

IN THE SUPREME COURT OF FLORIDA

WILLIAM GREGORY THOMAS,

Appellant,

v.

CASE NO. SC18-48
Lower Tribunal No.
1993CF5394
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant, William Gregory Thomas, was convicted of burglary, kidnapping, and first-degree murder, and was sentenced to death. Thomas v. State, 693 So. 2d 951 (Fla. 1997), cert. denied, Thomas v. Florida, 522 U.S. 985 (1997).

Thomas planned the kidnapping and murder of his wife, Rachel, in order to avoid paying his part of a settlement agreement in their pending divorce. Thomas and a friend, Douglas Schraud, went to Rachel's house, September 12, 1991, the day before a substantial payment was due, and Thomas beat, bound, and gagged Rachel. When Rachel tried to escape by hopping outside, Thomas knocked her to the ground and dragged her back inside by her hair. He then put her in the trunk of her car and drove off. She was never seen again.

Thomas was charged with first-degree murder, burglary and kidnapping. The State presented numerous witnesses to whom he had made incriminating statements. Thomas presented no evidence during the guilt phase and was found guilty on all counts. During the penalty phase, several witnesses testified on his behalf and Thomas himself took the stand. The jury recommended death by a vote of eleven to one, and the judge imposed a sentence of death based on five aggravating circumstances and no mitigating circumstances.

Id. The five aggravating circumstances were:

Thomas had committed a prior violent felony; the murder was committed in the course of a burglary; the murder was committed for financial gain; the murder was especially heinous, atrocious, or cruel (HAC); the murder was committed in a cold, calculated, and premediated manner (CCP).

Id. at 951 n.1.

Additional facts from the record demonstrate that not only did Appellant's accomplice, Douglas Schraud, testify at trial,

Appellant made at least ten inculpatory statements and admissions to at least eight individuals who all testified at trial. Thomas, 693 So. 2d at 952 n.3. One of these eight witness was Ahmed Dixon. (R. at 954-75).

Dixon was incarcerated with Appellant while he awaited trial. (R. at 958). At Appellant's trial in March 1994, Dixon explained that while in jail, he went to another inmate's cell, Adrian Cason's, to borrow headphones. (R. at 960). Cason and Appellant were talking and Dixon overheard the conversation. (R. at 961). Dixon overheard Appellant say that he "chopped the bitch in the throat," referring to his wife, and "put her in the trunk of the car." (R. at 963). Appellant also stated that he dropped Schraud off before disposing of the body so that Schraud would not know where the body was. (R. at 963). Approximately a week and a half after over-hearing this conversation, Dixon contacted the state attorney. (R. at 965).

Dixon also testified that he had been convicted of three felonies previously. (R. at 955). Dixon also testified that he was currently incarcerated at the Duval County Jail on federal criminal charges for possession with intent to distribute cocaine, that he pled guilty without a plea bargain October 3, 1993, to the drug charges, but had not been sentenced. (R. at 955-56). Dixon was later sentenced after Appellant's trial in March 1994.

Cason did not testify at Appellant's trial. Cason pled guilty

to first-degree murder in September 1993 and was sentenced in July 1994. (Answer Attachment 1 and 3). There was an evidentiary hearing in Cason's appeal in July 2000. (Answer Attachment 2). Cason's appeal was summarily denied March 26, 2002. Cason v. State, 814 So. 2d 1030 (Fla. 1st DCA 2002).

Dixon and Cason were not the only inmates to hear Appellant discussing details of the murder. James Bonner, a former co-worker with Appellant, testified that while incarcerated together, Appellant admitted that he and Mr. Schraud forced their way into Appellant's wife's house and "took care" of her. (R. at 981). While speaking about taking care of his wife, Appellant took his hand across his throat. (R. at 981). Appellant stated that he disposed of his wife's body and he is the only person who knows where it is. (R. at 983).

Eddie Rhiles, who was incarcerated with Appellant, testified that Appellant stated he and Schraud beat Appellant's wife and placed her in the trunk of the car. (R. at 989). Rhiles witnessed Appellant act nervous when a news story came on about a body being found in a wooded area. (R. at 988). After watching a news story about Schraud together, Appellant told Rhiles that Schraud was lying about the incident because he could not have known the wife was dead because "when they put her in the trunk she wasn't dead yet." (R. at 990).

