IN THE SUPREME COURT OF FLORIDA

MILO A. ROSE,

Appellant,

vs. **CASE NO. 95,227**

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

This is an appeal from the summary denial of a successive motion for postconviction relief by a capital defendant. In the opinion affirming the judgment and sentence, this Court described the facts as follows:

> At approximately 10 p.m. on October 18, 1982, several witnesses were talking together outside one of their residences. Testimony at trial revealed that they saw two men walking down the street. Subsequently they heard the sound of breaking glass and saw that one of the men, later identified as Robert C. Richardson, was lying on the ground. The other man, identified by witnesses as Milo Rose, appellant, was standing over him. Evidence shows that appellant then walked to a nearby vacant lot, picked up a concrete block, and returned to the man on the ground. Appellant raised the block over his head and hurled it down on Richardson's head. He picked up the block and hurled it down a total of five or six times. The area where the incident occurred was well lighted, so the witnesses were able to see the man with the concrete block clearly.
>
> Appellant was living with Mrs. Richardson, the victim's mother, at the time. Two other acquaintances were staying with them. On the night of the incident, these two acquaintances left an apartment which was in the vicinity where the killing occurred and found appellant hitchhiking on a nearby street. Appellant got into their truck and stated several times that he had just killed Richardson. Appellant was later found in Mrs. Richardson's house and was arrested.

Rose v. State, 472 So. 2d 1155, 1156-57 (Fla. 1985).

Thus, facts presented at trial and existing in the court file reveal that Rose and the victim, Butch Richardson, knew each other

prior to the murder, and that Rose was living with Richardson's mother (DA-R. 876, 957).[1]

On October 18, 1982, Catherine Bass, Melissa Mastridge and MaryAnn Hutton were standing outside Mastridge's home in Clearwater and saw Rose and Richardson walking along a well-lit street at approximately 10:00 p.m. (DA-R. 702-03, 712, 735-36, 755-56). After continuing their conversation, the three women heard a noise, like glass breaking (DA-R. 703, 737, 757). At that time, they saw Richardson lying on the ground and Rose leaning over him (DA-R. 704-05, 737, 757). Rose then walked around the area looking for something and soon after, returned to Richardson with a brick, cement block, or cinder block in his hands (DA-R. 706-07, 737-38, 759). Rose lifted the block over his head and threw it down upon Richardson's head (DA-R. 707, 738, 759). Rose proceeded to do this several more times, all in plain view of the three women (DA-R. 707-08, 739, 759-60). Catherine Bass testified that Rose picked up the block and heaved it at the victim's head seven or eight different times (DA-R. 712).

Mastridge ran to neighbor Carl Hayword's house and told

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[1]References to the record in this case will be designated as follows: "DA-R" for the record from Appellant's direct appeal, Florida Supreme Court Case No. 64,484; "PC-R" for the record to the instant postconviction appeal, Florida Supreme Court Case No. 95,227; and "1PC-R" for the record from the initial postconviction appeal, Florida Supreme Court Case No. 76,377.

Hayword what was going on, whereupon Hayword's wife call 911, and Hayword went outside (DA-R. 739, 759, 771). When Hayword saw Rose hold the block over Richardson, Hayword shouted out to Rose, who then dropped the block and ran off (DA-R. 708, 739-40, 760, 771-72, 776-777). Hayword and Bass tried to follow Rose in Bass' car, but they lost him (DA-R. 709, 730, 740, 772).

When the police arrived that night, Bass, Mastridge, Hutton and Hayword gave detailed, consistent descriptions of the attacker (DA-R. 713, 722, 742, 760-61, 768, 772). Patrolman McKenna was the first police officer to respond to the scene of the murder, and he recognized Richardson as having been involved in an altercation earlier that same night, to which McKenna had also responded (DA-R. 972, 982-83). McKenna had interviewed both Richardson and Rose after that altercation, and upon arriving at the murder scene, he gave other officers both Rose's name and description (DA-R. 983, 986-87). Based on this information and the description from the four eyewitnesses, the police developed Rose as a suspect and went to Rose's residence the same night of the murder, which had occurred about 10:00 p.m. (DA-R. 951).

