IN THE SUPREME COURT OF FLORIDA

ANTHONY BRADEN BRYAN,

Appellant,

CASE NO. 96,802

v.

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This Court affirmed Bryan's conviction of, among other things, first-degree murder and sentence of death in Bryan v. State, 533 So.2d 744 (Fla. 1988), cert. denied, 490 U.S. 1028 (1989).[1] After the signing of his first death warrant in 1990, Bryan filed a motion for postconviction relief. The circuit court stayed the execution and conducted an evidentiary hearing. This Court affirmed the circuit court's denial of that first motion for postconviction relief. Bryan v. State, 641 So.2d 61 (Fla. 1994). Bryan then filed a petition for writ of habeas corpus in the federal system, and the Eleventh Circuit Court of Appeals affirmed the district court's denial of relief. Bryan v. Singletary, 140 F.3d 1354 (11th Cir. 1998), cert. denied, 119 S.Ct. 1067 (1999).

On September 23, 1999, Governor Bush signed Bryan's second death warrant, such warrant active between 7:00 a.m. October 25 and 7:00 a.m. November 1, 1999, with execution presently scheduled for 7:00 a.m. on Wednesday, October 27, 1999. On September 30, 1999 and October 1, 1999, collateral counsel for Bryan, the Office of the Capital Collateral Regional Counsel for the Northern Region (CCRC-N, the successor agency to CCR) served twenty-four public records requests, pursuant to Fla.R.Crim.P. 3.852(h)(3), on

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[1] The procedural history of this case is set out fully at pages 1 through 36 of the Response to Bryan's Emergency Motion to Vacate Judgment and Sentence, which was previously supplied to this Court, and is hereby incorporated by reference.

nineteen state agencies (including the First Circuit State Attorney's Office and the Florida Department of Law Enforcement (FDLE)). A telephonic status hearing was held on October 11, 1999, and on October 12, 1999, the State filed notices of filing which included all known pre-1999 public records requests and responses, as well as a separate notice attaching the status reports or responses to all of Bryan's outstanding 1999 public records requests. Another telephonic status hearing was held on October 13, 1999, at which Bryan was directed to file any postconviction motion by 5:00 p.m. on Friday, October 15, 1999, with leave to supplement such through Monday, October 18, 1999.

In accordance with these time parameters, Bryan filed his successive motion for postconviction relief, raising the following claims: (1) a claim that Bryan's right to public records has been denied by virtue of the death warrant; (2) a renewed claim of ineffective assistance of counsel at the guilt phase for failing to obtain testimony or evidence from Sharon Cooper relating to Bryan's mental state at the time of the murder; (3) a renewed claim of ineffective assistance of counsel at the penalty phase stemming from the same omission; (4) a renewed claim of ineffective assistance of counsel and/or of mental health experts for not considering the above information; (5) a renewed claim that Sharon Cooper acted as a state agent when she agreed that a telephone conversation with Anthony Bryan in September of 1983 would be tape-

recorded, and that various constitutional rights were violated thereby; (6) a claim that Bryan has been deprived of his access to the clemency process, and (7) a claim of cumulative error.[2] On October 18, 1999, Bryan filed a supplement to his prior motion to vacate, adding claim (8), contending that the State allegedly suppressed evidence relating to the circumstances under which the victim's body was discovered, premised upon unnamed public records disclosures. Appended to the Supplemental Motion were affidavits in support of some of Bryan's earlier claims, several of which were executed prior to the filing of the original motion on October 15, 1999. The State filed its response on October 19, 1999, in which it contended, inter alia, that all of the claims asserted in the successive motion were procedurally barred, insufficiently pled or otherwise not a basis for postconviction relief.

The circuit court held a hearing on Bryan's successive motion, as amended, pursuant to Fla.R.Crim.P. 3.851(c) and Huff v. State, 622 So.2d 982 (Fla. 1993), on October 19, 1999. At the hearing, counsel for Bryan served a motion to compel, contending that a number of the agencies had allegedly failed to comply with outstanding public records requests, primarily due to absence of formal certification under Rule 3.852. During the course of the

[2] On October 5, 1999, Bryan filed an All Writs Petition in this Court attacking the constitutionality of execution by electrocution in Florida's electric chair, as well as an Application for Stay of Execution on such basis. This Court denied that petition on October 20, 1999.

hearing, collateral counsel for Bryan conceded that they had in their possession the tape-recording of the September 6, 1983 telephone conversation between Bryan and Cooper, as well as the "note" from law enforcement files allegedly giving rise to claim (8), but stated that they saw no need to formally provide such to Judge Bell. (Transcript of Proceedings of October 19, 1999 at 78-80) Additionally, due to the objections of Bryan's counsel, the State withdrew two of the attachments to its response- a September 2, 1983 FBI summary report, as well as the September 12, 1983 supplemental police report by Captain Boswell of the Santa Rosa County Sheriff's Department; such matters were, however, part of the recent public records disclosures (Id. at 75-81).

On October 21, 1999, Judge Bell rendered his order denying all relief. Judge Bell expressly found that Bryan had failed to satisfy either of the requirements for a cognizable successive motion under Rule 3.850(f), and that, accordingly, the motion was untimely. Judge Bell also expressly found that Bryan had failed to demonstrate that the matters contained within the motion could not have been discovered earlier through due diligence, within the time periods set forth in Rule 3.850(b), and that, accordingly, claims (2)-(8) (all except the public records claim) were procedurally barred. Judge Bell found that the "cornerstones" of Bryan's motion were the 1983 tape-recording as well as purported new statements from Sharon Cooper and Judy Belch Whaby; as both had testified at

Bryan's trial, the judge found that any knowledge attributed to them could not be considered "new" for successive postconviction purposes, and likewise found that, even if accepted, the allegedly "new" matters created no reasonable probability of a different result. The court found, as to claim (1), that Bryan's counsel had failed to show "why his current records requests had not been made earlier and why such a massive request is necessary now given the lengthy history of this cause;" the court likewise found that "CCRC could articulate no genuine, legitimate, substantive need for much of the requested records other than the need to review 'everything.'" In a separate order, Judge Bell formally granted Bryan's motion to compel production of public records, to the extent that the agencies listed therein were ordered to "disclose their records pursuant to Chapter 119 and relevant case law."

SUMMARY OF ARGUMENT

Judge Bell's summary denial of Bryan's successive motion for postconviction relief should be affirmed in all respects. Bryan has been represented by collateral counsel since 1990, and all of the matters contained within his 1999 successive motion could have been raised long ago through the exercise of due diligence. The eleventh hour public records acquisition under Fla.R.Crim.P. 3.852(h) provides no basis for a stay of execution or any other relief, as Bryan has been requesting and utilizing public records since 1990, and still can point to no potential claim for relief which could be fashioned from any public records request allegedly unsatisfied. It should also be noted that Judge Bell **granted** Bryan's most recent motion to compel.

Bryan's claims at this juncture include a non-cognizable complaint concerning clemency counsel, as well as assertions allegedly relating to "new" evidence. These latter "new" matters include: a 1983 tape-recording (known to Bryan's counsel since trial and previously raised as both an appellate and 1990 postconviction claim); statements or "knowledge" attributed to former trial witnesses Sharon Cooper and Judy Belch Whaby; and an unidentified "note" from law enforcement files allegedly concerning the discovery of the victim's body. Even if these matters were not now procedurally barred, Bryan would nevertheless be entitled to no relief. Prior to trial, Anthony Bryan's mental state was assessed

by no less than **nine** mental health experts, and not one perceived a viable defense based upon mental state; Bryan received an evidentiary hearing on his claims involving mental health issues or assistance as part of the 1990 postconviction proceedings. At trial, Bryan asserted a defense of factual innocence and, indeed, took the stand and testified under oath that he did not murder the victim.

The 1983 tape-recording, at most, shows Bryan's mental state weeks after the murder, and the "knowledge" attributed to Cooper and Whaby shows, at most, alleged consumption of alcohol or drugs during the summer of 1983. Nothing now alleged casts doubt upon the validity of Sharon Cooper's trial testimony, or the other evidence, establishing this as a most premeditated and calculated of crimes, and collateral counsels' assertion that trial counsel failed to explore these matters is squarely contradicted by the record, in that trial counsel asked Sharon Cooper at her deposition about Bryan's mental state at the time of the murder, and she specifically stated under oath that he had been fully aware of what he was doing and had known right from wrong, additionally denying that he had been "insane." The unidentified "note", even if proven, changes nothing. The order on appeal should be affirmed, and all requested relief denied.