In addition to making admissions to other inmates, John Brewer

testified that Appellant told him that he was court ordered to pay his wife some money, which he did not have, "so he had to see that Rachel disappeared." (R. at 569). Christina Thomas, Appellant's girlfriend, testified that Appellant thought his ex-wife was plotting to kill him. (R. at 894). Appellant had told Christina that his family was part of the mafia, and that they would kill Rachel before she could kill him. (R. at 894). On the day of Rachel's disappearance, Appellant told Christina that "the family had taken Rachel." (R. at 898). Appellant told Joseph Stewart that his mafia linked family kidnapped and killed Rachel. (R. at 946).

In addition to Appellant's inculpatory statements and admissions, the State presented evidence that Appellant and his wife had a heated phone conversation the day she disappeared. (R. at 551). Additionally, two witnesses testified that Appellant's wife was scheduled to meet with the Appellant at her house the evening she disappeared. (R. at 558). Appellant's palm print was found on the trunk lid of his wife's car even though her car had recently been washed. (R. at 701, 758). Additionally, blood of his wife's blood type was found in the trunk of the car. (R. at 728, 730-31).

On appeal, Thomas raised nine issues:

- 1) The State failed to prove the corpus delicti;
- 2) the sentencing order is deficient;
- 3) the CCP instruction was faulty;
- 4) the prosecutor misinformed the jury about

the weighing process; 5) the court improperly informed the jury on the weighing process; 6) the HAC instruction was faulty; 7) the prosecutor made improper comments in closing; 8) the court used the felonies underlying the first-degree murder conviction as an automatic aggravator; 9) the evidence was insufficient to support the pecuniary gain aggravator.

Thomas, 693 So. 2d at 951 n.2. This Court affirmed the convictions and sentences. Id. at 953. Appellant's case became final on November 17, 1997, when the United States Supreme Court denied his petition for writ of certiorari. Thomas, 522 U.S. at 985; Fla. R. Crim. 3.851(d)(1)(B).

The trial court denied Appellant's motion for post-conviction relief and Thomas appealed raising eight issues. Thomas v. State, 838 So. 2d 535, 538 n.3 (Fla. 2003). This Court found no error and affirmed the denial of Appellant's post-conviction motion. Id. at 542.

Appellant sought a writ of habeas corpus in federal court for which the litigation is ongoing and focused on the issue of equitable tolling. See, e.g., Thomas v. Att'y Gen., Fla., No. 3:03-cv-237-J-32PDB, 2018 WL 733631 (M.D. Fla. Feb. 6, 2018). Petitioner also filed two habeas petitions related to the claims contained herein, one arising out of the trial for the murder of his wife and one arising out of the guilty plea for the murder of his mother. Thomas v. Sec'y, Fla. Dep't Corr., Nos. 3:17-cv-662-JBT and 3:17-cv-661-TJC-PDB. Both are still pending resolution.

On January 11, 2017, Appellant filed a successive post-conviction motion raising one claim; that Hurst should apply to his case. Thomas v. State, 234 So. 3d 559 (Fla. 2018); Hurst v. Florida, 136 S. Ct. 616 (2016); Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, Florida v. Hurst, 137 S. Ct. 2161 (2017). This Court affirmed the denial of the post-conviction motion because Hurst does not apply to Appellant's case, which became final prior to the decision in Ring. Id. at 560; Ring v. Arizona, 536 U.S. 584 (2002); see, e.g., Hitchcock v. State, 226 So. 3d 216, 217 (2017), cert. denied, Hitchcock v. Florida, 138 S. Ct. 513 (2017).

On June 8, 2017, Appellant filed a successive post-conviction motion alleging Newly Discovered Evidence (Motion), which is the basis for this appeal. The State filed a response (Answer) and the post-conviction court summarily denied the claim. This is the state's Answer to Appellant's Initial Brief.

SUMMARY OF THE ARGUMENT

Summary Denial of Appellant's Legally Insufficient Claims of Newly Discovered Evidence was Appropriate. Summary denial was appropriate because Appellant's Motion was legally insufficient on its face and directly contradicted by the evidence of his guilt which was presented at trial. In his Motion, Appellant failed to satisfy the test for newly discovered evidence. Appellant cannot demonstrate that his claims were timely filed as all the information pertaining to his claim could have been discovered through due

diligence by 2002 at the latest. Even assuming Appellant's claims are true, the "new" information does not raise any doubt as to Appellant's culpability. Appellant's claims are procedurally barred, facially insufficient, and without merit. Thus, summary denial was appropriate and this Court should affirm.

