnesses, reviewed all scientific reports, and pursued leads to develop suspects other than Gorby (PCR IX 1026-7). Komarek recognized that the State had a strong case against Gorby, and felt that he would be convicted (PCR IX 966-7); he stated that Gorby rejected an plea offer from the State (PCR IX 1039). The witness testified that, from the time of his appointment, he had been aware that there might be a penalty phase, and had begun preparation early, and, indeed, had interviewed Gorby with that in mind (PCR IX 981). Komarek acknowledged that he had requested, and received, the appointment of an investigator, Gene Ray, as well a "mitigation specialist," Lee Norton (PCR IX 982-6). Likewise, because Gorby had told him that he had suffered a head injury as a child, the attorney secured the appointment of a confidential mental health

expert, Dr. Clell Warriner (PCR IX 990-1); the attorney stated that Gorby's competency had been examined at the time of the trial, and that Drs. Annis and McClaren had testified at the competency hearing (PCR IX 991-2). Komarek stated that he found Gorby's head injury to be significant, such could provide a basis for the jury to acquit on first degree murder, due to a lack of ability to premeditate, and could also constitute mitigation or a basis for a life sentence at any penalty phase (PCR IX 992-3). Komarek testified that Dr. Warriner had advised him that he would not be the best witness to testify, and had recommended that he retain Dr. Goff instead, which he did (PCR XI 1380-2; IX 995, 1027-9); State's Exhibit #3 includes a memo to the file, dated June 21, 1991, from a member of Komarek's staff, stating that Warriner had called and "it is his impression that he could best be of help as a consultant rather than a witness. He feels that his testimony would only dilute that of Dr. Goff" (State's exhibit #3). Komarek testified that he had traveled to West Virginia and met with a number of Gorby's family members, including his mother and his sisters (PCR IX 987-90, 997-9); Komarek testified that he had spoken to Gorby's father by telephone, who was difficult to locate and not particularly helpful (PCR IX 1032-9).

Komarek testified that he had secured the testimony of Gorby's family members in an attempt to "humanize" him, so that the jury would be more inclined to recommend life (PCR IX 999, 1008). He also stated that he had made a number of records requests, and that some records had been destroyed (PCR IX 1005); he subsequently

listed nine (9) institutions (either of learning or correction) from whom he had requested records (PCR IX 1030). Attorney Komarek also testified that he did not acquire some of Gorby's recent employment records from Texas, inasmuch as Gorby had utilized an alias at such time (PCR IX 1073-4). Komarek stated that, at times, he did not supply certain records to the mental health experts, as a matter of strategy, because he did not want the State to utilize their contents against his client (PCR X 1031). The attorney testified that he had interviewed Gorby's mother, Wanda Garrison, for hours and had relied heavily upon her as a source of information and as a means of contact with other family members (PCR IX 1048). He stated that Ms. Garrison had told him that she did not know of any sexual abuse committed upon Gorby, and that his sisters similarly denied any knowledge of such occurrence; Gorby himself had told his attorney that he had never been sexual abused (PCR IX 1049). Komarek stated that he believed that he had left his business card with each family member, so that he could be contacted further if desired (PCR XI 1358). As to the matter of Dr. Sybers, Komarek testified that, at the time that the witness actually testified at Gorby's trial, there had been no formal allegation of misconduct or criminal conduct and further testified that had the witness's trial testimony differed from that set forth in his earlier deposition, he would have utilized such to impeach the witness, if beneficial to the defense (PCR X 1075). Komarek opined, however, that Sybers' testimony to the effect that the victim could have lost consciousness relatively early on, had in

fact been helpful to the defense (PCR X 1075-6; XI 1364). Komarek testified that he did not re-call Dr. Goff at the penalty phase, in that "he had given me everything that he could" earlier and that it would have just been a duplication to have done so (PCR IX 1006; XI 1316); he stated that he did utilize Goff's testimony in his penalty phase closing argument as a basis for contending that the two statutory mental mitigators applied (PCR XI 1360).

The defense presented the testimony of two of Gorby's sisters at the postconviction hearing (PCR X 1077-1104; 1163-1182). Mary Jane Cain testified that she had indeed met with Attorney Komarek in West Virginia prior to Gorby's trial, but that such had been a "joint" meeting with other family members, and that she had felt inhibited in what she could say (PCR X 1078-9); Wilma Morris offered comparable testimony (PCR X 1172-4). Ms. Cain testified that everyone in her family drank alcohol, and that she had once seen her great-uncle strike Gorby (PCR X 1082-3). She likewise stated that her father's second wife had been drunken and abusive when the children had visited (PCR X 1086). On cross-examination, Ms. Cain conceded that nothing had prevented her from contacting Attorney Komarek and talking about these matters (PCR X 1093). The witness stated that Olen Gorby had left home while the two siblings were still in grade school, going to live with his father (PCR X 1099-1100). She also stated that, while her mother had been promiscuous and a poor mother, their grandmother had provided support and had looked after the children (PCR X 1094-5). Wilma Morris testified that her mother had sometimes brought men home,

and that Olen had apparently slept with her mother as well as her current boyfriend at times (OR X 1165-6). Wilma Morris testified, however, that she did not "really remember" Olen, who had left home to live with their father at age eight (8); Wilma was two (2) years younger than Olen (PCR X 1164, 1167). Ms. Morris also testified that there was alcoholism in her family (PCR X 1171). Ms. Morris could not explain why it was that she had failed to contact Attorney Komarek and volunteer any of this information, outside of the presence of the rest of the family (PCR X 1181).[3]

The defense also presented the testimony of a number of mental health experts - Drs. Warriner, Goff and Crown. Warriner affirmed that he had been retained as the defense confidential expert. He stated that based upon his examination of Gorby, review of records and test results, he concluded that there was a likelihood of "some minimal brain dysfunction;" accordingly, he recommended that Komarek retain a neuropsychologist (PCR X 1106), and, indeed, subsequently specifically recommended Dr. Goff, who was retained (PCR X 1107). Warriner testified that Komarek had never asked him about the applicability of the statutory mitigating circumstances (PCR X 1134), and also testified that Komarek had volunteered to supply any records or documents desired by the doctor, and had indeed supplied medical and institutional records (PCR X 1139-

[3] Interestingly, while both Cain and Morris, as well as other family members and friends, wrote letters to Judge Sirmons prior to the imposition of sentence in this case, no one detailed any accounts of alcoholism, dysfunction or abuse at this time (Defense Exhibit #11).

1140). Warriner purported to have no recollection of State's Exhibit #3 (the note in which it was related that he had declined to be a witness), but did not dispute its accuracy (PCR X 1146). Warriner testified that it was his opinion that, in order to evaluate an individual's mental state at the time of the offense, it was not necessary that the individual admit having committed it (PCR X 1161-2). The witness also stated that he had been retained by collateral counsel in this case, and had reviewed additional background materials; based upon these "new" materials, Warriner opined that both statutory mental mitigating circumstances applied (PCR X 1135-6).

Dr. Goff affirmed that he had been retained by trial counsel and had supplied Komarek with a confidential report (PCR X 1190-1). He stated that he reviewed Gorby's medical records from the clinic in Wheeling, West Virginia, and had spoken to Gorby's mother by telephone (PCR X 1191). Goff stated that he had testified during the guilt phase of Gorby's trial, and had not been asked to consider the applicability of the statutory mitigating circumstances (PCR X 1192); he stated, however, that had he been asked, he would have testified that the two statutory mental mitigating circumstances applied (PCR X 1195-6). Goff also affirmed his prior testimony to the effect that he could not do a mental status examination of Gorby as to his mental state at the time of the murder, in that Gorby had stated that he was not there (PCR X 1214); under the circumstances, at most, one could talk about an individual's "general presentation," in that "you can't

say exactly what was going on at the time something happened when he says he wasn't there and it didn't happen." (PCR X 1216). Like Dr. Warriner, Dr. Goff was retained by collateral counsel, and supplied "new" background materials (PCR X 1196). Although he stated that he had not read all these materials, Goff testified that they supported his prior opinion, but did not change his conclusions (PCR X 1198, 1209). Upon questioning by Judge Costello, Goff stated that his view that §921.141(6)(b) applied was based upon his view that because Gorby was brain damaged "all his life," "there is extreme mental disturbances as far as I'm concerned;" he offered comparable testimony as to the application of §921.141(6)(f) (PCR X 1219-1220). In his written report, which was introduced by both parties (Defense Exhibit #31; State Exhibit #7), Goff had stated that his testimony had indicated an I.Q. of 88.

Dr. Barry Crown, a diplomat in neuropsychology, testified on October 9, 1998. Crown stated that he had interviewed Gorby, administered a battery of neuropsychological tests and had studied background materials (PCR XII 1433-4). Based on everything that he had reviewed, Crown opined that both statutory mental mitigating circumstances applied (PCR XII 1434-5). Asked to explain, the witness cited a number of factors including Gorby's early head injury, his dysfunctional family, the fact that his family nickname was "Bucky" "because of his impulsiveness and general

misdirection,"[4] his history of substance abuse and the stress that he was under (PCR XII 1435-6). Crown stated that he agreed with all prior experts to the effect that Gorby had brain damage which would be exacerbated by alcohol usage (PCR XII 1437-8); likewise, he concurred with Goff to the effect that Gorby suffered from organic personality syndrome (PCR XII 1441). Crown testified, on cross-examination, that Gorby's denial of commission of this offense (or even presence at the crime) did not hinder his ability to assess his mental state at the time of the murder, in that he considered Gorby's denial "insignificant" to a neuropsychologist (PCR XII 1456-7). Dr. Crown was not able to identify any documentary basis for his belief that Gorby was under stress at the time of the murder, observing simply that Gorby's brain damage "follows him twenty-four hours a day, seven days a week." (PCR XII 1457-8). When pressed as to a basis for his belief that Gorby had been drinking "near" the time of the murder, Crown stated that near meant "within twenty-four hours," as such term was utilized "for neuropsychological behavioral purposes." (PCR XII 1480). Although Crown purported to find the facts of the case important, he attributed no significance to the fact that Gorby had written the note, "Will Be Back Tuesday," and left such on the victim's door so as to avoid detection of the crimes (PCR XII 1462-4). Crown stated that he felt that his more recent evaluation of Gorby was the more

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[4] In her July 9, 1998 deposition, Garnet Butcher, Gorby's half sister, stated that Gorby was known as "Bucky" because he was a bully (Defense Exhibit #23 at 4).

probative than that conducted by prior experts, who had examined the defendant closer in time to the murder, but conceded that he had never spoken to any of the prior experts (PCR XII 1466-8).