When police went to Rose's downstairs apartment, they saw that his physical features and clothing matched the descriptions given by the eyewitnesses, and that Rose had blood on his arms and clothing (DA-R. 954). Rose was arrested and transported to the

Clearwater Police Department for questioning (DA-R. 954) Meanwhile, a police officer, with the victim's mother present, went to the upstairs apartment of Becky Borton and Mark Poole, woke them up, told them what happened, and asked them if they knew anything (DA-R. 881, 900). Borton and Poole told police that earlier that night, they picked up Rose, who was hitchhiking at the intersection of Drew Street and Cleveland Street (DA-R. 864, 888), and that on the way back to their apartments, Rose repeatedly told them that he had just killed Richardson with a brick (DA-R. 865-66, 868, 888-89). Borton and Poole also noticed blood on Rose (DA-R. 868, 893-94).

Approximately two hours after the murder and after Rose was arrested, Bass, Mastridge, Hutton and Hayword went to the police station to give statements, and during that time, they were each separately shown a photopak of possible suspects (DA-R. 713-14, 762, 773). Bass, Hutton and Hayword positively identified Rose as the attacker (DA-R. 714-15, 763, 773-74, 789-92, 801).

Bass, Mastridge, Hutton, Borton and Poole were deposed prior to the trial and gave sworn testimony consistent with their police statements (DA-R. 179-230, 235-259). At Rose's trial in 1983, Bass, Mastridge, Hutton, Hayword, Borton and Poole testified, and their trial testimony was consistent with their police statements and/or deposition testimony (DA-R. 701-782, 860-902). Rose did not

testify at trial. Rose was found guilty of first degree murder and subsequently sentenced to death.

The trial court's findings on sentencing indicate that the statutory aggravating factors of under sentence of imprisonment and prior violent felony convictions were established, due to a string of violent crimes dating back to 1968 (DA-R. 330-31). Although the trial court rejected heinous, atrocious, or cruel, finding that the victim's intoxication and the lack of conscious suffering precluded the factor, the judge cited a number of facts to support the cold, calculated and premeditated factor (DA-R. 335-37). These primarily focused on the manner in which the homicide had been committed, including Rose having searched for a large object, locating the 35-pound concrete block and carrying it back to where Richardson lay on the ground, holding it over his head and pausing before throwing it repeatedly onto Richardson's head (DA-R. 335-37). The judge rejected all statutory mitigation, weighing only that Rose was a good person as nonstatutory mitigation (DA-R. 337-39). In her discussion of the rejection of both statutory mental mitigators, the judge cited eight different reasons for not applying the factors; facts taken from Borton and Poole's testimony were mentioned in part of two of the reasons (DA-R. 337-39).

Rose was indicted, tried, and convicted in 1983. This Court affirmed Rose's conviction and sentence on May 16, 1985. Rose v.

State, 472 So. 2d 1155 (Fla. 1985). On October 2, 1987, Rose filed his first Motion to Vacate Judgment and Sentence. The motion did not include any claim alleging any violation of Brady v. Maryland, 373 U.S. 83 (1963). The motion was denied in 1990, and the denial was affirmed by this Court on March 11, 1993. Rose v. State, 617 So. 2d 291 (Fla. 1993).

Rose filed his second Motion to Vacate Judgment and Sentence on December 24, 1996 and subsequently filed an Amended Motion to Vacate Judgment and Sentence on September 4, 1998. The State filed a response on December 7, 1998. A Huff hearing was held and on February 23, 1999, the court below summarily denied these most recent postconviction motions. This appeal follows.

SUMMARY OF THE ARGUMENT

I. The court below properly denied Rose's successive motion for postconviction relief without an evidentiary hearing. The judge correctly assumed that the facts asserted by the defense were true, but found that, even if the allegations were proven, no relief would be warranted since there was no reasonable probability that the outcome of Rose's trial could be affected. The court below also found that, since defense counsel could have discovered this information with due diligence prior to trial, there was no basis for an untimely, successive motion. The judge's findings are supported by the record and cannot be disturbed on appeal.

II. Rose's claim of newly presented Brady information was properly summarily rejected. Even if evidence of an alleged "deal" between Rebecca Borton and/or Mark Poole and the State had been presented to Rose's jury during his trial, there is no reasonable probability that the outcome of the trial would have been different. This is clear due to the limited impeachment value of the deal alleged; the consistency between Borton and Poole's trial testimony when compared to their statements to the police a few hours after the murder; and the independent eyewitness testimony establishing Rose as the perpetrator of this offense.