ARGUMENT

THE CIRCUIT COURT'S ORDER SHOULD BE AFFIRMED AND ALL REQUESTED RELIEF, INCLUDING ANY EVIDENTIARY HEARING OR STAY OF EXECUTION, MUST BE DENIED.

INTRODUCTION

Because this is an appeal from the denial of a successive motion for postconviction relief, filed more than one year after finality of judgment and sentence, it was Bryan's initial burden to demonstrate that all of the matters asserted in that motion could not have been raised earlier through the exercise of due diligence, and that, in fact, all matters were raised within one year of their discovery through due diligence. Bryan utterly failed to satisfy this threshold showing below, and the circuit court's summary denial of this successive motion, on the grounds of procedural bar and/or untimeliness, was in accordance with such binding precedent of this Court as Mills v. State, 684 So.2d 801, 804-5 (Fla. 1996), Stano v. State, 708 So.2d 271 (Fla. 1998), Buenoano v. State, 708 So.2d 941, 952 (Fla. 1998), Remeta v. State, 710 So.2d 543, 546-8 (Fla. 1998), and Davis v. State, 24 Fla.L.Weekly S345 (Fla. July 1, 1999). No evidentiary hearing was required on "diligence."

Both Buenoano and Remeta expressly hold that a capital defendant's "eleventh hour" initiation of the public records process and/or litigation does not provide a basis for stay of execution or substantive relief. Buenoano, 708 So.2d at 952-3

("The Public Records Act has been available to Buenoano since her conviction; but most of the records she alleges were not disclosed prior to the filing of her latest rule 3.850 motion were not requested until January 1998, or later. . . . Buenoano has not alleged that through the exercise of due diligence she could not have made these requests within the time limits of rule 3.850."); Remeta, 710 So.2d at 546 ("The public records materials could have been obtained and investigated many years ago; instead, Remeta waited until the 'eleventh hour' to attempt to investigate the issues raised in this claim. Remeta has provided no basis for why the information he now seeks to investigate 'could not have been ascertained by the exercise of due diligence.'") The murder in this case occurred in 1983, and Bryan's convictions and sentence of death have been final since 1989. A decade of collateral litigation has demonstrated no basis for relief, and Bryan's sentence should, at last, be carried out.

The instant motion to vacate was by no means a model of clarity, and, aside from the claims relating to public records or clemency (and the supplemental claim relating to discovery of the victim's body), essentially seems to present several interrelated "claims" relating to Sharon Cooper's alleged knowledge of Bryan's mental state at the time of the murder, as well as an assertion in regard to a tape-recorded telephone conversation between Cooper and Bryan in September of 1983. Although all these matters will be

discussed in detail infra, the 1983 tape-recording clearly can give rise to no postconviction relief in 1999. Its existence was known to trial counsel (who claimed a discovery violation in regard to it at the time of Bryan's trial [OR 663-668])[3], and Bryan unsuccessfully asserted a claim on appeal in regard to its existence. Bryan, 533 So.2d at 748. Likewise, in 1990, Bryan's collateral counsel asserted virtually identical claims of ineffective assistance of counsel and government misconduct in regard to the tape-recording (See October 2, 1990, Motion to Vacate at 43-53; [PCR(S) 125-135]; Amended Motion of December 3, 1990 at 1-11; [PCR(S) 123-135; 315-327] (See Appendix to Response). The circuit court's denial of relief as to these claims was affirmed by this Court, Bryan, 641 So.2d at 62-3, n.2, and the federal district court's disposition of comparable claims, Bryan v. Singletary, United States District Court Case No. 94-30327-LAC, order of July 9, 1996 at 40-5) was not appealed to the United States Court of Appeals for the Eleventh Circuit. Bryan, 140 F.3d at 1353, n.1. The only seemingly "new" aspect to this claim would seem to be that, in 1999, current collateral counsel have actually listened to

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[3] (OR __) represents a citation to the original record on appeal from Bryan's direct appeal, Bryan v. State, Florida Supreme Court Case No. 68,803, whereas (PCR __) represents a citation to the initial 3.850 record on appeal filed on or about December 2, 1991 in Bryan v. State, Florida Supreme Court Case No. 78,885, and (PCR(S) __) represents a citation to the supplemental record in that proceeding, filed July 9,1992. There is no formal citation to the record on appeal in this proceeding, as such has not yet been received.

the tape-recording. Because that recording has always been available as, inter alia, the State Attorney's Office specifically granted access to their records in 1994 to Bryan's collateral counsel, presentation of any claim relating to this tape-recording at this juncture is plainly dilatory, as opposed to diligent. Further, the contents of the tape-recording -- reflecting Bryan's mental state weeks after the murder -- are either irrelevant or cumulative to other matters long known; additionally, it is hard to see the exculpatory nature of a tape which shows the defendant seeking to concoct a false alibi.

As to assertions that Sharon Cooper and/or Catherine Judy Whaby (formerly Judy Belch; Emergency Motion at 14) have knowledge concerning Bryan's mental state at the time of the murder, such likewise constitute matters always available to defense counsel both at trial and in prior stages of the collateral attack. As both Cooper and Belch testified at Bryan's trial (Cooper for the state [OR 407-443; 716-726], Belch for the defense [OR 581-584]), any "knowledge" attributable to either witness cannot be considered "new" at this juncture. See Mills, 684 So.2d at 805, n.9 (rejecting claim that affidavits of interview with witness constituted "newly discovered evidence" where witness testified at trial and was available for examination on matters at hand; same holding as to affidavits from witnesses located through interview with trial witness). Further, to the extent that the present claim

relates to the contents of Sharon Cooper's sworn statement of September 8, 1983 (Emergency Motion at 5-6), such claim cannot now serve as the basis for relief, as the sworn statement has always been available to Bryan's trial and collateral counsel; indeed, the instant motion contains no allegation that this statement has been "withheld" or "suppressed". To the extent that the present claim rests upon an assertion that the litigation of this case, including any theory of defense, would have been fundamentally changed had Bryan's trial counsel, Ted Stokes, only "known what Sharon Cooper knew" as to Bryan's mental state (Emergency Motion at 13), such assertion is flatly refuted by the record. As will be demonstrated infra, Attorney Stokes specifically asked Cooper about Bryan's mental state at her deposition on September 17, 1985, and she flatly told him that Bryan had known right from wrong at the time of the murder, that he had been fully aware of what he was doing, and that he was not insane. (See Appendix to Response, Deposition of Sharon Cooper, December 27, 1985, at 54).

The suggestion that any additional uncovered "explosive" evidence exists relating to Bryan's mental state is patently preposterous under the circumstances of this case, as Anthony Bryan's mental state has been examined, and litigated, to a greater extent than that of virtually any other death row inmate. As the records, files and prior testimony in this case indicate, Bryan was initially tried on his federal bank robbery charge, and, at such

proceeding, unsuccessfully asserted a defense of insanity. Attorney Stokes was aware of this fact, contacted the experts involved and declined to use them. As the prior collateral opinion in this case makes plain, Stokes originally contemplated a defense of insanity and had Bryan examined by seven mental health experts. Bryan, 641 So.2d at 64.[4] Stokes arranged for a competency hearing in this proceeding, and utilized the reports of the mental health experts at the penalty phase in support of mitigation.

In the 1990 collateral attack, Bryan asserted that Attorney Stokes had been constitutionally deficient in this respect and, inter alia, that he had failed to provide the experts with sufficient background information upon which to make their evaluations (See 1990 Motion to Vacate at 6-43, [PCR(S) 88-125]); Bryan received a stay of execution and an evidentiary hearing on these matters. At the 1991 evidentiary hearing, collateral counsel called three of the prior experts -- Drs. Larson, Medzerian, and Gentner -- after providing them with additional background information; as the courts which have reviewed this claim specifically found, none of the additional background information changed the experts' opinions as to Bryan's mental state at the time of the offense. Bryan, 641 So.2d at 64 (quoting circuit court finding, "None of the mental health experts testified at the

[4] Collateral counsel averred in Bryan's 1990 motion that Stokes actually had Bryan examined by nine mental health experts. (1990 Motion at 22, [PCR(S) 104]).

evidentiary hearing that their conclusions as to the defendant's mental state would have been changed through the receipt of the additional information admitted in preparation for this postconviction relief proceeding."); Order of Federal District Court, Bryan v. Singletary, at 12 (quoting above language).