Gorby also presented the testimony of a number of other witnesses, relevant to some of the specific challenges in the postconviction motion. Thus, CCRC investigator Conklin testified about the unsuccessful attempts to locate Robert Jackson (PCR X 1183-6). A local attorney, Timothy Warner, testified that he believed that any attorney defending a capital client had a duty to seek all available records, and that, within the context of this case, Dr. Goff should have been formally re-called at the penalty phase to highlight for the jury the potential mitigation presented (PCR X 1222-1232). On cross-examination, Warriner stated that he had never discussed the case with Komarek, and was offering no opinion as to the latter's competency, noting that some attorneys would not recall a witness who had not made a favorable impression upon the jury (PCR X 1232-6). Leroy Riddick, a state medical examiner in Alabama, testified that, in his opinion, the victim had been rendered unconscious "almost immediately" after the first hammer blow, further opining that all such hammer blows to the head could have been inflicted "in five seconds" (PCR XI 1263-4). Riddick stated that the victim could have died within a one to five second period, and disagreed with Sybers' conclusion that Raborn's heart would have kept beating for ten to fifteen minutes after the attack, given the amount of blood (PCR XII 1266-7). On cross-examination, the witness conceded that Dr. Sybers had testified

that the victim could have been unconscious and unable to feel pain after the first hammer blow (PCR XI 1274-5). Likewise, Riddick did not dispute Sybers' testimony as to the cause of death, or as to the amount of time the bleeding could have occurred (PCR XII 1276-7). Finally, Gorby presented Molly Sheridan, a sign language interpreter from Texas, who had acted as an interpreter twice in court (PCR XI 1280-1). The witness stated that she had reviewed the testimony of Allan and Marissa Brown, but that she had no opinion as to whether the trial interpreter (Kay Hicks) had correctly interpreted or signed the questions (PCR XI 1304).

Among the documentary exhibits introduced by Gorby were depositions of Gorby's half sister, Garnet Butcher, and his father, Ernie Gorby, neither of whom could attend the hearing for health reasons (Defense Exhibits #23, 24). In her deposition, Ms. Butcher stated that, for the most part, she had not been raised in the same household as Gorby, but that their mother was abusive and an alcoholic (Defense Exhibit #23, at 5 and 8). Ms. Butcher testified that Gorby was "uncontrollable" at school (Exhibit #23 at 12). Like her sister, Ms. Butcher stated that she had met with Attorney Komarek in a family group, and had not felt free to volunteer information (Id. at 19-21). Gorby's father testified that he had been forced to leave the family to work in a steel mill, in order to support them (Defense Exhibit #24 at 4); he stated that they had all lived together as a family for less than five years (Id. at 50). While Ernie Gorby testified as to some instances of his former wife's misbehavior, he also testified that he did not

believe that she had beaten or abused the children (Id. at 51). Ernie Gorby testified that his son had never been the same after the head injury as a result of the car accident, and that he had "contrary spells" (Id. at 25). He stated that by the time his son had come to live with him he was "too old to be straightened out" (Id. at 41-2). Ernie Gorby stated that he recalled meeting someone from Florida prior to Gorby's trial in 1991, and that he had told this person (most likely Paul Komarek) the same matters which he had told collateral counsel (Id. at 48-9); he also testified that he had told this attorney in 1991 that he would not be able to attend the Florida proceeding (Id. at 52).

The 1998 deposition of Cleo Calloway, the individual to whom Gorby had sold the victim's car in Texas, was likewise introduced (Defense exhibit B). During this deposition, the witness conceded that he was presently taking psychiatric medication, and that he had been doing so at the time of his testimony at Gorby's trial (Id. at 5-8); Calloway testified, however, that he had understood the questions presented to him both at trial and deposition, and that he had testified truthfully (Id. at 9-10). Collateral counsel also introduced various records, relating to Gorby's schooling, prior incarcerations and hospitalizations, and such were likewise included in Defense Exhibit #17, the background materials utilized by the collateral mental health experts. The records, however, are not particularly extensive. Thus, the only school records presented relate to the year 1966 (Defense Exhibit #17, tab 17). The records concerning Gorby's past criminal history document an

adjudication of delinquency in 1963, probation revocation in 1967, and the commission of criminal offenses in West Virginia, Pennsylvania, New Mexico, Florida, Ohio, New Jersey and Texas, beginning in 1968 (Defense Exhibit #27; Defense Exhibit #17, tabs 14, 18, 23). The only psychiatric record is that from the Wheeling Clinic in 1962, where Gorby's father brought him for treatment; the examiner diagnosed primary behavioral disorder, and recounted instances of Gorby's misbehavior both at home and at school, noting that he had been getting into fights and stealing from neighbors (Defense Exhibit #17, tab 20). The records from the Ohio Valley Central Hospital relate to treatment for asthma, whereas those from Washington Hospital in Pennsylvania relate to Gorby's treatment for a shotgun wound to the buttocks inflicted during a robbery attempt (Defense Exhibits #21 and 22). Defense Exhibit #17 also includes the 1991 report of Dr. Annis, one of the mental health experts appointed by Judge Sirmons to determine Gorby's competency and sanity (Defense exhibit #17, tab 5). In this report, Dr. Annis noted that Gorby had been considered a "management problem" by the jail staff, and that he had engaged in arguments with the staff and other prisoners, as well as physical confrontations with the latter. Annis additionally stated that Gorby had presented him with a version of events at the time of the alleged offense which was "rational and consistent," and that at the time of the offense, Gorby had been behaving "in a purposeful and goal-oriented fashion." (Id.)

The State called three witnesses at the postconviction proceedings, in addition to Attorney Komarek, and likewise introduced documentary evidence. The State initially called Leroy Parker, a crime lab supervisor at FDLE. He testified that he had routinely double checked every analysis conducted by Jan Johnson, as well as other technicians, as a matter of FDLE's procedure of "checks and balances," and that he had specifically reviewed her blood spatter analysis in this case (PCR XI 1318-1320). Parker testified that Johnson was qualified in the field of bloodstain pattern analysis. The State also called Kay Hicks, the interpreter who had assisted the Browns in their testimony at Gorby's trial. Ms. Hicks testified that she had spoken aloud each question presented to the witnesses, so that any "mistake" could be caught at the time (PCR XI 1354). She stated that neither the attorneys nor the Browns had indicated any problem with her signing or interpreting (PCR XI 1355). The documentary exhibits introduced by the State included substantial portions of Komarek's files, including his correspondence with Gorby (State's Exhibits #1, 2, 3, 4, 6, 9, 10 and 11). Additionally, the State introduced the pre-trial deposition of Jan Johnson, in which she affirmed that all forensics reports had been verified by another analyst, and that Leroy Parker had reviewed, and cosigned, the reports in this case (State's Exhibit #8 at 20-1).

The prosecution called Dr. Harry McClaren, one of the mental health experts who had assessed Gorby's competence and sanity in 1991 (PCR XI 1325). Like the other witnesses, McClaren had been

presented with "new" matters contained in Defense Exhibit #17 (PCR XI 1326-7). McClaren testified that, in his view, Gorby was of average intelligence, and that it was likely that he had an underlying personality disorder with antisocial features, a degree of brain dysfunction and some alcohol dependency (PCR XI 1327). On the basis of Gorby's records, McClaren did not view any brain damage as severe, noting that Gorby had obtained a GED, and that he had never displayed psychosis; he likewise noted that Gorby had been able to marry, father children, and engage in purposeful conduct near the time of the murder (PCR XI 1328). Dr. McClaren noted that, during the course of the murder, the victim was struck repeatedly, but not randomly, with the hammer; rather, each blow was directed towards the head, suggesting that this was done intentionally in order to kill or seriously injure the victim (PCR XI 1329). The expert found the fact that the victim had been tied with several ligatures to be evidence of purposeful conduct, as was Gorby's writing the note, which he characterized as suggesting "a cognizance of his situation and deliberate behavior to help his attempts to elude authorities;" McClaren also noted that Gorby's theft of the victim's car and credit cards and his ability to navigate to Texas and elude the authorities for three weeks suggested a relative lack of disorganized behavior (PCR XI 1329-1331). McClaren testified that none of the "new" matters which he had reviewed changed his original opinion, and also stated that it was beyond the expertise a mental health expert to draw conclusions as to the applicability of the statutory mental mitigating

circumstances in an instance in which the defendant denied committing the crime (PCR XI 1331-2). The expert testified that there was a very low probability that this murder had occurred because the victim had made a homosexual advance and Gorby had experienced a "psychotic episode" (PCR XI 1348). McClaren also stated that the mere existence of brain damage did not necessarily provide an explanation for the murder, and that most persons with brain damage did not commit murder (PCR XI 1345, 1346-7).

In her final order of December 2, 1998, Judge Costello made specific findings as to each claim upon which an evidentiary hearing had been granted, and additionally attached portions of the record (PCR V 675-734). As to the portion of Claim VII which had alleged that counsel had been ineffective for failing to move to suppress Gorby's exculpatory statements on the basis of his alleged mental problems, the Court found that "neither counsel nor any of the mental health experts were examined regarding this issue," and further attached the portion of the record relating to Gorby's interrogation (PCR V 675). As to Claim VIII(a), regarding counsels alleged ineffectiveness relating to the interpreter, Judge Costello found that the trial record refuted these allegations as to Ms. Hicks' ability, and that, during the evidentiary hearing, "defendant's expert testified that she could not find any inconsistency or error in the translated testimony." (PCR V 675). As to Claim VIII(b), regarding counsel's alleged ineffectiveness for failing to impeach Dr. Sybers, the Court noted that Attorney Komarek had testified during the evidentiary hearing that not all

of Sybers' testimony had been harmful and that, in fact, the defense had utilized some of it during closing argument at the penalty phase. Judge Costello found, "There was no evidence presented during the evidentiary hearing to materially contradict Dr. Sybers' trial testimony." (PCR V 675). As to the portion of Claim VIII relating to an alleged undisclosed "deal" between the State and Robert Jackson, the Court found that Jackson's request that he not be chained or presented in jail clothing while testifying, and that he be held in safety in the county jail with some of his personal items, did not evidence that a "deal was made" (PCR V 676). As to Claim VIII(d), to the effect that the State had coerced Jerry Wyche to present false testimony, the Court found that there was no merit to the allegation and that "defendant has failed to provide adequate evidence to support this claim." (PCR V 676). As to Claim VIII(a), regarding Cleo Calloway, the Court found, based on Calloway's deposition, that he had testified under oath that he had understood the questions presented and had testified truthfully at Gorby's trial (PCR V 676). As to Claim XIII, which had involved the Brady claim relating to the testimony of Jan Johnson, the Court found "no presentation of false evidence by the State," in that another FDLE agent had independently verified Johnson's findings; the Court found Claims IX and XI to be repetitive of VII and without merit (PCR V 676).