III. Furthermore, the conclusion that the trial outcome would have been the same withstands the cumulative review mandated by

Kyles v. Whitley, 514 U.S. 419 (1995). Rose misconstrues the nature of a cumulative error analysis, since no evidence beyond that offered in the current Brady issue exists which should have been presented to Rose's jury but, due to constitutional error, was not. Rose's assertions that the court below failed to apply the correct standard or to consider cumulative error is without merit.

IV. Rose has failed to demonstrate any error in the lower court's rulings with regard to Rose's public records requests. The court below complied with statutory requirements and this Court's directives by holding an *in camera* inspection of the documents that the State withheld as exempt.

V. Rose's ancillary claims were properly summarily rejected. This Court has denied similar claims regarding the effectiveness of collateral counsel based on legislative funding; has upheld the constitutionality of judicial electrocution as a method of execution; has repeatedly declined to scrutinize executive clemency procedures; and has found the claim pertaining to the propriety of limits on post-trial juror interviews to be procedurally barred in postconviction proceedings.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT DENIED DUE PROCESS IN SUMMARILY DENYING ROSE'S RECENT POSTCONVICTION MOTIONS.

Rose initially asserts that the trial court erred in denying his 1996 postconviction motion, as amended in 1998, without an evidentiary hearing. Specifically, Rose claims that the court committed three mistakes: applying an incorrect standard, relying on non-record documents, and denying his *pro se* motion which was filed after the Huff hearing. A review of the record in this case clearly refutes any suggestion of error with regard to each of these allegations.

As to the argument that the court below "made assumptions and relied on non-record evidence to analyze Mr. Rose's claim," (Appellant's Initial Brief, p. 43), the record fully supports this assertion. However, all of the assumptions and non-record reliance in this case benefitted the defendant. The trial judge repeatedly acknowledged that she assumed, for purposes of considering the need for an evidentiary hearing, that the facts alleged by the defendant were true and could be proven if a hearing was granted:

> But I think at this particular juncture that, you know, this is one of these things -- you know, I supposed you could have an evidentiary hearing to sort this out -- but in the light most favorable to the defense at this point in time ... (PCR. 5/748)

I think that's the result. In the light most favorable, I suppose, to the defense, we would have to assume that the loose marijuana was indeed a misdemeanor amount and the amount that she had been arrested on, that being a -- what the police officer presumed to be a misdemeanor amount, in essence was a felony amount -- (PCR. 5/749).

In the light more favorable to the defense, that certainly is a possibility or certainly is something that she possibly could have believed reasonable, that somebody said, gee, this came back a felony amount, but you were charged with a misdemeanor and we'll just continue to treat it as a misdemeanor. So maybe she thought she was getting something (PCR. 5/750).

But I'm prepared, at least at this point, to assume, if I'm going to consider whether to grant or deny an evidentiary hearing -- particularly if I'm considering denying it -- that it would be appropriate to consider this in the light most favorable to the defendant, which would be -- based on the affidavit, based on the document that I have seen -- which would be that she was arrested for a misdemeanor prior to the murder and that subsequent to the murder she was charged with a misdemeanor consistent with her arrest while there was a possibility she could have been charged with a felony and it's possible that somebody told her that they would give her this break (PCR. 5/751).

So if anything, it seems to me -- now, I don't know -- you see, it's very difficult for me to know without an evidentiary hearing whether Mr. Young explained that he was going to give her this agreement or not.

But, as I said, let's assume that all of this happened and Mr. Young said you've been cooperative so I'm going to let this be filed as a misdemeanor and you're on probation and this will go well for you (PCR. 5/753).

Thus, the court repeatedly assumed, for the benefit of the defense, that the allegations in the postconviction motion were true. The court's ruling to deny relief, however, was not premised on these assumptions, but on the fact that, even assuming the allegations to be true, there was no reasonable probability of any difference in the outcome of Rose's trial (PCR. 5/753-63).

Rose has not identified any factual assumptions accepted by the court which were contrary to his position. Since the factual assumptions were made solely in a light most favorable to the defense below, no error has been demonstrated. By accepting Rose's allegations as true, the judge complied with all applicable case law and did the very thing which Rose's brief accuses her of failing to do.