The course of action now proposed by Bryan -- yet another evidentiary hearing at which yet more "new" mental health evidence will be presented to yet more mental health experts, consuming yet more years of litigation and delay -- is simply untenable. As the circuit court stated, "there is no basis sufficient to stay execution and conduct an evidentiary hearing. To hold otherwise would make a mockery of the judicial system and process." (Order at 2). As the Eleventh Circuit observed in its most recent opinion, Bryan's actions at the time of the murder were deliberate and purposeful and motivated by a desire to avoid detection, such that any contention that Bryan was "impulsive", "unable to plan" or unable to appreciate the criminality of his conduct would be flatly refuted by the uncontrovertible facts of the offense. Bryan, 140 F.3d at 1360. Further, as will be demonstrated infra, Sharon Cooper's full testimony as to all of Bryan's conduct and "mental state" in the summer of 1983 not only does not support a viable defense of insanity or intoxication, but would have provided the jury with additional evidence of premeditation, as well as additional devastating collateral crime evidence; of course, any

alternative (and belated) defense of insanity or intoxication is also squarely contradicted by Bryan's own trial testimony, in which he denied committing the offense. As this Court held in Atkins v. State, 663 So.2d 624, 627 (Fla. 1995), "Endless repetition of claims is not permitted." The circuit court's well-reasoned denial of relief should be affirmed.[5]

POINT I

THE CIRCUIT COURT'S DENIAL OF BRYAN'S PUBLIC RECORDS CLAIM WAS NOT ERROR.

As his first issue below, Bryan argued that numerous violations of his right to inspect public records have occurred. He argued that, by signing his death warrant, Governor Bush "intruded" on his "statutory and constitutional rights to public records, due process of law, and access to courts, as well as the provinces of the legislature and the judiciary" (Emergency Motion

[5] Collateral counsel contended in the successive motion that their investigator located Sharon Cooper, at an undisclosed location, in May of 1999, "a few months ago" (a point in time well in advance of the instant public records litigation or, indeed, the filing of the successive motion itself). Although it was also averred that this investigator "obtained a statement from her," (Emergency Motion at 6, 12), no sworn statement was appended to the motion, and the second-hand hearsay affidavits appended to the Supplemental Motion detail Cooper's refusal to execute an affidavit. Collateral counsel's unconscionable omission in this respect clearly distinguishes this case from Roberts v. Singletary, 678 So.2d 1232 (Fla. 1996) (stay of execution granted for defendant who proffered recently-acquired sworn affidavit from out-of-state unavailable witness, allegedly recanting testimony), and no stay of execution, or other relief can be predicated upon such unsworn conjecture. The subsequently proffered hearsay affidavits attached to the Supplemental Motion do not change this result.

at 31), that the circuit court's actions on public records rendered collateral counsel ineffective (Id. at 31-32), and that agencies blatantly disregarded the public records law in complying with his eleventh hour records requests. (Id. at 32-37).

The circuit court fully considered Bryan's public records claim and, in denying it, stated its finding that

> Defendant has been unable to show why his current records request was not made earlier and why such a massive request is necessary now given the lengthy history of this cause. Absent such a showing, one is left with the question of whether such a request is one last casting of the net at the end of a very exhausting yet unfruitful adventure, or worse, a tactical decision to simply delay execution of a lawful sentence.

(Order at 6). The court based this ruling on collateral counsel's inability to articulate a "genuine, legitimate, substantive need" for the currently requested public records. (Order at 6). This ruling was correct and should be affirmed. In addition, of course, the circuit court granted Bryan's October 19, 1999, motion to compel (a ruling which he, presumably, does not cite as error), to the extent that the agencies cited in such motion were directed to "disclose their records pursuant to Chapter 119 and relevant case law." Judge Bell's even-handed approach should be affirmed in all respects.

According to Bryan, the signing of his death warrant and the scheduling of his execution thirty-four days later violate at least the spirit of Florida Rule of Criminal Procedure 3.852(h)(3) and

subsection 119.19(8)(d), Florida Statutes (Supp. 1998), which allow twenty days for the request and production of additional public records. Bryan presented nothing, however, demonstrating that a statute and rule of procedure, without express provisions so providing, assuming that they could do so, can restrict the Governor's power to sign death warrants. Instead, this complaint is similar to those raised by other death-row inmates (such as Bryan himself in 1990; see, 1990 Motion to Vacate at 129-140 [PCR(S) 211-222]) that the governor violated Florida Rule of Criminal Procedure 3.850 by signing death warrants before the expiration of the two-year period provided in that rule. This Court has rejected such claims. E.g., Remeta v. Dugger, 622 So.2d 452, 456 (Fla. 1993) ("In no way does [rule 3.851] act to prohibit the Governor from signing a death warrant until two years after a death sentence became final"); Cave v. State, 529 So.2d 293, 299 (Fla. 1988) ("this Court has no constitutional authority to abrogate the Governor's authority to issue death warrants on death sentenced prisoners whose convictions are final;" sentences can be executed "immediately after they become final").

While it is extremely questionable whether, under rule 3.852(h), any agency from whom Bryan had not previously requested records was required to provide access to records on an expedited basis, the fact remains that responses were made to all of Bryan's latest public records requests, and access granted. His claim

about the timing of his warrant and execution has no merit and, indeed, cannot be resolved by this Court without interfering with the powers of the Executive.

Bryan also complained that the circuit court rendered his current counsel ineffective by ordering that his postconviction motion be filed before counsel studied all of the currently produced public records. He relied on Peede v. State, 24 Fla.L.Weekly S391 (Fla. August 19, 1999), in making this claim, but that case is distinguishable. This Court reversed the denial of Peede's initial motion for postconviction relief and remanded for an evidentiary hearing. In doing so, the Court noted that Peede's counsel filed an initial brief of only twenty-four pages and, after roundly criticizing counsel, urged the trial court "to be certain that Peede receives effective representation." Id. at S393 n.5. In contrast to Peede's counsel, Bryan's managed to file a 104-page motion in very short order.[6]

Based on Murray v. Giarratano, 492 U.S. 1 (1989), and Pennsylvania v. Finley, 481 U.S. 551 (1987), this Court has held that "claims of ineffective assistance of postconviction counsel do not present a valid basis for relief." Lambrix v. State, 698 So.2d 247, 248 (Fla. 1996); State ex rel. Butterworth v. Kenny, 714 So.2d 404 (1998) (same). It is obvious that Peede does not control this

[6] It should also be noted that the circuit court allowed Bryan time to review the records provided on his current requests and to file an amended motion after that review.

case. Besides not being cognizable in these proceedings, the claim of collateral counsels' ineffectiveness is, on the face of this record, without merit.

Bryan also argued that the agencies he requested records from should have responded by the close of business on October 11, 1999. (Emergency Motion at 34). He criticized numerous agencies for their "untimely" responses, for not providing affidavits that they have no records that would fulfill the requests, and for misleading the circuit court. (Emergency Motion at 35-36). He asked the circuit court to "find all agencies that have failed to comply with section 119.19 and rule 3.852 in noncompliance and grant Mr. Bryan relief at least until such time as these agencies have followed the law of this state." (Emergency Motion at 34-35, footnote omitted). There are numerous problems with this claim.

It ignores the fact that all of the agencies upon which Bryan served the eleventh-hour requests complied (See State's Notice of Filing of October 12, 1999). Moreover, Bryan was given the opportunity to review the last-arriving documents and to amend his postconviction motion if those documents contained newly discovered evidence.[7] Thus, Bryan cannot and did not shown any reason to hold any of the responding agencies in noncompliance.

[7] Moreover, it should be noted that Bryan did not request a finding of noncompliance at either the October 11 or October 13, 1999 hearing.