Finally, as to the claims of ineffective assistance of counsel at the penalty phase, Judge Costello expressly found:

As to claim XVI, defendant alleges that counsel failed to provide the sentencing jury with information on the defendant's childhood, early development environment or with psychological testimony in mitigation that considered these factors. The record clearly refutes this allegation. (See Trial Transcript, pp. 1762-1788). Counsel testified that he traveled to West Virginia in search of defendant's relatives however, defendant's father was uncooperative and as a trial tactic, counsel determined not to present the defendant's father's testimony. However, the defendant's mother and both adult sisters did testify at trial about his childhood and background. The defendant complains that his attorney should not have interviewed his family members as a group. One sister testified at the evidentiary hearing about their mother's promiscuity, which occurred after the defendant had moved from the home and about which he was ignorant or he could have informed his attorney. The attorney left his business cards with family members who could have contacted him if they had wished to do so. Moreover, the record shows that Dr. Goff, who testified for the defense, was given an opportunity to familiarize himself with the defendant's childhood, background and history in West Virginia prior to trial. (See Trial Transcript, p. 1433).

Next, regarding claim XVII, defendant alleges that he did not receive a professionally adequate mental health evaluation by a qualified expert. The record refutes this allegation since Dr. Goff, a neuropsychologist, provided assistance, as did Dr. Lawrence Annis, Clinical Psychologist and Dr. Harry McClaren, Clinical Psychologist. (See Trial Transcript, p. 2181 and Competency Hearing, April 1991, p. 2178). Further Dr. Goff and Dr. Crown testified that they would offer the same diagnosis which was presented to the jury and the judge in 1991. That diagnosis was that the defendant had substance abuse problems and organic personality syndrome. Even though Dr. Goff did not testify during the penalty phase, counsel asserted that Dr. Goff's testimony in the guilty phase did establish mitigation. Therefore, even if Dr. Goff had testified during the penalty phase that testimony would have resulted in the same findings thus, there is not reasonable probability of a different result. Moreover, the defense experts opined that

due to the defendant's brain damage, he would have acted impulsively yet, the evidence shows that he thought out and took the time to write a note which was meant to divert anyone from discovering the victim's body. The Court finds that such behavior was not impulsive but was rather intentional. In addition, counsel presented testimony regarding the defendant's head injuries, changes in his personality, and Dr. Goff's opinion.

Finally, the Court finds that the defendant has failed to substantiate each of his ineffective assistance of counsel claims and errors, if any, would not have affected the outcome of the trial. The Court further finds that counsel adequately met the Strickland test and provided reasonable assistance of counsel. (PCR V 676-7).

SUMMARY OF ARGUMENT

Gorby presents six points on appeal in regard to the circuit court's denial of his Motion for Postconviction Relief. The primary point relates to Judge Costello's denial of Gorby's claim of ineffective assistance of counsel at the penalty phase, such ruling made following evidentiary hearing. No error has been demonstrated. Gorby's trial counsel presented a number of family members at the 1991 penalty phase, and likewise presented the testimony of a mental health expert at the guilt phase, whose testimony, he contended, constituted mitigation; Judge Sirmons' found all of these matters to constitute non-statutory mitigation at the time of sentencing. Although afforded an evidentiary hearing, collateral counsel have simply presented more of the same, and neither deficient performance of counsel nor prejudice has been demonstrated. To the extent that any truly "new" matter was presented below, such as more extensive evidence of an alleged abused childhood, no reasonable probability of a different sentencing result has been demonstrated, in light of, inter alia, the strong, and unassailed, findings in aggravation. Gorby's death sentence remains reliable, and his duplicative claim involving the mental health experts is likewise without merit.

Judge Costello additionally afforded Gorby a hearing on some of his claims of ineffective assistance of counsel at the guilt phase, as well as alleged State suppression of evidence, and, in all material respects, Gorby failed to sustain his burden of proof. Likewise, it was not error for the Court to have summarily denied

other claims of ineffective assistance of counsel, when, for the most part, such simply represented improper attempts to avoid the procedural bar, by the couching of "merits" issues as those ostensibly involving counsel's effectiveness. Gorby was, in all respects, afforded a full and fair hearing, and no error has been demonstrated in the circuit court's disposition of any public records issues. The order on appeal should be affirmed in all respects.

ARGUMENT

POINT I

THE CIRCUIT COURT'S DENIAL OF RELIEF, FOLLOWING EVIDENTIARY HEARING, OF GORBY'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE, WAS NOT ERROR.

As his first, and predominant, claim for relief, Gorby contends that Attorney Komarek rendered ineffective assistance of counsel at the penalty phase, in two primary respects -- failure to conduct reasonable investigation into Gorby's family background and into Gorby's mental state or alleged deficiencies; this later portion of the claim duplicates Point II, infra. Gorby was afforded an evidentiary hearing on these matters, and presented the testimony of several witnesses, as well as deposition testimony from others and voluminous documentary exhibits; the State presented witnesses of its own, and likewise introduced documentary exhibits. In her final order denying relief, Judge Costello held this claim to be largely refuted by the record, noting the fact that Attorney Komarek had presented family background testimony and mental health testimony at the 1991 proceedings, and had argued such in mitigation (PCR V 676).

Indeed, the Court below made specific findings at to each portion of this claim. As to that involving investigation of family background, Judge Costello found:

> As to claim XVI, defendant alleges that counsel failed to provide the sentencing jury with information on the defendant's childhood, early development environment or with psychological testimony in mitigation that considered these

> factors. The record clearly refutes this allegation. (See Trial Transcript, pp. 1762-1788). Counsel testified that he traveled to West Virginia in search of defendant's relatives however, defendant's father was uncooperative and as a trial tactic, counsel determined not to present the defendant's father's testimony. However, the defendant's mother and both adult sisters did testify at trial about his childhood and background. The defendant complains that his attorney should not have interviewed his family members as a group. One sister testified at the evidentiary hearing about their mother's promiscuity, which occurred after the defendant had moved from the home and about which he was ignorant or he could have informed his attorney. The attorney left his business cards with family members who could have contacted him if they had wished to do so. Moreover, the record shows that Dr. Goff, who testified for the defense, was given an opportunity to familiarize himself with the defendant's childhood, background and history in West Virginia prior to trial. (See Trial Transcript, p. 1433). (PCR V 1676).

As to the allegations relating to counsel's handling of mental mitigation, Judge Costello found:

> Next, regarding claim XVII, defendant alleges that he did not receive a professionally adequate mental health evaluation by a qualified expert. The record refutes this allegation since Dr. Goff, a neuropsychologist, provided assistance, as did Dr. Lawrence Annis, Clinical Psychologist and Dr. Harry McClaren, Clinical Psychologist. (See Trial Transcript, p. 2181 and Competency Hearing, April 1991, p. 2178). Further Dr. Goff and Dr. Crown testified that they would offer the same diagnosis which was presented to the jury and the judge in 1991. That diagnosis was that the defendant had substance abuse problems and organic personality syndrome. Even though Dr. Goff did not testify during the penalty phase, counsel asserted that Dr. Goff's testimony in the guilt phase did establish mitigation. Therefore, even if Dr. Goff had testified during the penalty phase that testimony would have resulted in the same findings thus, there is no reasonable probability of a different result. Moreover, the defense experts opined that

> due to the defendant's brain damage, he would have acted impulsively yet, the evidence shows that he thought out and took the time to write a note which was meant to divert anyone from discovering the victim's body. The Court finds that such behavior was not impulsive but was rather intentional. In addition, counsel presented testimony regarding the defendant's head injuries, changes in his personality, and Dr. Goff's opinion.
>
> Finally, the Court finds that the defendant has failed to substantiate each of his ineffective assistance of counsel claims and errors, if any, would not have affected the outcome of the trial. The Court further finds that counsel adequately met the Strickland test and provided reasonable assistance of counsel. (PCR V 676-7).

Although collateral counsel seek to dismiss these findings as "of exceptionally limited relevance" (Initial Brief at 66) or as without support in the record, the State respectfully contends that, in fact, these finding are dispositive of Gorby's claim, and that, in fact, Judge Costello's findings are supported by competent substantial evidence in the record. See, e.g., Stephens v. State, 748 So.2d 1028, 1033-4 (Fla. 1999); Way v. State, 25 Fla.L.Weekly S309, 311 (Fla. April 20, 2000); Asay v. State, 25 Fla.L.Weekly S523, 527 (Fla. June 29, 2000). Attorney Komarek, to the extent possible, investigated Gorby's family background, traveling to West Virginia to investigate and meet with family members; at the penalty phase, Gorby's mother and two of his sisters testified on his behalf. Likewise, Attorney Komarek secured the services of two mental health experts at the time of the 1991 proceedings, and called one, Dr. Goff, at the trial itself; while Goff did not formally re-testify at the penalty proceedings, Komarek argued his

prior testimony as a basis for the finding of mitigation, which, as noted, was in fact found. To the extent that any deficiency of counsel exists, Gorby has failed to demonstrate, as he must, that he was deprived of a reliable penalty phase proceeding. See, e.g., Rutherford v. State, 727 So.2d 216, 223 (Fla. 1998); Asay, supra. Accordingly, the order on appeal should be affirmed in all respects. Each portion of Gorby's claims will now be addressed.