In addition, although Rose also asserts that "allegations of fact regarding due diligence must also be accepted as true," (Appellant's Initial Brief, p. 44), no such factual allegations were presented in this case. To the contrary, Rose's motion offered a claim of ineffective assistance of counsel as an alternative to the Brady claim, thus apparently acknowledging that counsel could have discovered this information (PC-R. 2/196-99; see also, Appellant's Initial Brief, pp. 48, 57). Rose's brief does not identify any particular allegation of due diligence which was disregarded by the court below. Although Rose bemoans the lack of

any opportunity to present evidence of due diligence, there were no allegations upon which to present such evidence, and he has not identified what evidence he would present if given the chance.

More importantly, however, the judge's finding that any possible evidence of a deal between the State and Rebecca Borton could have been discovered with due diligence is supported by Rose's trial record, which includes Borton's pretrial deposition. In her deposition, Borton discusses her misdemeanor conviction, and the public records now offered by the defense to create questions about the conviction were clearly available prior to the trial. Therefore any unpled allegation of due diligence is clearly refuted by the record and files in this case, and the judge below properly used the lack of due diligence as an alternate basis for the denial of relief.

Rose's complaint as to the judge's reliance on non-record documents is similarly without merit. Although the State offered court records which were outside the scope of the actual trial record in this case in order to support its position that there was no deal between the State and Borton, the judge rejected this position and assumed, for Huff hearing purposes, that such a deal existed. Furthermore, to the extent that Rose is suggesting a trial court may not rely on "non-record" documents such as court records in other cases in considering a postconviction motion,

there is no authority to support such a suggestion. Of course, a court is permitted to take judicial notice of its own records, and there are no cases mandating that the court must ignore relevant, self-authenticating documents that may be available when making a preliminary ruling on a postconviction motion.

Finally, Rose's challenge to the court's denial of his *pro se* motion for reconsideration does not demonstrate any basis for relief. As Rose acknowledges, his *pro se* motion was filed while Rose was represented by counsel. He cites no authority for his suggestion that due process demands consideration of a *pro se* motion under such circumstances. In fact, case law is clearly to the contrary. See, Bell v. State, 699 So. 2d 674, 677 (Fla. 1997) (no abuse of discretion in trial court's denial of defendant's request to act as co-counsel); Davis v. State, 586 So. 2d 1038, 1041 (Fla. 1991) ("A criminal defendant does not simultaneously enjoy a right to assistance of counsel and the right to represent himself"); State v. Tait, 387 So. 2d 338, 340 (Fla. 1980) (no right to self-representation exists in state or federal constitution where defendant is represented by counsel; "When the accused is represented by counsel, affording him the privilege of addressing the court or the jury in person is a matter for the sound discretion of the court"); Carter v. State, 713 So. 2d 1103 (Fla.

4th DCA 1998); Tucker v. State, 562 So. 2d 415 (Fla. 1st DCA 1990); Whitfield v. State, 517 So. 2d 23 (Fla. 1st DCA 1987).

On these facts, no evidentiary hearing was warranted, and no error has been shown in the trial court's summary denial of Rose's successive postconviction motions.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING ROSE'S BRADY/GIGLIO CLAIM.

Rose's next claim presents the crux of his argument for postconviction relief submitted in his latest motions. He asserts that he should have been granted a hearing on his claim that Rebecca Borton and Mark Poole received favorable treatment from the State in exchange for their testimony at Rose's trial. However, a review of Rose's claim, in light of the other evidence, clearly establishes support for the trial court's finding that there would be no difference in the outcome of Rose's trial even if such information existed and had been presented to the jury.

There is no need for this Court to consider this issue absent some error in the lower court's finding that trial counsel could have discovered this information with due diligence prior to trial. A successive claim of ineffective assistance of counsel for failing to discover this information is clearly barred, and if the evidence was reasonably discoverable, the instant Brady claim is also barred as untimely and successive. However, even if the issue is considered, no relief is warranted.

Rose's initial argument that the court below applied the wrong legal standard in analyzing this claim compels review of the transcript of the Huff hearing. The following discussion on the appropriate standard is reflected:

THE COURT: Is that that -- that fourth one that I had forgotten -- I've done a lot of Brady cases. Is is -- I can't remember the standard -- is it "probably would have produced a different result"?

MS. KING (Asst. State Attorney): "Reasonable probability that the outcome would have been different."

THE COURT: Would have been different. Okay. So it's a "reasonable probability."