Moreover, his complaint regarding the lack of affidavits (Emergency Motion at 35 n.7) was not well-founded. Subsection 119.19(e) provides that, after a warrant is signed, counsel may make additional public records requests "of a person or agency that the defendant has previously requested to produce such records," and, if no such records exist, the agency will file an affidavit to that effect with the trial court; in this case, that would apply to FDLE and the Office of the State Attorney, both of which have supplied all requested records. The recent amendment to rule 3.852 removed "has previously" from (h)(3). Amendments to Florida Rules of Criminal Procedure 3.852 and 3.993, 24 Fla.L.Weekly S328, appendix S2 (Fla. July 1, 1999). This amendment, no doubt simply for grammatical reasons, however, left intact language which certainly suggests the prerequisite of prior request before an inmate under death warrant may seek further records; Rule 3.852(h) still refers to agencies from which collateral counsel "requested" public records, records which were "not previously the subject of an objection," records which were "received or produced since the previous request," and records which were for any reason "not produced previously," all of which suggest some requirement of prior request. The agencies responding that they had no documents that would fulfill the instant requests had never received previous records requests. No requests should have been made of these agencies under (h)(3) because of the plain meaning of subsection

119.19(e); the view of Bryan's counsel that they may make eleventh hour requests upon agencies whose involvement in the case has always been known (and from whom trial counsel, no doubt, secured the desired records, either directly or through the prosecution's discovery response) is plainly contrary to the spirit and intent of the Rule, as well as Chapter 119. Therefore, these agencies were not required to file affidavits, and their responding by letter was more than proper.

Bryan's complaints about the other agencies were not well taken. He has been continuously represented by collateral counsel, in its current and previous manifestations, since at least 1990. The Public Records Act has been available during that time, and Bryan stated (Emergency Motion at 57) that he made public records requests in 1990.[8] Moreover, the bases of all his current claims, a tape-recording of a telephone conversation between Bryan and Sharon Cooper, etc., have been known about since trial or discoverable earlier through due diligence, as explained further,

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[8] He offers no documentation to support this statement, but the State established he made a public records request of FDLE in 1990 and further made requests upon the Attorney General's Office and Office of the State Attorney in 1994. (See Notice of Filing, October 12, 1999). Further, Bryan pursued public records litigation against the Attorney General's Office, see, Bryan v. Butterworth, 692 So.2d 878 (Fla. 1997), and asked this Court to recall mandate in 1995 so that he could seek "full compliance with chapter 119." (See Appendix to Response). It is obviously the view of Bryan's collateral counsel that they can pick and choose when to initiate, or decline, public records acquisition. The rule and Chapter 119 say otherwise.

infra. See Bryan v. Dugger, 641 So.2d 61 (Fla. 1994); Bryan v. State, 533 So.2d 744 (Fla. 1988), cert. denied, 490 U.S. 1028 (1989).

Subsection 119.07(8), Florida Statutes (1999), provides that section 119.07, the public records law, "may not be used by any inmate as the basis for failing to timely litigate any postconviction motion." Rule 3.852(a)(2) also expressly provides that the rule shall not be a basis for renewing requests that have been initiated previously. Therefore, due diligence must be employed in seeking public records. Demps v. Dugger, 714 So.2d 365 (Fla. 1998); Remeta v. State, 710 So.2d 543 (Fla. 1998); Buenoano v. State, 708 So.2d 941 (Fla. 1998); Mills v. State, 684 So.2d 801 (Fla. 1996). This Court denied relief therein on claims that more time before execution was needed to review public records. As stated in Remeta:

> Remeta had ample opportunity to investigate and raise claims in earlier petitions. *See Buenoano v. State*, 708 So.2d 941 (Fla. 1998). The public records materials could have been obtained and investigated many years ago; instead, Remeta waited until the "eleventh hour" to attempt to investigate the issues raised in this claim. Remeta has provided no basis for why the information he now seeks to investigate "could not have been ascertained by the exercise of due diligence."

710 So.2d at 546. As in Remeta and Buenoano, Bryan has shown no reason why the current public records requests were not made in a

timely manner.[9] Rule 3.852(h)(3), and the fact that this provision did not exist in rule 3.852 when first enacted, do not excuse the failure to pursue the earlier public records requests or to make additional requests. This case is yet another example of a capital defendant seeking a stay of execution based upon the existence of public record acquisition or litigation, which clearly could have been undertaken long ago. At most, under the applicable statute and rule, Bryan was authorized to seek additional records from agencies upon which he previously made a request (i.e., three agencies), for records generated since his last request. As he received much more than that to which was entitled, he should not now be heard to complain.

Even in the face of Bryan's lack of due diligence, all of the current public records requests were answered, and Bryan was given the opportunity to amend his motion if the documents produced under those requests provide newly discovered evidence. See, Buenoano, supra. Rule 3.852(k) gives the circuit court broad discretion in interpreting and applying rule 3.852. Bryan has demonstrated no

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[9] Collateral counsel claim that Porter v. State, 653 So.2d 374 (Fla. 1995), holds "that collateral counsel in capital cases have a duty to seek and obtain every public record related in any fashion to the pending case in order to ascertain whether any basis for relief exists in those records." (Emergency Motion at 34 n.6.) No pinpoint cite to such exhortation in Porter is provided, however, and undersigned counsel has been unable to locate it. Instead, Porter affirmed the trial court's denial of relief because the allegedly newly discovered evidence could have been found previously if due diligence had been exercised.

abuse of discretion, and the circuit court properly denied his claims regarding public records.

POINT II

THE CIRCUIT COURT'S DENIAL OF RELIEF, AS TO BRYAN'S SUCCESSIVE AND PROCEDURALLY BARRED CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE, WAS NOT ERROR

Judge Bell properly found this matter to be procedurally barred, but alternatively found that, even if all of Bryan's allegations were credited, he still would be entitled to no relief. In pertinent part, the order, which should be affirmed in all respects, reads:

> The cornerstones of the Defendant's motion are (a) a 1983 taped telephone conversation between Sharon Cooper and the Defendant; and (b) a purported "new" statement by Sharon Cooper and a recently acquired affidavit from a trial defense witness, Judy Whaby, f/k/a Judy Belch. Neither statement constitutes a recantation of earlier statements.
>
> As thoroughly outlined and convincingly argued by the State, even if one ignores the procedural bar, neither cornerstone suffices to support or justify a successive 3.850 motion. As to the tape, the Supreme Court of Florida has already determined that the trial judge "inquired fully into the dispute and obviously concluded the prosecutor had offered the tape to the defense and that there had been no discovery violation."[footnote omitted] The trial court, the Defendant and his attorney knew of the taped-conversation. If the Defendant argues he did not know the content of the tape, he obviously could have known. with reasonable diligence, the

> evidence was obviously available to trial counsel and has been available to collateral counsel. The requirements to set aside a conviction based on newly discovered evidence are not met.[footnote omitted] The Defendant has also failed to show that a reasonable probability exists the outcome of the proceedings would have been different if counsel have reviewed the tape and used it as suggested. *Mills* at 805.
>
> Likewise, the procedural bar applied to the purported "new" evidence from Sharon Cooper and Judy Whaby. Both witnesses testified at trial and were available to defense counsel. The knowledge attributable to them is not "new." See *Mills* at 805, n.9. Regardless, as with the taped telephone conversation, even if one overlooks the procedural bar, the Defendant has failed to carry his initial burden of showing a reasonable probability exists the proceedings would have been different. The State's factual statements and arguments on this issue if [sic] on point and accepted by this Court. (Order at 3-4)

The trial court's finding of procedural bar is well in accord with this Court's precedents. Bryan presented in his 1999 successive motion a renewed claim of ineffective assistance at the guilt phase, due to counsel's failure to develop or present evidence of Bryan's mental state at the time of the murder, apparently through the testimony of Sharon Cooper. He specifically asserted that Attorney Stokes was ineffective for failing to inquire of Sharon Cooper with regard to Bryan's mental state before, during and after the murder. (Emergency Motion at 41). Relying primarily upon precedent from the District Courts of Appeal, involving noncapital cases, collateral counsel contended

that a successive claim of ineffective assistance of counsel is permitted under the law. The circuit court, however, properly found this claim to be procedurally barred. The record supports the court's finding that any material supporting this claim could have been found long before the filing of this eleventh-hour successive motion through the exercise of due diligence. (Order at 3-4).