A. THE FAMILY BACKGROUND CLAIM

Attorney Komarek testified at the hearing below that he began investigation for the penalty phase virtually from the beginning of the case, and that he questioned Gorby with the goal of obtaining information usable at such proceeding; for instance, when Gorby told him of his childhood head injury, Komarek arranged for the appointment of a confidential mental health expert (PCR IX 981, 990-3). Komarek testified that he traveled to West Virginia to meet with Gorby's family, hoping for some family input as to what kind of childhood Gorby had, to assist in the securing of a life sentence (PCR IX 988, 999). The attorney stated that he had wanted to humanize Gorby, and to demonstrate to the jury that he was part of a family and that people loved him (PCR IX 1000, 1008). Komarek testified that he had specifically asked each family member whether Gorby had suffered from any abuse, trauma or sexual molestation, and that no family member (indeed, including Gorby himself), had ever offered any information in this regard (PCR IX 1011, 1049). The attorney stated that he had met with Gorby's mother, Wanda Garrison, for hours, and that she had summoned other family members

to her home (PCR IX 989, 997-8, 1048). Komarek stated that he "pressed" Gorby's sisters for any information at all as to Gorby's background, and had likewise followed up on the information given him by Ms. Garrison as to other potential witnesses or sources of information (PCR IX 1048-9). The attorney stated that he had spoken with Gorby's estranged father, Ernie Gorby, but had found him to be an uncooperative, unhelpful witness; contemporaneous notes contained in Komarek's files to this effect were referenced (PCR IX 1032). Likewise, Komarek testified that he had sought background records, but that some, including those relating to Gorby's head injury, had been destroyed (PCR IX 993, 1005; X 1058). Komarek likewise stated that he had met with family members in Florida prior to their testimony, and said that his practice was to give those he interviewed his business card (PCR IX 998; XI 1358).

The original record, of course, reflects that Attorney Komarek called Gorby's mother, Wanda Garrison, at both the guilt and penalty phases of Gorby's trial (OR IX 1407-17; XI 1764-1777). At such time, she told the jury of the fact that Gorby had been born into poverty, that he had sustained a serious head injury at the age of four (after which he was "never the same"), that his father was an alcoholic and that the two had fought over his custody, that Gorby had not wanted to live with his father who had allegedly beaten him, that Gorby was an alcoholic, that Gorby's family loved him, and that Gorby suffered trauma when his sisters were shot. Gorby's sisters, Garnet Butcher and Mary Jane King, testified of Gorby's love for them, and the trauma he suffered when they were

shot (OR XI 1779-1780, 1783, 1785-7). In his closing argument, Attorney Komarek pointed to Gorby's deprived background and the fact that his family loved him as reasons to spare his life (OR XI 1806, 1819, 1821). In his sentencing order, Judge Sirmons specifically found as non-statutory mitigation such factors as Gorby's poor background, the fact that his family loved him, that he had had an absent father, that he had been hit by a car at age four, and that he was traumatized by the shooting of his sisters (OR XI 2626).

At the hearing below, collateral counsel, with the advantage of additional time and resources, were able to present additional evidence concerning Gorby's background and childhood, which was largely cumulative to that presented in 1991, with the exception that Wanda Garrison (who did not testify at the evidentiary hearing) was now painted as an abusive slattern and jezebel, rather than a loving mother. Gorby's sisters claimed that they had been to intimidated by the presence of other family members to advise Attorney Komarek of these matters in 1991 (or to so advise the jury, presumably). Collateral counsel fault Attorney Komarek for holding group interviews, a practice which allegedly violates "reasonable investigative procedures" (Initial Brief at 69), and for failing to obtain information from Gorby's father. No valid claim of ineffective assistance of counsel has been presented.

As in Bryan v. State, 641 So.2d 61, 64 (Fla. 1994), this is not a case which defense counsel failed to prepare. Attorney Komarek understood the importance of family background evidence in

mitigation, traveled out-of-state to interview Gorby's family, and presented the testimony of family members at the penalty phase. Collateral counsel have cited no precedent from this, or any other, court to the effect that such presentation or preparation constitutes deficient performance. The fact that collateral counsel have been able to scour the West Virginia hillsides and hollows for additional witnesses and/or elicit new or different testimony from those witnesses who previously testified does not mean that Attorney Komarek was ineffective in 1991. See, e.g., Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986); Bryan, supra; Correll v. Dugger, 558 So.2d 423, 426, n.3 (Fla. 1990) (counsel not ineffective for failing to discover and present evidence of defendant's allegedly abused childhood, where family witnesses offered contrary testimony at prior proceedings); Ferguson v. State, 593 So.2d 508, 510-1 (Fla. 1992) (counsel not ineffective for failing to call additional family members to testify to defendant's difficult childhood, abuse and neglect, where, inter alia, counsel presented testimony of defendant's mother to the effect that he had been a "good son"). Judge Costello obviously credited the testimony of Attorney Komarek, to the effect that he had supplied the family members with he business card, and found less than credible their explanations for failing to volunteer this information in 1991; as noted, Gorby's family members, in their letters to the court prior to sentencing, likewise failed to mention any of these matters (Defense Exhibit #11). Further, counsel's strategic decision not to call Gorby's

father must be judged by the circumstances which existed at the time, and not in light of any later-alleged desire to cooperate.

To the extent that any deficiency in counsel's performance is perceived, Gorby has unquestionably failed to demonstrate prejudice under Strickland v. Washington, 466 U.S. 668 (1984), and no reasonable probability exists that, but for any alleged deficiency, the result of the sentencing proceedings would have been different. This murder involves a forty-one (41) year old defendant, with prior convictions for crime of violence, who, while on parole, beat a handicapped man to death with a claw hammer, so as to be able to steal his vehicle and credit cards. By virtue of the testimony actually presented in 1991, the judge and jury were already aware that Gorby had suffered a serious head injury as a child, that he had grown up in poverty, and that his father had abused him. The presentation of voluminous testimony detailing the sins of any and all members of the Gorby household would not have changed the juries view of Gorby, to such an extent that the instant sentence of death has been rendered unreliable[5]; under no rational view of the record can it be said that any additional non-statutory mitigation along these lines could outweigh the four strong (and unassailed) aggravating circumstances in this case. Accordingly, the circuit court's denial of relief as to this portion of Gorby's claim should be affirmed in all respects. See, e.g., Asay, supra (no prejudice from counsel's failure to present non-statutory

[5] As will be demonstrated below, this additional information likewise did not change the diagnosis of any mental health expert.

mitigation concerning childhood abuse, in light of strong aggravation); Rutherford, supra (same); Breedlove v. State, 692 So.2d 874, 878 (Fla. 1997) (same); Haliburton v. State, 691 So.2d 466, 471 (Fla. 1997) (same); Tompkins v. Dugger, 549 So.2d 1370, 1373 (Fla. 1989) (same).

B. THE MENTAL HEALTH CLAIM

The record in this case reflects that Attorney Komarek requested, and received, the appointment of a confidential defense expert, Dr. Clell Warriner (OR XI 1998). Following the filing of a Notice of Intent to Rely upon the Defense of Insanity, the court appointed two experts to examine Gorby -- Drs. Annis and McClaren; following a formal competency hearing, Gorby was deemed competent (OR XIII 2063, 2068, 2178). Because the experts' testimony raised the specter of possible brain damage, however, Komarek then asked for, and received the appointment of a neuropsychologist, Dr. John Goff (OR XIII 2191, 2216). Likewise, Attorney Komarek requested, and received, the funds for an EEG and skull x-ray, for Goff's use (OR XIV 2396-7).

Attorney Komarek presented Goff's testimony at the guilt phase (OR IX 1425-1498). Goff testified that he had administered a number of neuropsychological tests to Gorby, had reviewed his records (including a 1962 record from a West Virginia clinic which Gorby had visited "while he was a youngster"), and had spoken with Gorby's mother on the telephone "at some length" (OR IX 1433). On the basis of all of this evidence, Goff diagnosed Gorby as suffering from organic personality disorder and alcohol dependency

(OR IX 1433-4); he stated that the childhood head injury was consistent with his diagnosis, and further said that such condition would render Gorby "hair-triggered," with an inability to control his impulses (OR IX 1435-6). On cross-examination, Goff testified that he had no opportunity "outside of Gorby's general presentations" to assess Gorby's mental state at the time of the murder, in that Gorby had told him that he was not there (OR IX 1438-9); he also stated that both the EEG and CAT scan had failed to indicate any brain damage (OR IX 1495-6). While Attorney Komarek did not formally re-call Goff at the penalty phase, he did argue that Gorby's brain damage constituted mitigation, pointing to both statutory mental mitigating circumstances (OR XI 1871, 1821). In his sentencing order, Judge Sirmons found that Goff's testimony, to the effect that Gorby suffered from organic personality syndrome and alcohol dependence, constituted non-statutory mitigation, noting that no witness had testified that Gorby had acted in conformity with these conditions at the time of the murder (OR XXV 2625-6).

At the postconviction hearing, Attorney Komarek, as noted, testified that Gorby's account of childhood head injury had induced him to seek the services of a mental health expert (PCR IX 992-3). Komarek stated, however, that he "wasn't really happy with what he had to work with" from Warriner, and did not think Warriner "could get me where I wanted to go;" accordingly, he asked for, and received, the appointment of Dr. Goff to testify as to Gorby's brain damage (PCR IX 995). Komarek, utilizing a contemporaneous

written note, testified that Warriner had told him that he would better serve the defense by not testifying, and serving as a consultant, so as not to diminish the testimony of Dr. Goff (PCR IX 1028; XI 1361; State's Exhibit #3). Likewise, Komarek testified that while he had presented Dr. Goff at the guilt phase, he did not re-call him at the penalty phase, because he had given the defense "everything that he could testify to and it just would have been a duplication of what he already said." (PCR IX 1006). The attorney stated that it had been a "conscious decision," in the best interests of Gorby, to have called Goff at the guilt phase and then "use that testimony within his argument at the penalty phase" (PCR XI 1360).