MS. KING: And that's what Ms. Smith is speaking of, is the standard that was changed by the Florida Supreme Court in the Richardson case back from when it was different Hallman case. The standard became not a complete certainty that the outcome would have been different, but a reasonable probability that the outcome would be different. We have no quarrel with that.

THE COURT: That's right, and I want to make sure that we have an agreement here as to the standard, because I was listening to your argument and I wasn't certain what you were saying. That's my recollection. Those are the correct words that I recall, that the standard is -- when you get down to number four on Brady, and I think the same is true on newly discovered evidence, is a reasonable probability that the outcome would have been different. Either -- in this case, either the guilt phase and/or the penalty phase. Are you suggesting that there is a different standard that I should use in this case?

MS. SMITH (Asst. Capital Collateral Regional Counsel): No, that's the standard.

THE COURT: That's the standard.

MS. SMITH: And the definition of "reasonable probability," according to one of many decisions that the Florida Supreme Court has explained, is the -- the one I'm referring to is Blank v. State at 664 So.2d 242. The definition is a probability sufficient to undermine confidence in the outcome.

THE COURT: Right.

(V5/735-738).

Clearly, the court below used exactly the standard that defense counsel requested, and exactly the standard that Rose now contends should have been applied. Rose's recitation of the court finding this information to not be "newly discovered evidence" does not suggest the standard that was applied by the court below; this was only a comment on the analysis used by the court to determine if the untimely, successive motion could be excused. Counsel for Rose noted at the Huff hearing that he was referring to newly discovered evidence only with reference to the timeliness of his motion, and not to suggest a standard of review (PC-R. 5/725-27). The actual standard for newly discovered evidence, whether the evidence is of such a nature that a different result would probably be rendered on retrial, was never mentioned or applied at any time during the proceedings below. See, Lightbourne v. State, 24 Fla. L. Weekly S375, S379 (Fla. July 8, 1999); Jones v. Dugger, 709 So. 2d 512 (Fla.), cert. denied, 118 S. Ct. 1350 (1998).

Rose also suggests, for the first time in this appeal, that a lower standard may be applicable under United States v. Agurs, 478 U.S. 97 (1976), based on a substantive claim of prosecutorial misconduct based on the knowing use of false testimony. Obviously, jumping from marginal impeachment evidence on an ancillary State witness at trial to the witnesses actually lying about what they had seen and heard from Rose is quite a leap, without any foundation. Although this was not an issue below, the court

happened to note that one of the difficulties she had with Rose's claim was that Borton's veracity was strengthened by the allegations. For example, the record reflects that Borton threatened to "forget" what she had heard in failing to negotiate a deal with the State (PC-R. 5/742). Despite the speculative impeachment evidence offered in this issue, there is absolutely no reason to believe that any of the testimony offered by Borton or Poole may have been false, particularly since it is consistent with all of the other compelling evidence of Rose's guilt.

Thus, no error can be found with regard to the propriety of the standard used below. In addition, the record fully supports the denial of relief even if a lower standard could be applied. Shortly after Richardson's murder, Borton and Poole saw Rose hitchhiking and gave him a ride home. At that time, Rose was living with Richardson's mother, and Borton and Poole lived in an upstairs apartment at the same location. When the police developed Rose as a suspect, they went to the residence and found him, matching the description of the suspect, with blood on his arms and clothing.

Police went to the upstairs apartment to interview Mark Poole and Becky Borton. Both Poole and Borton told the police that they had picked Rose up hitchhiking earlier and Rose told them repeatedly that he had just killed Richardson with a brick. Borton and Poole's statements about Richardson's murder, just like the

statements of the other four eyewitnesses, have remained consistent from hours after the murder, up through seventeen years later.

Clearly, if any information had been presented at the trial suggesting that Borton and Poole had a deal with the State for their testimony, the State could have presented the statements Borton and Poole made to police on the night of the murder as prior consistent statements. See, Kelley v. State, 486 So. 2d 578, 582 (Fla. 1986) (prior consistent statements admissible to rebut inference of improper motive to fabricate). Given the consistency between Borton and Poole's statements on the night of the murder -- prior to any possible knowledge of any "deal" -- and their testimony at trial, any defense claim that Borton and Poole were motivated to testify in order to strike a deal with the State is not persuasive here and would not have been persuasive to a jury.