STANDARD OF REVIEW

Summary denial by the post-conviction court is reviewed de novo. Suggs v. State, 238 So. 3d 699, 709 (Fla. 2017) (citing Hunter v. State, 29 So. 3d 256, 261 (Fla. 2008)).

ARGUMENT

ISSUE: SUMMARY DENIAL OF APPELLANT'S LEGALLY INSUFFICIENT CLAIMS OF NEWLY DISCOVERED EVIDENCE WAS APPROPRIATE

Appellant argues that the post-conviction court erred in summarily denying the two claims of newly discovered evidence raised in his Motion. However, both claims are legally insufficient on the face of the motion as they could have been discovered by 2002 and do not raise doubts as to Appellant's culpability. Thus, summary denial was appropriate.

A court can summarily deny a claim if "(1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient." Franqui v. State, 59 So. 3d 82, 94-95 (Fla. 2011) (citing Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000)) ; see also Tanzi v. State, 94 So. 3d 482 (Fla. 2012) (summary denial

is appropriate when the claim is “facially insufficient, procedurally barred, or without merit...”). The Appellant has the burden “of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden.” Freeman, 761 So. 2d at 1061.

[F]or a conviction to be set aside based on a claim of newly discovered evidence, the defendant must meet two requirements. First, the evidence must not have been known by the trial court, the party, or counsel at the time of the trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.

Spann v. State, 91 So. 3d 812, 815 (Fla. 2012) (citing Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)).

To satisfy the first prong of the newly discovered evidence test and to “be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence.” Jimenez v. State, 997 So. 2d 1056, 1064 (Fla. 2008). Due diligence requires that if the Appellant is aware of the existence of a record, he must try to obtain that record or request it. See Tompkins v. State, 872 So. 2d 230, 239 (Fla. 2003) (defense counsel knew of a police report and could have requested a legible copy).

To satisfy the second prong of the newly discovered evidence test, defense must demonstrate that the newly discovered evidence

"weakens the case against [the Appellant] so as to give rise to a reasonable doubt as to his culpability." Spann, 91 So. 3d at 815 (quoting Jones, 709 So. 2d at 526). Further,

[i]n determining whether the newly discovered evidence compels a new trial, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial."

Spann, 91 So. 3d at 815-16 (quoting Jones v. State, 591 So. 2d 911, 916 (Fla. 1991)).

Appellant alleges that the State: (1) failed to disclose the arrest record of Ahmed Dixon, (2) failed to disclose that Dixon received a more favorable sentence for his federal drug charges in exchange for testifying against Appellant, (3) knowingly presented Dixon's false testimony at trial about not having a plea deal arranged, and (4) failed to disclose that Adrian Cason had negotiated a plea deal in exchange for assisting the State in prosecuting Appellant. Appellant claims that this information is "newly discovered" because he just learned of it. However, this evidence cannot be considered newly discovered as Appellant cannot meet either requirement of the newly discovered evidence test.

Appellant fails to meet prong one of the newly discovered evidence test because the majority of this information was readily available to Appellant in 1993, prior to trial, and was available

in its entirety by 2002. Additionally, failure to meet prong one causes Appellant's claims to be untimely and procedurally barred.

Appellant fails to meet prong two of the newly discovered evidence test because this information does not negate his culpability. Additionally, Cason did not testify at trial and Dixon was already impeached with his criminal history. Thus, the information is irrelevant. Thus, summary denial was appropriate.

Dixon's Criminal History Records

Appellant alleges that the criminal history of Ahmed Dixon is newly discovered evidence which was unknown to the movant until June 2016. (Brief at 3). Appellant claims this evidence demonstrates that the State committed a Brady violation by not disclosing Dixon's criminal history at trial. Since Dixon's criminal history was discoverable upon due diligence at the time of Appellant's trial, it is not newly discovered evidence. Even if timely, Appellant's Brady claim is without merit as he had knowledge of and access to Dixon's criminal history throughout the proceedings. Further, Dixon was impeached at Appellant's trial. Any additional impeachment evidence gleaned from Dixon's criminal history was cumulative to the evidence presented at trial. This information also would not negate any of the evidence of Appellant's guilt which was presented at trial. Summary denial of this claim was proper as the claim is facially insufficient, procedurally barred, and meritless.