Dr. Warriner testified at the hearing below that Komarek had never asked him about the applicability of the statutory mitigating circumstances, but also stated that Komarek had supplied him with any records or documents desired (PCR X 1134, 1139-1140). Although Warriner purported to have no recollection of telling Komarek that he would not be a good witness, he did not dispute such testimony (PCR X 1146); Warriner stated that he had reviewed the background materials supplied by collateral counsel, and opined that both statutory mitigating circumstances relating to mental state applied. Warriner also testified that he believed that a mental health expert could evaluate an individual's mental state at the time of offense, even if the individual denied committing it (PCR X 1135-6, 1161-2). Dr. Goff likewise testified that he had reviewed the materials supplied by collateral counsel, and would

have testified that both statutory mental mitigators applied; he stated, however, that his original diagnosis of Gorby was unchanged by these new materials and, contradictorily, seemed to maintain his trial testimony to the effect that a mental health expert could not do a mental status examination of a defendant who stated that he had not committed the crime (PCR X 1198, 1209, 1214-16). Upon questioning by the Court, Dr. Goff stated his belief that the statutory mental mitigators applied solely due to the fact that Gorby had been brain damaged "all his life" (PCR X 1219-1220); Goff claimed that Attorney Komarek had never discussed these mitigating factors with him.

The defense also called Dr. Barry Crown, a neuropsychological diplomate, who had examined Gorby in 1996. Crown had likewise review the background material provided by collateral counsel, and opined that the two statutory mental mitigators applied (PCR XII 1433-5). Crown agreed with the prior diagnosis of Gorby, and state that Gorby's denial of commission of the offense did not hinder his ability to assess his mental state at the time (PCR XII 1441, 1456-7). The State called Harry McClaren, a clinical psychiatrist who had assessed Gorby's competence in 1991. McClaren likewise testified that he had reviewed the materials compiled by collateral counsel, and offered a diagnosis of Gorby not wholly inconsistent with that of the other experts -- personality disorder with anti-social features, a degree of brain dysfunction and some alcohol dependency (PCR XI 1326-7). Unlike the defense experts, however, McClaren stated that it was beyond the expertise of a mental health

expert to draw conclusions as to the applicability of a statutory mental mitigating circumstance, in an instance in which the defendant denied committing the crime (PCR XI 1331-2). McClaren also stated that whatever brain damage Gorby suffered was not severe, and noted that the purposeful actions and conduct which accompanied the murder -- tying the victim with ligatures, the repeated infliction of fatal blows and the presence of the handwritten note on the victim's door to avoid detection -- were not consistent with any severe mental disorder (PCR XI 1329-1331).[6]

In her order denying relief, Judge Costello noted that, while no mental health expert had been called at the penalty phase, Attorney Komarek had argued Goff's trial testimony as a basis for mitigation, and that the presentation of his live testimony at the penalty phase would have created no reasonable probability of a different result (PCR V 676). She likewise observed that the presentation of "new" materials to the various experts had not produced any change in Gorby's diagnosis, and found the defense experts' claims that Gorby's brain damage would have caused him to act impulsively were inconsistent with Gorby's intentional action of "writing a note which was meant to divert anyone from discovering the victim's body" (PCR V 767). The Court found that neither prong of Strickland v. Washington had been satisfied (PCR V 767).

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[6] Collateral counsel's suggestion that Dr. McClaren found the note "irrelevant" (Initial Brief at 43, 79) represents a complete misreading of his testimony.

Again, as in Bryan v. State, supra, this is not a case which defense counsel failed to prepare. Defense counsel understood the potential, and applicability, of mental mitigation, and secured the appointment of a confidential mental health expert, as well as a neuropsychologist; by virtue of the challenge to Gorby's competency, two other experts evaluated Gorby's mental state. Attorney Komarek decided not to call Dr. Warriner to testify, after that expert advised him that Dr. Goff would be a better witness. Attorney Komarek presented Goff's testimony, which set forth Gorby's mental condition, and then made the strategic decision not to re-present the same testimony at the penalty phase, but rather to utilize such in argument, as a basis for the finding of mitigation. As noted, Judge Sirmons credited all these matters as non-statutory mitigation. Collateral counsel have entirely failed to demonstrate any deficiency in Komarek's performance, and precedent is clearly not on Gorby's side. See, Provenzano v. State, 561 So.2d 541, 545-6 (Fla. 1990) (counsel not ineffective for failing to present testimony of mental health witnesses at penalty phase, where witnesses had testified in guilt phase); Ferguson v. State, supra (counsel not ineffective for failing to re-present mental health experts at penalty phase, where such would simply have been cumulative to guilt phase testimony); Bryan, supra (counsel not ineffective for presenting written reports of mental health experts in lieu of live testimony, and using such as basis for argument in mitigation); Medina v. State, 573 So.2d 293, 297-8 (Fla. 1990) (counsel not ineffective for failing to present

testimony of mental health expert who indicated his testimony would not be helpful).

To the extent that any deficiency of counsel is perceived, Gorby has nevertheless failed to demonstrate prejudice. Despite the best efforts of all counsel concerned, this has never been a case in which mental mitigation would play a predominant role. Gorby's diagnosis, as per Dr. McClaren, is not a severe one; his organic personality disorder has not precluded his normal functioning or, significantly, his ability to premeditate. Gorby is not psychotic or suffering from any major mental illness. Further, as recognized by Judge Costello, Gorby's actions at the time of the murder were inconsistent with any claim of disability, especially his placement of the handwritten note on the victim's door, saying "Will be back Tuesday," in an attempt to avoid detection.[7] See also, Bryan v. Singletary, 140 F.3d 1354, 1360-1 (11th Cir. 1998) (no prejudice from counsel's failure to call experts at penalty phase, where conclusions of experts inconsistent with defendant's actions in carrying out the murder and attempting to cover up evidence); Rutherford, 727 So.2d at 223-4 (in determining prejudice, it is important to focus upon the nature of the un-presented mental health mitigation; no prejudice found where lack of evidence that defendant's disorder contributed to action

[7] Indeed, in the original sentencing order, Judge Sirmons rejected the applicability of the statutory mitigating circumstances on exactly the same basis -- that there was no evidence to the effect that the defendant was exhibiting any of the behavioral characteristics consistent with this personality syndrome at the time of the murder (OR XV 2626).

effectuating murder); Asay, supra (same). Further, had the defense called Drs. Warriner or Crown, the State would no doubt have called Dr. McClaren to counter their testimony, and Dr. Goff's testimony is itself internally inconsistent as to whether a mental health expert can assess the mental state of a defendant who denied committing the offense. See, e.g., Bertolotti v. Dugger, 883 F.2d 1503, 1516-1520 (11th Cir. 1989) (no prejudice from counsel's failure to call expert whose testimony was internally inconsistent and would have been subjected to stinging rebuttal).

In all respects, Gorby has failed to demonstrate that, but for counsel's alleged errors, he would probably received a life sentence, the requirement set forth by this Court in Hildwin v. State, 654 So.2d 107, 109 (Fla. 1995). By virtue of the evidence which Attorney Komarek did present in 1991, both the jury and judge had an accurate picture of Gorby, and it must be remember that Judge Sirmons expressly found in non-statutory mitigation such factors as Gorby's organic personality syndrome and alcohol dependence, his poor background, his abusive father, and the trauma he suffered when his sisters were shot (OR XXV 2626). Because, as both the original sentencing judge, Judge Sirmons, and the postconviction judge, Judge Costello, recognized, Gorby's actions at the time of the murder remained fatally inconsistent with any claim of "impulsivity" (the alleged byproduct of organic personality disorder), no amount of mental health mitigation along these lines would ever have risen above the level of non-statutory mitigation. As such, its omission, as well as the omission of any

of the un-presented family background testimony, does not render Gorby's sentence of death unreliable, in light of the four strong findings in aggravation, stemming from the beating death of a handicapped individual. See, e.g., Asay, supra (defense counsel's failure to present evidence of abused childhood, as well as testimony of mental health experts, not prejudicial in light of strong aggravation); Grossman v. Dugger, 708 So.2d 249, 251 (Fla. 1997) (counsel's failure to present mitigation not prejudicial where facts of case showed defendant's conduct to be so egregious that proof of mitigating circumstances extremely difficult); Breedlove v. State, supra (counsel's failure to present additional mental health or family background testimony not prejudicial where aggravators overwhelm potential mitigation); Bottoson v. State, 674 So.2d 621 (Fla. 1996) (counsel's failure to present mental health mitigation and evidence pertaining to defendant's traumatic childhood not prejudicial, in light of strong aggravation); Buenoano v. Dugger, 559 So.2d 1116, 1119 (Fla. 1990) (no prejudice from counsel's failure to present evidence of sexual abuse and mental problems suffered by defendant in light of four strong aggravating circumstances). The circuit court's denial of relief as to this claim should be affirmed in all respects.

POINT II

THE CIRCUIT COURT'S DENIAL OF RELIEF AS TO GORBY'S CLAIM UNDER AKE V. OKLAHOMA, 470 U.S. 68 (1985) WAS NOT ERROR.

Collateral counsel next contend that Judge Costello erred in denying relief as to Gorby's claim under Ake v. Oklahoma, 470 U.S. 68 (1985), contending that Attorney Komarek failed to ensure that Gorby received mental health assistance from "a fully-informed" mental health expert (Initial Brief at 77). Judge Costello found this matter to be largely refuted by the record, additionally noting that any allegedly "unknown" matters would not have changed the diagnosis of any of the experts, as evidenced by their statements at the evidentiary hearing (PCR V 676-7). Although collateral counsel again castigate Judge Costello for making "irrelevant" findings, no error has been demonstrated.

In light of this record, it is hard to credit collateral counsel's Ake claim, and their reading of that precedent would seem overbroad to say the least. See, Clisby v. Jones, 907 F.2d 1047, 1049-1050 (11th Cir. 1990). As noted, Attorney Komarek secured the appointment of two mental health experts. The record reflects, on the basis of trial testimony, deposition and written report, that Dr. Goff, the expert who testified, possessed all desired information, and there has been no showing that Goff was deprived of information due to any inaction of counsel or that he lacked sufficient information in order to render a reliable opinion. (See Defense Exhibit #17, tab #8 [Goff testimony]; tab 9 [Goff

deposition]; tab 26 [Goff written report]). The fact that other experts could offer testimony comparable to that of Goff, on the basis of any "new" matters, is irrelevant, when, as Judge Costello cogently recognized, all roads lead to the same result (PCR V 676-7). No valid basis for postconviction relief has been demonstrated. See, e.g., Rose v. State, 617 So.2d 291, 295 (Fla. 1991); Turner v. State, 614 So.2d 1075 (Fla. 1992); Johnston v. Dugger, 583 So.2d 657, 660-1 (Fla. 1991); Jennings v. State, 583 So.2d 316, 320-1 (Fla. 1991). The circuit court's denial of relief as to this claim should be affirmed in all respects.