In addition, allegations about a deal between the State and Borton and Poole do not reach the level of materiality due to the other, independent evidence of Rose as the perpetrator of this murder. As previously noted, Rose was also identified by four separate witnesses to the murder. Three of these witnesses actually saw Rose throw the concrete block onto the victim's head repeatedly; the fourth interrupted Rose when Rose was poised to strike the victim with the block another time. Three of the four positively identified Rose in the courtroom during the trial and in a photopak hours after the murder. The strength of this evidence,

which remains untainted by allegations of constitutional error, provides a strong foundation for confidence in the verdict against Rose which is not undermined by the Brady claim raised below.

Although Rose asks this Court to also consider the impact of any error in the penalty phase of his trial, he does not have any better claim from that perspective. The sentencing order reflects that the Borton/Poole trial testimony had little significance in the imposition of the death sentence. Only one of the three aggravating factors even remotely relied on this testimony, and it was well established by the other evidence cited in the sentencing order. No mitigation was rejected outright due to the testimony; it was merely one of many factors noted in the trial court's rejection of the statutory mental mitigators.

On these facts, no error has been demonstrated in the trial court's summary denial of Rose's Brady claim. There is no reasonable probability that a different result would be obtained even if Borton and Poole never testified against Rose. The trial court properly found any new information about Borton and Poole to be immaterial, and no relief is warranted.

ISSUE III

WHETHER THE TRIAL COURT APPLIED THE WRONG STANDARD AND/OR FAILED TO CONSIDER CUMULATIVE ERROR.

Rose's next issue again concerns the trial court's analysis of his summarily denied Brady claim. Citing Kyles v. Whitley, 514 U.S. 419 (1995), Lightbourne v. State, 24 Fla. L. Weekly S375 (Fla. July 8, 1999), Swafford v. State, 679 So. 2d 736 (Fla. 1996), and State v. Gunsby, 670 So. 2d 920 (Fla. 1996), Rose asserts that the court below failed to consider any possible cumulative error in determining the materiality of the purported Brady information. Once again, Rose's claim is refuted by the record presented.

The record clearly reflects that the court below did not fail to consider any particular information or evidence which, due to constitutional error, had not been presented to the jury. Rose's only attempt to identify such evidence is a recitation of his prior allegations of ineffective assistance of counsel, which were rejected previously by this Court and the trial court, and a comment about a lab report on the blood found on Rose that had been one of the bases of the ineffectiveness claim in Rose's prior postconviction motion. In the prior appeal of Rose's initial postconviction motion, this Court expressly rejected the assertion that trial counsel had provided Rose with ineffective assistance:

> We have reviewed the trial record and find that it conclusively rebuts Rose's claims that his counsel provided ineffective assistance in the guilt phase. Rousen brought

> out on cross-examination and in closing argument that the State had failed to prove that the blood on Rose and his clothing belonged to the victim and that the State had "messed up" the results of the blood tests. Rousen's decision not to present evidence on the blood samples in the defense case was a reasonable trial tactic. Rather than risk an analysis with potentially unfavorable results, Rousen chose to attack the State's lack of evidence on this issue.
>
> Rousen also effectively cross-examined the eyewitnesses to the crime. He pointed out inconsistencies between the eyewitnesses' testimony, as well as differences in the trial testimony of each witness and his or her earlier statements. Counsel brought out those inconsistencies in closing argument. Rose has failed to show any prejudice resulting from the failure to obtain an expert in eyewitness identification.

617 So. 2d at 297.

Since there was no suppressed, withheld, or undisclosed evidence that should, absent constitutional error, have been presented to Rose's jury based on his prior allegations of ineffective assistance of counsel, there is nothing to weigh cumulatively with the new information alleged on Poole and Borton from Rose's prior sixth amendment claim.

However, since the materiality standard is not met in this case even if all previously rejected allegations are considered together with the new Borton/Poole allegations, any possible failure by Judge Schaffer to expressly weigh the cumulative effect of this unidentified evidence is harmless. As noted in the previous issue, the essence of the State's case and the strongest

evidence against Rose were the four eyewitnesses that testified about Richardson's murder.[2] Three of these eyewitnesses saw the murder itself; the fourth observed Rose at the scene of the crime, holding the murder weapon. Even when all prior claims are considered, this strong eyewitness testimony is left intact and unscathed. Due to the strength and independence of the eyewitness testimony, the State's case was not so diminished and Rose's defense was not so bolstered by the new Borton/Poole allegations that confidence in the outcome of the trial is undermined. Furthermore, the fact that Borton and Poole had made prior consistent statements again renders these allegations immaterial.