This Court has consistently held that successive claims of ineffective assistance of counsel are not permitted in capital collateral litigation, including litigation carried out during the course of a death warrant. See, e.g., Melendez v. State, 718 So.2d 746, 749, n.4 (Fla. 1998); Buenoano, 708 So.2d at 951, n.8 (where defendant had previously raised claim of ineffective assistance of counsel in prior 3.850 which was summarily denied, defendant could not represent such claim "in a piecemeal fashion" and successive motion); Pope v. State, 702 So.2d 221, 223 (Fla. 1997) ("A defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by filing successive motions. . . . Where a previous motion for postconviction relief raised a claim of ineffective assistance of counsel, a trial court may summarily deny a successive motion which raises an additional ground for ineffective assistance of counsel."); White v. State, 664 So.2d 242, 244 (Fla. 1995); Atkins, 663 So.2d at 626; Jones v. State, 591 So.2d 911, 913 (Fla. 1991). On the basis of the above precedents,

this claim is procedurally barred, the circuit court's ruling should be affirmed, and all relief should be summarily denied.

As the court noted, the alleged factual bases for this claim have long been known either to Bryan's trial or collateral counsel, or could have been discovered through the use of due diligence, and this claim is procedurally barred as untimely. As in Mills v. State, 684 So.2d 801, 805, n.9 (Fla. 1996), the witnesses allegedly possessing the "knowledge" to support this "claim" testified at trial, and the fact that Bryan has engaged in eleventh hour successive public records acquisition and/or litigation does not change this result. See, Buenoano, supra; Remeta, supra; Demps v. Dugger, 714 So.2d 365, 367 (Fla. 1998); see, Zeigler v. State, 632 So.2d 48, 50-1 (Fla. 1993). The record in this case, as evidenced by the State's Notice of Filing of October 12, 1999, shows that collateral counsel are well aware of the potential for utilizing public records to secure information. Thus, in 1990, Bryan's collateral counsel filed a public records request upon Florida's Department of Law Enforcement; to the extent that it is suggested that a comparable motion was filed upon the Office of the State Attorney at this time, (Emergency Motion at 57) such has not been documented in any fashion. In 1994, Bryan's collateral counsel filed public records requests upon the Office of the Attorney General and the Office of the State Attorney; the latter agency provided written notification that the files were available for

inspection, yet it would not appear that collateral counsel did anything, whereas collateral counsel did inspect the files of the former agency and vigorously litigated that agency's assertion of exemption. See, Bryan v. Butterworth, 692 So.2d 878 (Fla. 1997).

The September 6, 1983, tape-recording of the conversation between Bryan and Cooper has always been available to the defense, and due diligence could have secured its acquisition prior to 1999. Likewise, the September 8, 1983, recorded sworn statement of Sharon Cooper has always been available to the defense, and no justification has been offered for collateral counsels' failure to utilize such in prior litigation. The signing of a second death warrant did not authorize Bryan to blanket the state with new (and in some instances repetitive) public records requests, and it is clear from this record that all of these requests could have been made years earlier, as the significance of the agencies from whom records were requested was apparent from the trial record. Not only is this a successive claim of ineffective assistance of counsel, and thus procedurally barred on such basis, it is a claim for postconviction relief based upon matters which could have been discovered more than a year earlier through the exercise of due diligence, and thus is time barred on that basis as well. Mills, supra. Further, as the court below pertinently recognized, Bryan himself was a "source" for all of the matters asserted herein.(Order at 5, n.6)

To the extent that any further argument is necessary, it is clear that neither "prong" of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), can be satisfied, and that, in fact, this claim is squarely refuted by the record; prejudice, or a reasonable probability of a different result, is also lacking under any legal theory alleged. Attorney Stokes did ask Sharon Cooper about Anthony Bryan's mental state at the time of the murder, at her deposition of December 27, 1985, and her answer makes clear why no further inquiry was conducted. While Cooper stated earlier in the deposition that she thought that Bryan's disposal of the victim's car after the murder had been "kind of weird" or "crazy" (in that he had run the car into the river at 35 m.p.h., after being particular about positioning it between two trees [Deposition at 46-7], she also offered the following testimony:

> **Q. How long did you say that you knew Tony, then? How long where ya'll actually together?**
>
> **A. I would say about a month and a half.**
>
> **Q. Based on the experiences that you had with him, do you feel like that he knew right from wrong?**
>
> **A. Yes.**
>
> **Q. You indicated at one incident that when he ran the car off into the river that it was kind of weird or crazy, but are there any other incidents that you would categorize as crazy or insane or weird?**

> **A. I would not say he was insane. He was fully aware of what he was doing -- I do know that. (Deposition of Sharon Cooper, December 27, 1985, at page 54; emphasis supplied) (See Appendix to Response).**

No reasonable attorney would have perceived Sharon Cooper as a source for "helpful" mental state testimony, in light of the above.

To the extent that it is suggested that Cooper's prior 1983 sworn statement would have been helpful (such sworn statement, of course, always available to collateral counsel), such is again not supported by the record, and reasonable counsel in Stokes' position could quite well have concluded that the witness's subsequent deposition in 1985 constituted her final statement on these issues, and clarified any ambiguity in the prior statement. At most in 1983, Cooper stated that she told Bryan, while he was holding the victim hostage in his own home, that he was "crazy"; from its context, such would seem to be, at most, a comment upon Bryan's reckless use of force, at a time well before the actual murder. Likewise, although Cooper stated that on the night before the murder, while Bryan held the victim hostage at the Crestview Motel, Bryan "was acting real strange," like he "had a weird attitude" and "was pissed but he wasn't pissed," she also testified that after Bryan murdered the victim the next day, he said that he "had had to kill him," and expressed absolutely no remorse for the act. Further, while Sharon Cooper stated that, at various points on days prior to the murder she had been "real super drunk" or "delirious,"

such condition did not exist at the time of the murder. Reasonable counsel would not have fashioned a defense upon the above statements, not only in light of Cooper's later statement, but also in light of all the evidence which Cooper could provide as to Bryan's mental state before, during and after the murder.[10]

Thus, while collateral counsel apparently view Sharon Cooper's potential testimony as to Bryan's mental state before, during and after the murder as an unqualified boon to the defense, the opposite is true. All of Sharon Cooper's testimony -- sworn statement, deposition and trial -- offers not only a chilling portrait of the premeditated murder of George Wilson by an

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[10] The recently proffered second-hand hearsay affidavits attached to the supplemental motion do not change this result. At most, persons who purport to represent what Sharon Cooper knows, represent that "Cooper and Bryan had been drinking during their time together; "that Bryan hardly slept"; "that Bryan often talked nonsense"; that Cooper told the authorities that Bryan had been "out of his mind during the time with George Wilson" and that, apparently Bryan may have been using drugs. As noted above, Cooper stated in her deposition in 1985 that Bryan had known what he was doing and had known right from wrong at the time of the murder; further, her remark in 1983 that Bryan had been "crazy" represented her comment on the foolishness of the robbery. Inasmuch as Bryan has offered no sworn statement of any kind from Cooper at this juncture, he has nothing. Cf., Roberts v. Singletary, 678 So.2d 1232 (Fla. 1996). Even if the allegations in these affidavits were not procedurally barred under Mills, supra, and even if they did not constitute inadmissable hearsay under Lightbourne v. State, 644 So.2d 54, 56-8 (Fla. 1996), Jones v. State, 709 So.2d 512, 523 (Fla. 1998) and Jones v. State, 678 So.2d 309 (Fla. 1990), they are insufficient to either impeach Cooper's trial testimony or provide the basis for a viable insanity or intoxication defense. Cf., Mills, 684 So.2d at 806 (". . . there is nothing in recent affidavit which bears directly on Mills' participation in the crimes.").

individual unencumbered by any mental deficit -- but also places such homicidal conduct in context with other violent and antisocial acts committed by Bryan during the same time period.[11] Although Bryan complained about the admission of certain collateral crime evidence at trial during his direct appeal (that evidence relating to his federal armed robbery charge and his theft of a boat in Gulf Breeze), see, Bryan, 533 So.2d at 754-8, those matters simply represented the tip of the iceberg, compared to what Sharon Cooper could have testified about, had trial counsel followed the newest strategy now proposed by Bryan's collateral counsel.