POINT III

THE TRIAL COURT'S DENIAL OF GORBY'S CLAIMS FOR RELIEF UNDER BRADY AND GIGLIO, AS WELL AS ANY RELATED CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, WAS NOT ERROR.

As his next point on appeal, Gorby contends that Judge Costello erred in denying relief as to five unrelated evidentiary claims brought under Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972) and/or Strickland v. Washington, 466 U.S. 668 (1984). These claims were denied following evidentiary hearing, and Judge Costello's findings are supported by competent substantial evidence in the record. See, e.g., Way v. State, 25 Fla.L.Weekly S309, 311 (Fla. April 20, 2000). Accordingly, the rulings on appeal should be affirmed in all respects. Each claim will now be addressed.

A. THE "ROBERT JACKSON" CLAIM

In this claim, collateral counsel contend that a Brady violation occurred in regard to the State's failure to disclose a "threat" by state witness Robert Jackson not to testify unless certain conditions were met. The basis for this "claim" is a letter which Jackson wrote the prosecutor prior to trial (Defense Exhibit #4); as noted in the Initial Brief, collateral counsel could not locate Jackson to testify at the hearing (Initial Brief at 82, n.58). Judge Costello reviewed the exhibit and concluded that no relief was warranted, noting that Jackson's request were not extraordinary and did not evidence that any understanding or deal had existed between the witness and the prosecution; specifically, the judge found:

> In a letter to the State, Mr. Jackson requested that he not be chained or be presented wearing jail clothes in front of the jury, that he be held safely in the Bay County Jail for his protection and that he be allowed to bring his personal items with him. The Court finds that these requests are not extraordinary and do not evidence that a deal was made (PCR V 676).

Although collateral counsel berate the court below for these findings, their legal argument is frivolous, and no error has been demonstrated. The letter clearly indicates that no "deal" existed between the State and Jackson, and that he received no benefit for his testimony. At most, Jackson made requests as to the manner in which he would testify, (i.e., unchained and in civilian clothes), and where he would be housed while doing so. Jackson states in the letter that he is testifying "of his own free will," and the jury

was deprived of no relevant information which it needed in order to assess his credibility or bias. It is questionable whether any valid Brady claim has even been alleged, and the trial court's denial of relief was not error. See, e.g., Porter v. State, 653 So.2d 374, 378-9 (Fla. 1995) (fact that State allegedly intended to charge witness with accessory after the fact insufficient to constitute Brady claim); Routly v. State, 590 So.2d 397, 399-400 (Fla. 1991) (no Brady violation where allegedly undisclosed matters would not have materially added to jury's knowledge of matters which might have influenced witness to testify). No relief is warranted as to this claim.

B. THE "CLEO CALLOWAY" CLAIM

Collateral counsel next contend that Gorby is entitled to relief because the jury was not aware that a state witness, Cleo Calloway, suffered from mental illness. As collateral counsel note, Gorby's trial counsel, Paul Komarek, did not formally ask Calloway about his mental health either at trial or in deposition (Initial Brief at 84). While Calloway did not testify at the evidentiary hearing in this case, he did provide a deposition, which Judge Costello attached to her order denying relief (PCR V 720-730). The judge found no basis for relief, in that Calloway testified "that he understood the questions that were presented to him . . . and that he testified truthfully" at deposition and at trial. (PCR V 676)

While collateral counsel again berate Judge Costello and seek to dismiss her finding as "irrelevant" they have, again, failed to

demonstrate any basis for relief. As this Court noted in Mills v. State, 684 So.2d 801, 804, n.4 (1996), the prejudice prong of Strickland is identical to the materiality prong of Brady. Even if the jury were deprived of the opportunity to evaluate Calloway's claim that his testimony was truthful despite any mental illness, the fact remains that Calloway's testimony was not a material portion of the State's case. The witness testified, at most, that he had purchased the victim's car from Gorby a month after the murder in Texas (OR VI 999-1052). To a large extent, Calloway's testimony was cumulative to that of Allen and Marissa Brown, who likewise testified that Gorby was in possession of the victim's car (OR VII 791-3, 856). Further, all of this testimony was of less significance than the physical evidence linking Gorby to the murder scene and crime -- his fingerprint on a glass jar in the victim's kitchen and his handwriting on the note on the victim's door (OR VIII 1218, 1249), as well as testimony concerning Gorby's possession, and usage, of the victim's credit cards (OR V 737-743, VII 791-2, VIII 1103-8), and his admission to Allen Brown (OR VII 791-2). Calloway's mental illness, which did not preclude him from testifying truthfully, did not result in an unreliable verdict, and no relief is warranted as to this claim.

C. THE "JAN JOHNSON" CLAIM

Collateral counsel next contend that Gorby is entitled to a new trial because a forensic expert who assisted in the training of Jan Johnson, the crime scene analyst who did testify at Gorby's trial, has allegedly falsified her credentials. Counsel state that

Johnson's credibility is substantially diminished by "association" with this other individual (Initial Brief at 87). Counsel further suggests that trial counsel Komarek was ineffective for failing to press Johnson more fully as to her own credentials. Neither party called Jan Johnson or Judith Bunker, the much maligned alleged trainer, at the hearing below, although the State did call Leroy Palmer, Johnson's supervisor at the FDLE crime lab, who testified that he had, as a matter of routine, reviewed Johnson's analyses in this case, and that he concurred with her findings, and, indeed, had co-signed her report (PCR XI 1318-1320). Judge Costello credited this testimony (which was unrebutted) in denying relief as to this claim, finding, "The record shows that another FDLE agent testified that Johnson's finding were independently verified by him. The Court finds no presentation of false evidence by the State." (PCR V 676).

Collateral counsel again contend that this finding is "immaterial," and that Gorby is entitled to relief. This argument is frivolous. The issue before the Court was whether the jury had been presented with inaccurate expert testimony. The testimony of Leroy Palmer conclusively indicated that such was not the case, and Judge Costello's pragmatic reliance upon it was not error. While defense counsel could have embarked upon the course now advocated by collateral counsel, and wasted everyone's time seeking to lay a predicate for "impeachment by association," such was not constitutionally required, especially where, as demonstrated, the scientific evidence had been independently verified, and Gorby's

theory of State suppression of evidence is particularly far-fetched. See, Preston v. State, 528 So.2d 896, 898-9 (Fla. 1998) (State not required, under Brady, to disclose unfavorable personnel evaluation of expert witness); Bottoson v. State, 674 So.2d 621, 622-3 (Fla. 1996) (defendant not entitled to relief under Brady or Strickland, based upon fact that State expert later exposed as a charlatan, who had misrepresented himself); Correll v. State, 698 So.2d 522 (Fla. 1997) (fact that State blood spatter expert Judith Bunker had exaggerated her credentials no basis for relief). No relief is warranted as to this claim.

D. THE "WILLIAM SYBERS" CLAIM

In this claim, collateral counsel contend that Gorby was entitled to a new trial because the jury was not advised that Dr. Sybers, the medical examiner, had been "under investigation" or "under suspicion" for the murder of his wife at the time that he testified. It is alleged not only that the State suppressed evidence in this regard but also that defense counsel was ineffective for failing to discover and utilize this information. Neither party called Dr. Sybers below, but Gorby did call Dr. Leroy Riddick, an Alabama pathologist, who testified that, while he did not disagree with Sybers' testimony as to the cause of death or the amount of time in which such might have occurred (PCR XI 1276-7), or, indeed, with Sybers' conclusion that the victim could have been rendered unconscious and unable to feel pain after the first hammer blow (PCR XI 1274-5), he had certain criticisms of the medical examiner's techniques, and felt that the hammer blows could all

have been inflicted within five seconds (PCR XI 1263-4). Attorney Komarek testified that he had found Dr. Sybers' testimony to be helpful in many respects, and that he had utilized such, to the effect that the victim could have been unconscious after the first or second hammer blow, as an argument against the finding of the heinous, atrocious or cruel aggravating factor (PCR X 1075-6; XI 1364; OR XI 1815-16).

Judge Costello relied upon this latter testimony in denying relief, finding:

> During the evidentiary hearing, trial counsel testified that in his opinion, not all of the testimony of Dr. Sybers was harmful. He further testified that he had used portions of Dr. Sybers' testimony during his closing argument in the penalty phase. There was no evidence presented during the evidentiary hearing to materially contradict Dr. Sybers' trial testimony (PCR V 675).

Judge Costello's findings are supported by competent substantial evidence in the record, and Gorby has failed to demonstrate any basis for reversal.

Initially, as to the portion of the claim relating to the fact that the jury was not apprised that Sybers was "under investigation" or "under suspicion" for the murder of his wife, it should be noted that collateral counsel cite no precedent for the proposition that such matter could properly be used to impeachment. Such omission is understandable, in that it is clear that while a prosecution witness can be impeached with the existence of a related pending charge, neither mere arrest nor "suspicion" can be so utilized, see, e.g., §90.610(1), Fla. Stat. (1989), Francis v.

State, 473 So.2d 672, 674-5 (Fla. 1985), Torres-Arboledo v. State, 524 So.2d 403, 408-9 (Fla. 1988); the documents introduced by Gorby indicate that the Office of the State Attorney for the Fourteenth Judicial Circuit, in fact, declined to prosecute Sybers, and that any investigation was conducted by other law enforcement agencies (Defense Exhibit 2A, letter of September 9, 1992). As to the remainder of this claim, the fact that collateral counsel have been able to secure the services of an expert who allegedly could offer more favorable forensic testimony does not mean that trial counsel was ineffective. See, e.g., Stano v. State, 520 So.2d 278, 281 (Fla. 1988); Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990); Downs v. State, 740 So.2d 506, 509, n.5 (Fla. 1999). Judge Costello was correct in concluding that Sybers' testimony was not materially contradicted below[8], and reasonable counsel, in Attorney Komarek's position, could quite well have concluded that Sybers' testimony was not prejudicial. No relief is warranted as to this claim.