None of the cases cited by Rose compel a different result. In Gunsby, this Court considered a trial court's order denying an evidentiary hearing on a Brady claim regarding criminal records of two key witnesses that had not been disclosed to the defense. Noting that the new evidence only involved records of one of the two eyewitnesses and one of three witnesses that testified about having overheard admissions made by Gunsby, this Court stated that if this had been the only guilt phase issue with merit, this Court would agree with the trial judge's decision to deny the hearing. However, *when combined with the other evidence which should have been, but was not, presented to Gunsby's jury,* confidence in the

[2]The State strongly takes issue with the representation in the appellant's brief that the Borton/Poole testimony provided the "strongest evidence" against Rose in his trial (Appellant's Initial Brief, p. 60).

outcome of Gunsby's trial was undermined and a new trial was necessary.

The difference, of course, between Gunsby and the instant case is that Rose is attempting to resurrect a prior ineffective assistance of counsel claim which was previously rejected on the merits by this Court. Thus, although Gunsby was able to demonstrate constitutional error which prevented material evidence from reaching his jury, Rose's claim of constitutional error, presented in his first postconviction motion, was expressly rejected by this Court. Rose has offered no new allegations to supplement or revive his prior claim of ineffective assistance of counsel.

Similarly, Lightbourne does not compel any relief for Rose. Lightbourne's initial postconviction motion presented a claim that the jailhouse informants were state agents that unconstitutionally elicited incriminating statements from Lightbourne. At the time of the evidentiary hearing on the motion, two of the informants could not be located, but another testified consistent with Lightbourne's allegations. A few years later, the other two previous inmates were located, but the trial court only entertained testimony from one of the inmates, finding the second to be procedurally barred. On appeal, this Court held that the trial court's materiality analysis was flawed by the failure to consider the postconviction testimony of all three inmates collectively when considering

confidence in the outcome of Lightbourne's trial.

It is significant that despite the extent of the information at issue in Lightbourne -- recantations by key witnesses to Lightbourne's admissions -- this Court denied Lightbourne's request for a new trial, finding that in light of the other, proper evidence against Lightbourne, there was no reasonable probability of a different result on retrial. 24 Fla. L. Weekly at S379. However, because the inmates' testimony had provided much of the evidence to support at least three of the aggravating factors, this Court found that a new penalty phase was warranted.

In Rose's case, Poole and Borton only testified about matters germane to Rose's guilt, not about punishment. Although Rose claims that some mitigation was discounted due to the Borton/Poole testimony and that this testimony was offered as one reason to support the cold, calculated and premeditated aggravating factor, the limited testimony that Rose had admitted this murder clearly did not weigh heavily in the imposition of the death sentence. As previously noted, a review of the sentencing order reflects that the same sentence would have been imposed even if Borton and Poole had never testified.

In conclusion, there is no authority cited by Rose which follows what Rose is asking this Court to do: to reconsider allegations of ineffective assistance of counsel based on entirely new facts for an unrelated Brady claim. In all of the cases relied

on by Rose, new evidence which related to and supplemented a prior claim had to be considered in conjunction with any prior constitutional errors committed at trial. The cumulative error standard has never been held to require reconsideration of allegations of a previously rejected claim when the new evidence or information at issue is completely unrelated to the prior claim. Thus, Rose's request for a remand for further analysis of any cumulative error must be denied.

ISSUE IV

WHETHER THE TRIAL COURT DEPRIVED ROSE OF PUBLIC RECORDS TO WHICH HE WAS ENTITLED.

Rose next challenges the trial court's preliminary rulings with regard to his public records requests. The record clearly demonstrates that the court below properly resolved all public records issues in accordance with Florida law and this Court's precedents. Specifically, Rose challenges the trial court's holding an in camera inspection of the State's exempt materials, denying an evidentiary hearing on allegations of nondisclosure, and failing to require the State to disclose an inventory of all documents withheld as exempt.

Curiously, Rose cites no legal authority in his public records issue. Perhaps this is because the trial court dutifully entertained a sea of public records requests which were fully litigated in compliance with current law. Documents which the State Attorney's Office sought to withhold were examined at an in camera hearing. This is the appropriate procedure. See, Ragsdale v. State, 720 So. 2d 203, 206 (Fla. 1998). Some of these were ordered to be disclosed, others were sealed for this Court's review. There has never been a requirement that the State provide a written inventory of all withheld documents. There is no reason to impose the additional requirements suggested by Rose to the well developed law on public records for capital defendants. No relief is warranted in this issue.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING ADDITIONAL CLAIMS.