Dixon's criminal history record was readily available to the Appellant prior to, during, and after Appellant's trial, which occurred in 1994. Appellant knew Dixon was pending criminal charges as they were incarcerated together in 1993. As indicated in the Motion, this information was discovered simply by stopping "by the Jacksonville Sheriff's Office (JSO) to obtain criminal histories on witnesses." (Brief at 3). Certainly, if Appellant's trial or direct appeal attorney had exercised due diligence, this information would have been readily available to them. Fla. R. Crim. 3.851(d)(2)(A). This information should have been discovered as early as 1993 and raised at trial and on direct appeal. Since these claims are being raised almost twenty years later, they are untimely, procedurally barred, and fail prong one of the newly discovered evidence test.

This claim also fails prong two of the newly discovered evidence test. Even if Appellant had Dixon's arrest records (which trial counsel likely did at the time), Dixon was already impeached at Appellant's trial with his significant criminal history. Further, Dixon was only one of eight individuals who overheard Thomas make incriminatory statements. Dixon's arrest record does not negate this or any other evidence of Appellant's guilt, such as his accomplice's testimony, his heated phone call, his palm print on his wife's car's trunk, etc.

Additionally, Appellant's Brady claim is meritless. To "demonstrate a Brady violation, the defendant has the burden to show (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced." Franqui, 59 So. 3d at 101; see also Strickler v. Greene, 527 U.S. 263, 281-82 (1999); Way v. State, 760 So. 2d 903, 910 (Fla. 2000).

Appellant arguably meets prong one as this information is impeachment evidence. However, it would have been cumulative. Thus, it would not truly be favorable as it could have been excluded.

Appellant fails prong two of the Brady test because this information was not suppressed by the state. There "is no Brady violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or have obtained it through the exercise of reasonable diligence." Floyd v. State, 18 So. 3d 432, 451 (Fla. 2009) (evidence is "not suppressed where the defendant was aware of the information"); James v. State, 453 So. 2d 786, 790 (Fla. 1984) (holding no Brady violation because both the State and defense had equal access to a photograph belonging to a juvenile with sealed records where defense was aware of the information); Tompkins, 872 So. 2d at 239 (no suppression where defense was given illegible copy of police report because defense knew about report and could

have request a legible copy); Provenzano v. State, 616 So. 2d 428, 430 (1993) (no Brady violation where the defendant could have obtained records from jail officials if he had requested them).

Here, Appellant knew Dixon had a criminal record and it was used to impeach him at trial. If trial counsel did not have Dixon's entire criminal record, he certainly should have known of its existence and requested it. Because Appellant was aware and had equal access to the information, there was no suppression by the State. Thus, Appellant fails to meet prong two.

Appellant also fails to meet prong three of the Brady test because even if Appellant did not have the information, he was not prejudiced as it is immaterial. To establish materiality, "the defendant must establish a prima facie case that 'there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceedings would have been different.'" Freeman, 761 So. 2d at 1061, quoting United States v. Bagley, 473 U.S. 667, 682 (1985). Here, it is likely that Appellant had the information as it was used to impeach Dixon at trial. Even if Appellant did not have the entire criminal record at trial, the proceedings would not have been any different having the entire record. At most, it potentially would have provided additional impeachment information. This impeachment evidence would be cumulative to what was already presented at trial.

Since this information is untimely and does not raise a reasonable doubt as to Appellant's culpability, this information is not newly discovered evidence. Thus, the post-conviction court was proper in denying this claim. Summary denial was appropriate because the claim is facially insufficient, procedurally barred, and meritless. This Court should affirm the post-conviction court's summary denial of this claim.

Dixon's "Plea Deal"

Next, Appellant alleges that he recently discovered that Dixon's State drug charges were dropped and Dixon received a more favorable sentence for his federal drug charges in exchange for testifying against Appellant. Appellant claims that the State violated Brady for failing to disclose this information. However, like above, since Dixon's criminal history, including sentencing information, was discoverable upon due diligence throughout the proceedings, it is not newly discovered evidence. Even if timely, Appellant's Brady claim is without merit as he had knowledge of and access to Dixon's criminal history throughout the proceedings. Further, Dixon was impeached at Appellant's trial and any additional impeachment evidence related to his sentencing would be immaterial. This information also would not negate any of the evidence of Appellant's guilt which was presented at trial. Summary denial of this claim was proper as the claim is facially insufficient, procedurally barred, and meritless. Appellant's

accusations are conclusory allegations that fail to establish a prima facie case based upon a legally valid claim.