E. THE "ALLEN AND MARISSA BROWN" CLAIM

In this final claim, collateral counsel contend that Gorby is entitled to a new trial because he was deprived of a "meaningful" cross-examination of these state witnesses. It is unclear what exactly is meant by this, but collateral counsel contended below that the sign language interpreter used to assist the Browns in

[8] Riddick's belief that the seven hammer blows to the victim's head (and extraction of the claw hammer when it became lodged in the victim's scalp) could all have occurred within five second is implausible, to say the least.

testifying had been unqualified, and that Attorney Komarek had rendered ineffective assistance for failing to question the interpreter's competency and qualifications. Although neither party called the Browns at the evidentiary hearing, Gorby did call Molly Sheridan, a sign language interpreter from Texas, who stated that she had reviewed the Browns' testimony in this case, but had no opinion as to whether the trial interpreter, Kay Hicks, had competently interpreted or signed (PCR XI 1304). The State presented the testimony of Ms. Hicks, who stated that she had spoken aloud each question presented to the witnesses, so that any "mistake" could be caught at the time, and that neither witness, nor any of the attorneys, had indicated any problem with her signing or interpreting (PCR XI 1354-5).

Judge Costello denied relief, finding this claim refuted by the record or without merit, and attaching certain portions of the record (PCR V 675, 711-719). The circuit court found:

> The record clearly refutes this allegation where counsel questioned the interpreter at length as to her qualifications and ability to adequately interpret the testimony of the witness (See Trial Transcript, pp. 782-788). Additionally, the trial judge after questioning the interpreter, made a specific finding that she was able to communicate with the witness and able to repeat and translate the statements (See Trial Transcript, pp. 850-851). Moreover, during the evidentiary hearing, defendant's expert testified that she could not find any inconsistency or error in the translated testimony. (PCR V 675).

These findings, which are not attacked on appeal, are supported by competent substantial evidence in the record, and no error has been

demonstrated. The circuit court's denial of relief as to all matters contained in this point should be affirmed in all respects.

POINT IV

THE TRIAL COURT'S SUMMARY DENIAL OF VARIOUS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS NOT ERROR.

In this next claim, collateral counsel contend that Judge Costello erred in summarily denying relief as to six claims of ineffective assistance of counsel, relating to both trial and penalty phase matters, as well as an unrelated claim involving the State's use of jail house informants. As will be demonstrated below, the allegations of ineffective assistance of counsel were simply conclusory attempts to avoid the procedural bar (and obtain review of substantive matters which should have been presented on direct appeal), and the claim concerning the State's presentation of jail house informants, which did not relate to the admission of testimony from any witness below, did not state a claim for which relief could be granted. The circuit court's denial of relief as to all these matters should be affirmed in all respects. Each claim will now be addressed.

A. THE JURY QUALIFICATION CLAIM

Collateral counsel first contend that Attorney Komarek rendered ineffective assistance for failing to object to the general jury qualification process employed by Bay County. Although no transcript exists of what occurred in Gorby's case, collateral counsel speculate that Komarek and Gorby were both absent from this proceeding, and that an unnamed assistant state

attorney was present, based upon certain published opinions in other Bay County cases, such as Bates v. State, 750 So.2d 6 (Fla. 1999). Gorby raised this matter as a "merits" claim in his postconviction motion below (Claims XXIX - XXX), and included conclusory allegations of ineffective assistance of counsel (PCR III 465-8, 468-470). Judge Costello found all matters to be procedurally barred (PCR VIII 885-7; IV595).

No error has be demonstrated in the above ruling. Any attack upon the jury qualification process utilized in Gorby's case should have been preserved through objection and then presented on direct appeal. See, e.g., Blanco v. Wainwright, 507 So.2d 1377, 1380 (Fla. 1987) (claim that defendant absent from critical stages of trial procedurally barred when raised for first time on postconviction motion); Rivera v. Dugger, 649 So.2d 105, 107 (Fla. 1993) (same). Further, this Court has repeatedly, and consistently, held that 3.850 proceedings cannot be utilized as a second of substitute appeal, and that a defendant may not seek to avoid such result by couching procedural barred claims in the guise of ineffective assistance of counsel. See, e.g., Medina v. State, 573 So.2d 293, 295 (Fla. 1990); Kight v. Dugger, 574 So.2d 1066, 1073 (Fla. 1990); Lopez v. State, 634 So.2d 1054, 1056-7 (Fla. 1993); Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995); Rivera v. State, 717 So.2d 477, 480, n.2 (Fla. 1998) (condemning conclusory allegations of ineffective assistance of counsel); Rutherford v. State, 727 So.2d 216, 219, n.2 (Fla. 1998); Brown v. State, 755 So.2d 616, 621, n.7 (Fla. 2000); Asay v. State, 25 Fla.L.Weekly

S523, 527-8 (Fla. June 29, 2000). Judge Costello's rulings are in accord with the above precedent, and no error has been demonstrated.

Assuming that any further argument is necessary, it is clear that no viable claim of ineffective assistance of counsel has been demonstrated. The record reflects that Judge Sirmons announced on the record that Judge Bower had heard the jury excuses, and that the jury pool had been divided into three panels because there were three upcoming trials (OR I 37). Attorney Komarek had been practicing law in Bay County since 1975 (PCR IX 950). Collateral counsel has failed to demonstrate that every reasonably competent counsel in his position would have interposed an objection at this time, especially given the fact that no court has ever invalidated the procedure utilized in Bay County; conversely, collateral counsel have entirely failed to demonstrate any prejudice from counsel's omission, given the fact that no transcript exists of this proceeding, so as to demonstrate the existence of any error. The circuit court's finding of procedural bar should be affirmed.

B. THE EXPERT WITNESS INSTRUCTION CLAIM

Collateral counsel next contend that Attorney Komarek rendered ineffective assistance for failing to object to the standard jury instruction regarding expert witnesses. This matter was likewise raised as a "merits" claim below (Claim X), with a conclusory allegation of ineffective assistance (PCR III 361-3), and Judge Costello found this matter procedurally barred (PCR IV 595; VIII 878-9). No error has be demonstrated. This matter is certainly

one which could have been presented on direct appeal, see Brown, 755 So.2d at 621, n.5, n.7, and Gorby's allegation of ineffective assistance is simply an attempt to avoid this procedural bar. See, Asay, supra. Further, this Court held in Thompson v. State, 25 Fla.L.Weekly S346, 350 (Fla. April 13, 2000), that defense counsel could not be deemed ineffective for failing to object to an instruction, such as this, which had never been invalidated. The circuit court's finding of procedural bar should be affirmed.

C. THE AGGRAVATING FACTOR AND INSTRUCTION CLAIM

In this claim, collateral counsel contend that Attorney Komarek was ineffective for conceding the existence of the pecuniary gain and under sentence of imprisonment aggravating factors, and for failing to object to the jury instructions thereon, as well as to the jury instruction on the heinous, atrocious or cruel aggravating factor. The record reflects that collateral counsel asserted in Claim XIX of the motion below that the jury instruction on the pecuniary gain aggravator was unconstitutional and that counsel had been ineffective for failing to object to it (PCR III 412-14); that the instruction on the HAC aggravator had likewise been unconstitutionally deficient and that counsel had been ineffective for failing to litigate the issue (Claim XXI; PCR III 416-420), and, in Claim XXII, that the instruction on the under sentence of imprisonment aggravator had likewise been flawed and that counsel had been ineffective for failing to object to it (PCR III 420-2). Judge Costello found all of these matters procedurally barred (PCR IV 595; VIII 881-3).

Again, no error has been demonstrated. The propriety of the finding of any of these aggravating circumstances, as well as the constitutionality of any jury instructions thereupon, represent matters which should have been presented on direct appeal. See, e.g., Freeman v. State, 25 Fla.L.Weekly S451, 454 (Fla. June 8, 2000); James v. State, 615 So.2d 668 (Fla. 1993), and the claims of ineffective assistance of counsel are simply transparent attempts to avoid this bar. See Rivera, supra; Rutherford, supra; Asay, supra. Further, the record fails to substantiate any contention that defense counsel "conceded" the existence of any aggravating factor. As to the jury instruction, no court has ever invalidated the standard instructions on the pecuniary gain and/or under sentence of imprisonment aggravating factors, and this Court expressly noted in the direct appeal opinion that the jury in this case was not instructed on the heinous, atrocious or cruel factor in accordance with the instruction condemned in Espinosa v. Florida, 505 U.S. 1079 (1992), Gorby, 630 So.2d at 548, instead receiving an expanded instruction. Accordingly, it is clear that no viable claim of ineffective assistance of counsel has been demonstrated. See Thompson, supra; Downs v. State, 740 So.2d 506, 517-18 (Fla. 1999); Harvey v. State, 656 So.2d 1253, 1258 (Fla. 1995); Mendyk v. State, 592 So.2d 1076, 1080 (Fla. 1992). The circuit court's denial of relief as to this procedurally barred claim should be affirmed.

D. THE NON-STATUTORY AGGRAVATOR CLAIM

In this claim, collateral counsel contend that Attorney Komarek was ineffective for failing to object to the prosecutor's statements regarding lack of remorse in opening and closing arguments, as well as to the fact that the prosecutor allegedly "swung the hammer used in the murder wildly around the courtroom and used it repeatedly to strike the table during closing." (Initial Brief at 97). Gorby presented this matter as a "merits" claim in the 3.850 (Claim XXIV), with a conclusory allegation of ineffective assistance of counsel (PCR III 425-430), and Judge Costello found the matter barred (PCR IV 595, VIII 881-3).

No error has been demonstrated. Claims regarding the prosecutorial argument are matters which should be preserved through objection and presentation on direct appeal. See, e.g., Diaz v. Dugger, 719 So.2d 865, 867-8, n.2, 6 (Fla. 1998); Bryan v. Dugger, 641 So.2d 61, 62-3, n.2 (Fla. 1994). Gorby's alternative allegations of ineffective assistance of counsel are simply attempts to avoid the procedural bar. See Rivera, supra; Asay, supra. Further, the record reflects that defense counsel did object to the prosecutor's reference to lack of remorse in closing argument (OR X 1582), and that appellate counsel presented such claim of error to this Court on direct appeal, and that this Court rejected it. Gorby, 630 So.2d at 547. Gorby cannot relitigate this matter on postconviction, see Blanco, supra, Medina, supra, and the reference to lack of remorse in opening statement was insufficiently prejudicial to have rendered the trial verdict

unreliable. See Brown, 755 So.2d at 623 (defense counsel's failure to object to prosecutorial argument insufficient to merit relief in the absence of prejudice); Pope v. Wainwright, 496 So.2d 798, 802-4 (Fla. 1986). Conversely, the record fails to substantiate any allegation that the prosecutor "swung" the hammer during closing argument, and this claim is mere speculation. The trial court's finding of procedural bar should be affirmed.