Rose's final claim challenges the trial court's denial of the remaining issues presented in his successive postconviction motion. As the trial judge found, none of these issues provided a basis for any cognizable argument for relief, and therefore they were properly summarily denied. As will be seen, review of each issue independently demonstrates the propriety of the trial court's summary rejection of these claims below.

A. COMPETENCE OF CURRENT POSTCONVICTION COUNSEL

Rose asserts that his current postconviction proceeding was constitutionally inadequate due to a lack of sufficient funding for collateral counsel. This Court rejected this claim in Remeta v. State, 710 So. 2d 543, 546-547 (Fla. 1998). As in Remeta, the current counsel in this case have not identified any avenues for investigation which could possibly lead to a cognizable postconviction claim. Indeed, it is apparent from a review of the record that the current Brady claim was thoroughly investigated and presented to the lower court, as it has been in this Court. Therefore, this claim was properly summarily denied.

B. CONSTITUTIONALITY OF JUDICIAL ELECTROCUTION

Rose also presents a claim challenging the constitutionality of Florida's electric chair. This Court has repeatedly rejected similar claims as procedurally barred and meritless. Provenzano v.

State, 24 Fla. L. Weekly S443 (Fla. Sept. 24, 1999); Jones v. State, 701 So. 2d 76 (Fla. 1997). Relief was properly denied on this claim.

C. CONSTITUTIONALITY OF CLEMENCY PROCESS

Rose next contends that Florida's clemency review process violates his right to due process. As this Court has acknowledged, such a claim "is not properly the subject of a 3.850 motion." Medina v. State, 690 So. 2d 1241, 1249 (Fla. 1997). Rather, clemency is an exclusively executive function, not subject to being second-guessed by the judiciary. Provenzano v. State, 24 Fla. L. Weekly S314 (Fla. 1997); Bundy v. State, 497 So. 2d 1209, 1211 (Fla. 1986); see also, Wade v. Singletary, 696 So. 2d 754, 756, n.4 (Fla. 1997) (finding executive's power to grant or deny pardons to be beyond control or criticism of judiciary). Moreover, Rose's presentation of this issue is vague and conclusory, devoid of any specific facts identifying even potential deficiencies with the clemency process. For all of these reasons, the court below properly summarily denied this claim.

D. CONSTITUTIONALITY OF RULES REGARDING JUROR INTERVIEWS

Rose's last challenge disputes the constitutionality of Florida rules limiting an attorney's right to interview jurors after the conclusion of a trial. As usual, Rose's counsel fails to acknowledge or attempt to distinguish case law directly on point which rejects his claim. In Young v. State, 24 Fla. L. Weekly

S277, n. 5 (Fla. June 10, 1999), this Court expressly found this to be a direct appeal issue, procedurally barred in postconviction proceedings. See also, Ragsdale, 720 So. 2d at 205. Thus, the court below properly summarily denied this issue as barred.

Even if not barred, the claim would be denied as meritless. The United States Supreme Court has held that "long-recognized and very substantial concerns" justify protecting jury deliberations from the intrusive inquiry which Rose's attorneys are seeking to conduct in this issue. Tanner v. United States, 483 U.S. 107, 127 (1986). Federal courts have consistently upheld the federal restrictions on post-trial juror interviews against constitutional challenges much like Rose offers in his motion. See, United States v. Hooshmand, 931 F.2d 725, 736-737 (11th Cir. 1991); United States v. Griek, 920 F.2d 840, 842-844 (11th Cir. 1991). The reasoning of those cases applies equally well to Florida's rule restricting juror contact when considered in light of Florida's constitutional right of access to the courts, and demonstrates that Rose is not entitled to relief in this issue.

Since no error has been shown with regard to the trial court's summary rejection of these issues, Rose is not entitled to relief in this appeal.

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's summary denial of Rose's successive postconviction motion must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to John A. Tomasino and Linda McDermott, Office of Capital Collateral Regional Counsel - Northern Region, Post Office Drawer 5498, Tallahassee, Florida, 32314-5498, this _____ day of December, 1999.

COUNSEL FOR APPELLEE