Thus, Cooper stated that after she and Bryan left Jacksonville, they hitchhiked to Mississippi where Bryan sought to reclaim some money which he believed was owing to him. In order to secure this money, Bryan directed Cooper to lure one "Bubba" to a motel, where Bryan would confront him. Once this was accomplished, Bryan burst into the motel room and began to beat up Bubba in an attempt to secure the money. When this was unsuccessful, Bryan tied up Bubba's hands (much as he did George Wilson's), put him in his own vehicle (as he did to George Wilson), and drove him at knife point to a relative's home, where he demanded money from Bubba's relatives. Once this money was secured, Bryan drove Bubba,

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[11] In fashioning the following chronology, the State utilized only Sharon Cooper's deposition of December 27, 1985, and her sworn statement of September 8, 1983: reliance upon the FBI summary of her prior statement of September 2, 1983 has been excised, given its withdrawal below.

again at knife point, to a wooded area, where he tied him to a tree and left him. Apparently unsatisfied with the above, Bryan then made gasoline bombs and threw them into another individual's home and vehicle.

Bryan and Cooper then proceeded to Pensacola in a vehicle which was not secured through legitimate means, and Bryan announced the intention to steal a boat and commit a home robbery; on the way to Pensacola, the two had stopped in Alabama, where Bryan retrieved the shotgun which he had used in the federal bank robbery, and which he had secreted in a wooded area. Bryan then proceeded to "case" a house in Gulf Breeze, but settled for simply stealing a boat, which he and Cooper took to Pascagoula; Bryan subsequently stole an outboard motor to use with the boat. At the marina in Mississippi, Bryan came into contact with George Wilson, the victim in this case, and decided to rob him. He instructed Cooper to knock on the door of the victim's trailer and ask to use the phone; Bryan stood behind Cooper, so that Wilson would not be able to see the shotgun that he was holding. Once the victim opened the door, Bryan pulled the gun, and tied up the victim's hands; he then searched the trailer for valuables and other firearms, and directed Wilson to give him his car keys. As Bryan held the victim at gunpoint, he ordered Cooper to make him a sandwich. Bryan then announced that they were going to take the victim with them (in the victim's vehicle), and the three left Wilson's trailer, after both

Cooper and Bryan had done their best to remove any fingerprints. Cooper retrieved their bags from the boat, and Bryan drove the trio to Crestview, where they spent the night in a motel, the victim being tied to a chair at this point in time. It is indeed unlikely that anyone slept that night, as they did not arrive until 4:00 a.m. and left somewhere between 7:00 and 8:00 in the morning.

As they drove around the next morning, Bryan told Cooper that he intended to "tie the old man to something real heavy and then throw him into the ocean." Bryan continued driving until they arrived at a remote wooded area in a state forest or park, and Wilson asked Cooper if Bryan intended to kill him; no doubt thinking of Bubba, she stated that Bryan only intended to tie him to a tree. Bryan then forced the man out of the vehicle at gunpoint and marched him into the woods. Although Bryan told Cooper that he did not intend to shoot the victim, Cooper saw him hit Wilson in the back of the head with the gun and then heard a gunshot. Bryan ran back to the car, and he and Cooper drove to Fort Walton Beach, where Bryan put the shotgun in a duffle bag with some clothes and mailed it to Cooper, care of the bus station in Biloxi. He then drove around looking for the "perfect" place to dispose of the car, and eventually submerged it in a river. He and Cooper then hitchhiked to Biloxi, where they picked up the duffle bag (and shotgun). Bryan and Cooper stayed the night at a Biloxi motel with the individual who had picked them up while hitchhiking,

one "Dean." At this point, Bryan advised Cooper that he intended to knock Dean on the head, and steal his money and vehicle; Dean, however, awoke during the night and escaped.

In light of the above, no reasonable counsel would have opened the door to Sharon Cooper's recitation concerning Anthony Bryan's mental state; instead, Attorney Stokes sought to discredit her as much as possible. Further, it is clear that no prejudice could exist from Stokes' omission in this regard, given the fact, that in light of all the above, no viable insanity/intoxication/diminished capacity defense existed, given the overwhelming evidence of Bryan's purposeful conduct at the time of the murder, as noted by the Eleventh Circuit in its opinion, Bryan, 140 F.3d at 1360-1. See also, White v. State, 559 So.2d 1097, 1099 (Fla. 1990) (counsel not ineffective for failing to present intoxication defense, in light of defendant's purposeful conduct at time of murder); Harich v. Dugger, 844 F.2d 1464, 1471 (11th Cir. 1988) (en banc) (same).

Judge Bell not only recognized that admission of the above testimony would have been more of a detriment than an advantage (Order at 5, n.6), but also notes the fatal flaw to collateral counsels' latest proposed strategy. The defense of intoxication or insanity requires the defendant to admit committing the act. Here, Anthony Bryan, despite initially feigning amnesia as to the murder itself, took the witness stand during his trial in 1986, and stated under oath, **"I did not kill George Wilson."** (OR 632). Thus,

Bryan's trial position negates his present postconviction position, and the State is not aware of precedent from any jurisdiction which authorizes a defendant to obtain postconviction relief in a successive pleading by essentially announcing his perjury at the time of trial.

The circuit court noted that the current claim "would be diametrically opposed to and contravene the defense asserted at both the guilt and penalty phase." (Order at 5 n.6). The court correctly reasoned:

> given the Pandora's box the Defendant would have opened upon himself if he had asserted an impaired mental state caused by substance abuse, it does not seem reasonable such a defense would have assisted him at either phase. If anything, it would more likely have been a detriment, especially if the myriad collateral crimes Ms. Cooper described were admitted in response to a mental state element in either phase.

(Order at 5 n.8). As set out supra, the record fully supports the circuit court's comments.

It is safe to say that Anthony Bryan has postponed the day of judgment in this cause by constructing one false mental health defense after another, and, indeed, has already secured one stay of execution on such basis. Even if all of the present allegations were accepted, Bryan cannot be "innocent." No further stays are justified, the instant claim is procedurally barred, the circuit

court's order should be affirmed, and all relief should be summarily denied.[12]

POINT III

THE CIRCUIT COURT'S DENIAL OF BRYAN'S RENEWED AND PROCEDURALLY BARRED CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE, WAS NOT ERROR

Judge Bell also found this matter to be procedurally barred, or alternatively to constitute no basis for relief, largely for the reasons already set forth. Bryan raised a successive claim of

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[12] To the extent that this claim involves trial counsel's failure to utilize the tape-recorded conversation between Bryan and Cooper from September 6, 1983, such argument is frivolous. The taped statement was made weeks after the murder in this case, and any depression or alleged suicidal inclination on Bryan's part was well known to the nine mental health experts who extensively examined him in this cause and/or was discoverable much earlier through due diligence. Further, the tape unquestionably does establish that Bryan sought to solicit a false alibi from Cooper, and discussed the procedure for doing so during this tape-recorded conversation. This act was entirely consistent with his behavior while at the Springfield Mental Hospital, where he was being evaluated prior to his federal prosecution, when he solicited Mark Hart in a similar attempt to concoct a false alibi; at this point, Bryan obligingly wrote a false alibi note in his own handwriting, leaving his fingerprints upon it, as noted in the direct appeal opinion. Bryan, 533 So.2d at 745 (See Testimony of Mark Hart [OR 496-512]). No relief is warranted as to this procedurally barred claim, under any legal theory.

To the extent that this claim also relates to any potential testimony from Judy Belch Whaby (Emergency Motion at 14, 23), such has been long discoverable, and, like the tape-recording, fails under any legal theory, as it would seem to relate to a time period well removed from the murder. No explanation has been offered for why the recently proffered affidavit of Ms. Whaby appended to the Supplemental Motion and dated October 18, 1999, could not have been discovered earlier through diligence; in any event, such affidavit contains nothing of substance.

ineffective assistance of counsel at the penalty phase, due to, apparently, Attorney Stokes' failure to present mental mitigation derived from Sharon Cooper and/or Judy Belch, concerning his alleged insanity or intoxication at the time of the offense; likewise, counsel was apparently charged with having failed to utilize the tape-recorded conversation between Bryan and Cooper. Bryan, of course, raised a comparable claim of ineffective assistance of counsel in his October 2, 1990 motion to vacate (1990 motion at 638 [PCR(S) 88-120]), and received a stay of execution and evidentiary hearing thereon; at the 1991 hearing, Bryan called Attorney Stokes as a witness, as well as three of the mental health experts. The circuit court's denial of relief as to the 1990 claim was affirmed, Bryan, 641 So.2d 63-5, and the Eleventh Circuit likewise affirmed the federal district court's disposition of the matter. Bryan, 140 F.3d at 1357-1361.