E. THE CALDWELL CLAIM

In this claim, collateral counsel contend that Attorney Komarek rendered ineffective assistance for failing to object to standard instruction on the jury's role in capital sentencing which allegedly violate Caldwell v. Mississippi, 472 U.S. 320 (1985). This matter was raised as a "merits" claim below (Claim XXV) with a conclusory allegation of ineffective assistance of counsel (PCR III 430-4), and Judge Costello found the matter barred (PCR IV 595, VIII 881-3).

No error has been demonstrated. Caldwell claims are matters which should be presented on appeal, see Thompson, 25 Fla.L.Weekly at S350, and the allegation of ineffective assistance is simply an improper attempt to avoid the bar. See, Rivera, supra; Asay, supra. Further, because the instructions have never been invalidated, counsel cannot be ineffective for failing to object to them. See, Thompson, supra. Finally, counsel's omission is easy to understand, given the fact that the jury in this case was specifically advised that their recommendation was entitled to

great weight (OR XI 1824). The trial court's finding of procedural bar should be affirmed.

F. THE BURDEN-SHIFTING CLAIM

Collateral counsel next contend that Attorney Komarek rendered ineffective assistance for failing to object to alleged burden-shifting in the penalty phase instructions. This matter was raised as a "merits" claim (Claim XXVI) with a conclusory allegation of ineffective assistance of counsel (PCR III 434-7), and Judge Costello found it barred (PCR IV 595; VIII 881-3).

Again no error has been demonstrated. Claims of this nature represent matters which should be presented on direct appeal, see Brown, supra, and the allegation of ineffective assistance is simply an attempt to avoid this bar. See, Rivera, supra; Asay, supra. Further, seeing as the instructions have never been invalidated, counsel cannot be deemed ineffective. See, Thompson, supra. The trial court's finding of procedural bar should be affirmed.

G. THE JAILHOUSE INFORMANT CLAIM

Collateral counsel finally contend that Gorby was deprived of due process because of the prosecuting office's "pattern and practice" of utilizing jailhouse informants, contending that the State had contemplated using Eric Mace as a witness in this case, but did not do so. This matter was presented as part of Claim VIII of the motion, alleging a Brady violation (PCR III 349-350). After noting that Mace had not testified, Judge Costello found this matter insufficiently pled, and summarily denied relief (PCR IV

594, VIII 912-14). At the hearing, collateral counsel apparently attempted to introduce a letter from Jerry Crowder, another "snitch" who never testified in Gorby's trial, and Judge Costello adhered to her ruling (PCR XI 1410-13).

Collateral counsel present no allegation of ineffective assistance of counsel as to this matter, or explain their theory of reversible error. The witnesses in question never testified, and it is unclear what counsel should have done in this respect or what evidence might arguably be said to have been suppressed. No basis for reversal has been demonstrated, and the circuit court's denial of relief as to all matters presented in this point should be affirmed.

POINT V

GORBY WAS AFFORDED A FULL AND FAIR EVIDENTIARY HEARING BELOW.

Collateral counsel next contend that Gorby was not afforded a full and fair hearing below for three reasons: (1) the State refused to grant immunity to a witness whom collateral counsel wanted to call; (2) the alleged under-funding and under-staffing of CCR, as well as the allegedly draconian application of Rule 3.851 Fla.R.Crim.P. and (3) the fact that the Florida Rule of Professional Responsibility 4-3.5(d)(4) precluded counsel from initiating contact with the jurors in this case. As a general matter, a trial court enjoys wide latitude and discretion in its conduct of postconviction proceedings, Medina, 573 So.2d at 295, Asay, 25 Fla.L.Weekly at S524-5, and Gorby has failed to

demonstrate any basis for relief. Each of his claims will now be addressed.

As to the first matter, the record reflects that collateral counsel sought to secure the presence of Jerry Wyche, and, when Wyche failed to appear at the hearing, a capias was issued on July 16, 1998 at the request of collateral counsel (PCR XI 1310-13, 1347-1351, 1401-1410; IV 644-5). After the close of all evidence and presentation of closing arguments, collateral counsel stated, at the renewed hearing of October 9, 1998, that the capias had not been served on Wyche (PCR XII 1489, 1518-1520). Shortly before Judge Costello ruled on the 3.850 motion, Wyche, who was also facing pending charges relating to delinquency in child support, was taken into custody, and collateral counsel noted such fact in their motion to reopen the evidentiary hearing (PCR IV 668-674; V 771-3). On February 15, 1999, Wyche appeared before the Court, and counsel was appointed for him (PCR XIII 1529-1532). At this time, Wyche disputed his pending contempt charge stemming from the failure to appear, claiming that he had advised collateral counsel that he was afraid of flying and would not travel to the hearing by that method; he stated that he would have traveled by other means of transport (PCR XIII 1532-6). When asked to present testimony as to the substance of any claim for relief, however, Wyche chose to invoke his rights under the Fifth Amendment and remain silent (PCR XIII 1532-7). At this time, however, no request was made that the State offer Wyche immunity. Inasmuch as such request was never made below, it would seem that any claim now presented by

collateral counsel in this vein is procedurally barred. See, Doyle v. State, 526 So.2d 909, 911 (Fla. 1988); Jones v. State, 701 So.2d 76, 78 (Fla. 1997). In any event, collateral counsel have failed to demonstrate any requirement that the State offer immunity to this witness, or that State action precluded their presentation of this testimony. Accordingly, no relief is warranted.

As to the alleged under-funding and under-staffing of CCR and the application of Rule 3.851, the record reflects that Gorby's conviction and sentence became final on October 3, 1994, when certiorari was denied, see, Gorby v. Florida, 513 U.S. 828 (1994), and that CCR filed a postconviction motion, seeking further relief to amend, on October 3, 1995 (PCR I 1-147). Following public records litigation, CCR filed an amended motion for postconviction relief on May 30, 1997, setting forth thirty-six (36) claims for relief (PCR III 309-521). Although a notice of "loss" of designated counsel was filed on September 15, 1997, following the dismantling of CCR, a CCRC-North attorney filed a formal notice of appearance on February 3, 1998 (PCR IV 529-531, 544-5). Following the filing of the State's response, the Court attempted to schedule a hearing pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), but continued such on several occasions to accommodate collateral counsel for Gorby (PCR IV 550-1, 554-5). Likewise, the evidentiary hearing was continued to allow collateral counsel for Gorby to attend an out-of-state training seminar (PCR IV 562-3; VIII 917-944). The evidentiary hearing was held July 13-15, 1998, and was then recessed to accommodate the schedule of a defense expert

witness; collateral counsel also traveled to West Virginia and Texas, and introduced deposition testimony from non-available witnesses. The evidentiary portion of the hearing did not conclude until October 9, 1998, and Judge Costello did not formally deny relief, or any motions to reopen or reconsider, until February 19, 1999. All told, Gorby's postconviction proceeding was pending for three and a half years, during which he was represented by a number of fully competent and well compensated collateral counsel, with the means to travel out of state and secure any and all witnesses, testimony and exhibits desired. No relief is warranted as to this matter.

As to the final allegation, concerning collateral counsel's alleged inability to interview jurors, without running afoul of ethical constraints, such matter was presented in Gorby's postconviction motion as Claim XXVII (PCR III 437-464), and found to be a legally insufficient basis for relief. (PCR IV 595; VIII 883-5). No error has been demonstrated in regard to Judge Costello's holding. See, e.g., Johnson v. State, 593 So.2d 206, 210 (Fla. 1992) (court condemns practice of postconviction interview of jurors); Young v. State, 739 So.2d 553, 555, n.5 (Fla. 1999) (attack upon Florida Bar Rule precluding jury interviews procedurally barred on postconviction motion); Brown, 755 So.2d at 621, n.5, 7 (same). Gorby was afforded a full and fair hearing below, and no relief is warranted as to this matter.

POINT VI

NO ERROR HAS BEEN DEMONSTRATED IN REGARD TO ANY PUBLIC RECORDS ISSUE.

As their final claim, collateral counsel contend that Gorby was deprived of access to public records in regards to the Sybers investigation and that "State agencies have withheld information needed to investigate jury misconduct." (Initial Brief at 102). Although no specific arguments are presented as to this latter matter, such may relate to the fact that, on December 30, 1998, CCRC-North filed a public records request, pursuant to Fla.R.Crim.P. 3.852(h)(2), upon the Bay County Clerk's Office, seeking personal data relating to the jury members who convicted Gorby in 1991 (PCR V 737-740). This request, which was not made until after the Court had already denied the 3.850 motion itself, was, in any event, a nullity. See, Times Publishing Co. v. Ake, 660 So.2d 255, (Fla. 1995) (Clerk of Court not subject to public records demands).

As to the Sybers investigation, while it true that access to some records pertaining to this matter was denied in February of 1997, on the grounds that an ongoing investigation existed, pursuant to section 119.07(3)(b), Fla. Stat. (1995), collateral counsel do not on appeal dispute the correctness of this ruling. Further, it should be noted that, despite this ruling, collateral counsel were able to amass literally hundreds of documents pertaining to the Sybers investigation (Defense Exhibits 2A, 2B and 9), and likewise litigate a postconviction claim in such regard.

See Point III(D), infra. Although collateral litigation continued into 1999, collateral counsel never asked Judge Costello to revisit this ruling, and, at the Huff hearing of June 1, 1998, simply "renewed their objections" (PCR VIII 867-8). Accordingly, the State would contend that Gorby has failed to demonstrate any basis for relief in this regard, and that no continued dissatisfaction with this uncontested ruling was ever placed upon the record below, as required by this Court's precedent. See, Lopez v. Singletary, 634 So.2d 1054, 1058 (Fla. 1993); Castro v. State, 744 So.2d 986, 990 (Fla. 1999); Bryan v. State, 748 So.2d 1003, 1006 (Fla. 1999) (mere existence of public records request no basis for postconviction relief); Asay, 25 Fla.L.Weekly at S528, n.18. For all of the above reasons, the order on appeal should be affirmed in all respects.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the circuit court's order denying postconviction relief should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Andrew Thomas, Assistant CCRC, Capital Collateral Regional Counsel, Northern Region, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this ____ day of August, 2000.

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