As previously asserted, Bryan cannot present a successive claim of ineffective assistance of counsel in this respect, see Jones, supra, Buenoano, supra, Pope, supra, especially where the alleged factual bases for such claim relate to witnesses who actually testified at trial, see Mills, supra, and/or relate to matters which have always been known to, or discoverable by, Bryan's counsel through due diligence. See, Buenoano, supra; Remeta, supra; Davis, supra; Demps, supra. This claim is untimely and procedurally barred. To the extent that any further argument

is necessary, neither prong of Strickland can be satisfied, and, if anything, admission of a full account of Bryan's mental state and criminal conduct by virtue of the testimony of Sharon Cooper outlined in the previous claim would have increased the margin by which the jury recommended death. Cf., Atkins, 663 So.2d 626 (defendant not prejudiced due to alleged suppression of photographs which would simply have inflamed the jury against him); Bryan, 140 F.3d at 1360-1 (no prejudice from counsel's failure to present mental mitigation sub judice, given purposeful nature of crime and Bryan's deliberate actions and steps to avoid detection). As recognized in Atkins, 663 So.2d at 627, "endless repetition of claims is not permitted." The circuit court correctly found this claim to be procedurally barred, and no relief is warranted.

POINT IV

THE CIRCUIT COURT'S DENIAL OF BRYAN'S RENEWED AND PROCEDURALLY BARRED CLAIM RELATING TO MENTAL HEALTH ASSISTANCE WAS NOT ERROR

In Claim IV of the motion below, Bryan contended that his rights under Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), were violated because, allegedly, the mental health experts did not have sufficient information to make competent diagnoses of Bryan, presumably that information known to Sharon Cooper and Judy Belch as well as the tape-recording of Bryan and Cooper. The circuit court properly found this claim to be procedurally barred. (Order at 5).

Bryan raised a comparable claim for relief in his 1990 postconviction motion (See Motion of October 2, 1990 at 38-43 [PCR(S) 120-5]). Although the circuit judge did not expressly grant an evidentiary hearing on this claim, collateral counsel explored Attorney Stokes' pursuit of mental health defenses at the evidentiary hearing in 1991, and called three mental health experts at the time; at this juncture, each of the experts was asked if any "new" materials supplied to them since the 1986 trial had changed their original opinions, and all answered in the negative, as noted by prior courts to review this claim. See, Bryan, 641 So.2d at 64 ("None of the mental health experts testified at the evidentiary hearing that their conclusions as to the defendant's mental state would have been changed through the receipt of the additional information submitted in preparation for this postconviction relief proceeding."). The circuit court's denial of Bryan's 1990 claim was affirmed, Bryan, 641 So.2d at 62-5, and the Eleventh Circuit similarly affirmed the federal district court's disposition of the matter. Bryan, 140 F.3d at 1361, n.13.

Bryan has no right to re-present a variation of the same claim in a successive postconviction motion, see, Mills, 684 So.2d 806, especially when the "basis" for this claim involves information known to witnesses who actually testified at time of trial, and/or other matters obtainable by Bryan's counsel through due diligence long ago. See, Mills, supra; Buenoano, supra; Remeta, supra;

Davis, supra. The 1991 evidentiary hearing certainly provided collateral counsel with a perfect opportunity to present the mental health experts with all allegedly unconsidered matters relating to Bryan's mental state, and, specifically, counsel could have presented to them Cooper's sworn statement of September 8, 1983 as well as the 1983 tape-recording between Bryan and Cooper; for reasons known only to collateral counsel, they would seem to have failed to have done so, although, interestingly, they did present Dr. Larson with Cooper's 1985 deposition, which, as noted, demolishes any potential defense of insanity or intoxication. (Transcript of proceedings of June 12, 1991 at page 179-180 [PCR 179-180]; See Appendix to Response). This matter is procedurally barred and untimely. To the extent that any further argument is necessary, it is clear that no relief could be granted on this claim, given the vague and insubstantial nature of the allegedly unpresented defenses, as well as their fundamental inconsistency with the known facts and circumstances of the case, as noted by the Eleventh Circuit in its opinion. Bryan, 140 F.3d at 1360-1. No relief is merited as to this procedurally barred claim, and the circuit court's ruling should be affirmed.[13]

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[13] The recently proffered affidavit of the ever-helpful Dr. Larson provides no basis for any relief. As all courts have previously recognized, Attorney Stokes made a valid strategic decision not to call Larson at the penalty phase, as Larson told him that he would not be a helpful witness. Bryan, 641 So.2d at 64; Bryan, 140 F.3d at 1358, n.8. Larson testified at the 1991 evidentiary hearing, after being provided "new" background

POINT V

THE CIRCUIT COURT'S DENIAL OF RELIEF AS TO BRYAN'S RENEWED AND PROCEDURALLY BARRED CLAIM CONCERNING THE 1983 TAPE-RECORDING WAS NOT ERROR.

In his motion below, Bryan contended that he is entitled to relief, on a number of grounds, due to the fact that Sharon Cooper allegedly acted as a state agent when her conversation with Bryan in September of 1983 was tape-recorded. Judge Bell correctly found this matter to be procedurally barred, as well as a matter insufficient to merit relief. (Given Bryan's refusal to provide the court below with the tape-recording upon which this claim is allegedly premised, this latter finding would not seem unjustified.)

A virtually verbatim rendition of this claim, albeit significantly shorter, was presented in Bryan's 1990 motion (See October 2, 1990 Motion to Vacate at 50-3 [PCR(S) 132-5]), and found procedurally barred. This Court affirmed this ruling, Bryan, 641

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materials; his testimony then does not differ significantly from his latest affidavit [PCR 175-239; See Appendix to Response], except in one respect. In 1991, Dr. Larson acknowledged that he had read Sharon Cooper's deposition (Id. at 179-180), which, of course, contradicts any insanity or intoxication defense. His present cumulative, if not disingenuous, affidavit can safely be discounted, at this juncture, in that it is well established that a capital defendant's acquisition of a "new" expert does not provide any basis for a stay of execution or other relief. See, e.g., Stano v. State, 520 So.2d 278, 281 (Fla. 1988); Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990); Engle v. Dugger, 576 So.2d 696, 702 (Fla. 1991).

So.2d at 62-3, and the federal district court honored the procedural bar in its order on Bryan's federal habeas (see Order, Bryan v. Singletary, United States District Court Case No. 94-30327-LAC, July 9, 1996 at 40-2); Bryan did not appeal this ruling to the Eleventh Circuit. Bryan, 140 F.3d at 1355, n.1. (As part of his claim of ineffective assistance of counsel at the guilt phase, Bryan also attacked Attorney Stokes' handling of the tape-recording [See October 2, 1990 Motion to Vacate at 47-50; Amended Motion to Vacate of December 2, 1990 at 315-327 [PCR(S) 128-132; 315-327]], and the State would rely upon its assertion of procedural bar previously asserted).

Having presented this matter in a prior motion, Bryan has no right to seek to relitigate it at this juncture. See, Mills, supra; Francis v. Barton, 581 So.2d 583, 584 (Fla. 1991) (issue raised in prior 3.850 procedurally barred when presented in successive motion); Parker v. State, 718 So.2d 744, 745-6, n.6 (Fla. 1998) (same). Further, as the tape-recording has always been known to Bryan's counsel and its contents easily discoverable through due diligence long ago, it is clear that this matter is time barred. See, Mills, supra; Buenoano, supra; Remeta, supra; Davis, supra. The fact that, allegedly, Bryan's present collateral counsel did not listen to this tape until 1999 following a 1999 public records request is not controlling, in that, at minimum, the tape-recording has been constantly available to collateral counsel

since at least 1994, when the Office of the State Attorney wrote a letter to Bryan expressly indicating that access was granted in regard to his 1994 public records request (see Notice of Filing October 12, 1999). Any assertion that a prior public records request was made in 1990 (Emergency Motion at 57) is not supported by the record, but would, in any event, not change the result. This matter is procedurally barred on the authority of the above cases. To the extent that any further argument is necessary, Bryan would not be entitled to any relief under any legal theory, as the contents of the tape are negligible, for the reasons set forth infra. No relief is warranted as to this procedurally barred claim, and the circuit court's ruling should be affirmed.

POINT VI

THE CIRCUIT COURT'S DENIAL OF RELIEF AS TO BRYAN'S CLEMENCY CLAIM WAS NOT ERROR

Bryan also contended below that he was unconstitutionally deprived of counsel for a successive attempt at clemency. Bryan admits that he had an executive clemency proceeding. (Emergency Motion at 94). In this claim, however, he argued that he should have had a second clemency hearing before his death warrant was signed and that he "should have had counsel appointed following the exhaustion of his postconviction proceedings, and that counsel [should have been] provided with the time and resources to present an adequate case for mercy." (Emergency Motion at 98). The

circuit court summarily denied this claim for the reasons set forth in the State's Response. (Order at 5). This ruling should be affirmed.

Clemency is an executive function. Herrera v. Collins, 506 U.S. 390 (1993); Sullivan v. Askew, 348 So.2d 312 (Fla. 1977). Citing a minority opinion in Ohio Adult Parole Authority v. Woodard, 118 S.Ct. 1244 (1998), Bryan claims that he has a liberty interest in his life that affects clemency proceedings. (Emergency Motion at 92). In Florida, however, an inmate has no "liberty interest" in the state's clemency procedures, and those procedures are strictly a matter of executive discretion. Bundy v. Dugger, 850 F.2d 1402, 1423-24 (11th Cir. 1988). Neither the legislature nor the judiciary may encroach upon the executive's power over clemency. Sullivan, 348 So.2d at 316; Bundy v. State, 497 So.2d 1209, 1211 (Fla. 1986) ("It is not our prerogative to second-guess the application of this exclusive executive function"). Complaints about the clemency process, therefore, are not cognizable in postconviction proceedings, Medina v. State, 690 So.2d 1241 (Fla.), cert. denied, 117 S.Ct. 1330 (1997), and suggestions that death row inmates should be afforded a second clemency hearing, with counsel provided for that purpose, have been summarily rejected. Provenzano v. State, 24 Fla.L.Weekly S312 (Fla. July 1, 1999); Bundy, 497 So.2d at 1211. Therefore, the circuit court's denial of relief on this claim should be affirmed.

POINT VII

THE CIRCUIT COURT'S DENIAL OF RELIEF AS TO BRYAN'S CUMULATIVE ERROR CLAIM WAS NOT ERROR

Bryan argued below that the issues set out elsewhere in his pleadings, individually as well as cumulatively, warrant his requested postconviction relief. The circuit court denied this claim for the reasons set forth in the State's Response. (Order at 5). As the State has demonstrated supra, no relief should be granted on any of the individual claims. Because the individual alleged errors have no merit, this collective-error claim must also fail. The circuit court's ruling, therefore, should be affirmed. Downs v. State, 24 Fla.L.Weekly S231 (Fla. May 20, 1999) (cumulative error claim has no merit where it comprises individual claims that have been considered and found meritless).

POINT VIII

THE CIRCUIT COURT'S DENIAL OF RELIEF AS TO BRYAN'S PROCEDURALLY BARRED SUPPLEMENTAL CLAIM REGARDING THE DISCOVERY OF THE VICTIM'S BODY WAS NOT ERROR

In the supplemental motion of October 18, 1999, Bryan contended, for the first time, that he has received, through his 1999 public records acquisition, information which allegedly casts doubt upon any contention that Sharon Cooper assisted law enforcement in finding George Wilson's body at the murder site.

The circuit court summarily denied this claim based on the reasons set forth in the State's Response. (Order at 5).

Collateral counsel do not identify the factual basis for this "claim", and as such it is improperly pled and subject to summary dismissal, see, e.g., Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989), LeCroy v. Dugger, 727 So.2d 236, 239 (Fla. 1998); indeed, collateral counsel refused to provide the "note" allegedly giving rise to this claim to the court below. Additionally, as has already been clearly demonstrated, collateral counsel had the ability and wherewithal to make public records demands upon the local law enforcement agencies involved in this case well before 1999, and their lack of diligence in doing so renders any claim based upon information so derived procedurally barred and untimely, under the authority of such opinions as Mills, supra, Buenoano, supra, Remeta, supra, and Davis, supra.

To the extent that any further argument is required, such argument is extremely difficult to fashion, in the absence of any proper allegation by Bryan. Nevertheless, it is clear that whatever the true nature of this claim, it cannot cast a shadow of a doubt upon the constitutional validity of Bryan's convictions and sentence. At this juncture, does it truly matter when, where or by whom George Wilson's body was found? George Wilson is dead, and Anthony Bryan murdered him. Even if the unintelligible allegations in this claim, or any other, were true, Bryan would still not be

innocent, and would still remain totally undeserving of any further collateral relief.

The record does indeed reflect that trial prosecutor Patterson advised the jury in opening statement that George Wilson's body was not immediately recovered after the murder, that Sharon Cooper contacted the FBI, that authorities searched Santa Rosa County with Cooper in an attempt to find the murder site, that Cooper "broke down" at a site near Juniper Creek, and that the body was found a short distance away, in proximity to a spent shotgun shell (OR 260-1). At trial, the State presented the testimony of three witnesses relevant to this occurrence. Thus, Captain Boswell of the Santa Rosa County Sheriff's Department testified that he had been dispatched to the crime scene on September 3, 1983, and had observed recovery of the spent shotgun shell by another officer, Investigator Daniels. Boswell stated that the shell was retrieved from a dimly lit trail which ran parallel to Big Juniper (OR 351-2); Daniels offered comparable testimony (OR 373-4). When Boswell identified photographs depicting this event, he indicated that some of the photographs showed "the location of the body" and "the body itself in the water." (OR 352). The witness stated that although he had not been present when the body was first discovered, he had been present when it was removed from the creek (OR 360). Captain Cotton testified that he had been in contact with the FBI in Jacksonville, and had met with Sharon Cooper, who had "mentioned"

to the authorities “about a body possibly in our county or Okaloosa County.” (OR 392). Cotton stated that he had met with Cooper, and that the pair, accompanied by other law enforcement officers, had started out at the motel in Crestview where the victim was held hostage, and had then begun driving around Santa Rosa County (OR 392-3). Cotton testified that the body was not recovered on the first day, but that on the second day, they proceeded to the Blackwater State Forest area and followed drawings which Cooper had made (OR 394-5). At one point, Cooper “broke down” at a certain location, and the victim’s body was discovered a short distance away down the river, in proximity to a shotgun shell (OR 395). Sharon Cooper did not testify at trial concerning the recovery of the body (OR 407-443).

The testimony of these witnesses was independently corroborated by that of the medical examiner, who testified that he performed an autopsy on George Wilson’s body on September 4, 1983, at which point in time the body was “moderately to markedly decomposed.” (OR 445). It should require no citation of authority for the proposition that medical examiners perform autopsies as soon as possible after the discovery of a body, so as to render a reliable result, and it is preposterous to think that Wilson’s body had been discovered any time prior to September 3, 1983. It is likely that this “claim”, which cannot be regarded as anything other than a complete red herring, simply arises from a

typographical error in the anonymous "note" turned over in the 1999 public records acquisition (Supplement to Emergency Motion at 6-7). Among the matters always discoverable by trial or collateral counsel is the deposition of special agent Frederick McFaul, in which he relates discovery of Wilson's body by a fish and game officer "as a result of information furnished by Sharon Cooper." (See Appendix to Response). Collateral counsel's procedurally barred, reckless, and unsubstantiated assertions of governmental misconduct have no basis in fact, and the circuit court's summary denial of this claim should be affirmed.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the circuit court's order should be affirmed, and all requested relief should be denied.

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, P.O. Drawer 5498, Tallahassee, Florida 32314-5498, this 25th day of October, 1999.

_____
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