Ahmed Dixon was arrested and incarcerated in the Duval County jail in July 1993. At the time, he was pending both state and federal drug charges. Appellant implies that Dixon's state charges were abandoned because of some undisclosed deal with the State related to his testimony against Appellant. Appellant presents no direct evidence of any such deal, but instead merely implies that this occurred. What is more likely to have happened is that because of the ongoing prosecution in federal court, the State dropped the charges due to double jeopardy implications that would arise for a defendant facing both state and federal prosecution for one offense.

Appellant also implies that Dixon received a more favorable sentence in federal court due to his testimony against Appellant. To support this allegation, Appellant points to the federal court's finding "grounds for a downward departure from the sentencing guidelines" on the federal drug charge. Appellant fails to allege any facts that support his assumption. Instead, the federal court might have independently made this finding based on Dixon's agreeing to plead guilty or because there were persuasive mitigating circumstances.

Even if Appellant's accusations are true, the dropping of charges or lessening of his sentence could have been impeachment

material at trial. This could be considered favorable information under prong one in determining if a Brady violation occurred. However, this information could not add any additional impact in determining Dixon's credibility at trial. At trial, Dixon admitted to and was impeached with his prior criminal history of three felony convictions. Dixon also admitted to and was impeached with the fact that he was currently pending federal drug charges, for which he had pled guilty and was awaiting sentencing. Further, it is difficult to fathom a reason Dixon would admit facing serious pending federal charges then lie about less serious state charges. Common sense tells us that an individual would not admit that he was pending serious federal charges and lie about less serious charges pending in state court. Even if there were pending charges in state court, Dixon was likely confused about the fact that the state charges and the federal charges were technically separate prosecutions arising out of the same criminal acts.

Appellant cannot meet prong two of the Brady test as the information was not suppressed. Appellant knew Dixon was pending charges as they were incarcerated together. Just as with the claim above, Appellant could have requested the documents related to Dixon's pending state and federal charges at any point. As Appellant was aware of this information, it is not suppressed and the alleged Brady violation is "conclusively refuted." Tompkins, 872 So. 2d at 239; see also Way, 760 So. 2d at 911-12.

Appellant cannot meet prong three of the Brady test because even if the State had suppressed this information, Appellant cannot demonstrate prejudice as the information was not material. Because "the jury was made aware [the witness] was in jail on other charges, which exposed the possibility that he might have had other motives for testifying, including the prospect of receiving a plea deal," Appellant cannot demonstrate that actual evidence of a plea deal would have been material. Wickham v. State, 124 So. 3d 841, 855 (Fla. 2013). Further, factually, Dixon's testimony merely corroborated many other witnesses who testified at trial. There is "no reasonable probability of a different outcome" in light of the fact that Dixon's "trial testimony was cumulative to that of other witnesses." Id. Thus, Appellant cannot demonstrate that his proceedings would have been different even if he had evidence of a plea deal for Dixon. Thus, Appellant failed to meet prong three.

Since this claim is untimely and does not raise a reasonable doubt as to Appellant's culpability, this information is not newly discovered evidence. Thus, the post-conviction court was proper in denying this claim. Summary denial was appropriate because the claim is facially insufficient, procedurally barred, and meritless. This Court should affirm the post-conviction court's summary denial of this claim.

Dixon's "False" Testimony

Appellant also claims that in examining the "newly discovered" entire criminal record of Dixon, it is clear that he presented false testimony during trial and this was in violation of Giglio. Since Dixon's criminal record is not newly discovered evidence, this also cannot be newly discovered evidence. Additionally, Appellant cannot demonstrate that the State violated Giglio because the testimony was not false. Summary denial of this claim was proper as the claim is facially insufficient, procedurally barred, and meritless. Appellant's accusations are conclusory allegations that fail to establish a prima facie case based upon a legally valid claim.

This evidence of "false testimony" is predicated on the discovery of Dixon's criminal history. However, the Dixon's criminal history was not newly discovered because the claim is untimely and does not raise a reasonable doubt as to Appellant's culpability. Since Dixon's criminal history is not newly discovered, neither can this information be newly discovered.

Additionally, there was no Giglio violation. In order to prove a Giglio violation, "a defendant must show that (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material." Franqui, 59 So. 3d at 102; quoting Rhodes v. State, 986 So. 2d 501, 508-09 (Fla. 2008). Satisfying the second prong

requires more than an incidental inconsistency in a prosecution witness's testimony, it requires evidence establishing that the prosecutor knew the testimony was false. Guzman v. State, 868 So. 2d 498, 505 (Fla. 2003). See Shellito v. State, 121 So. 3d 445, 458 (Fla. 2013) (though prosecution witness testified falsely that he was facing a 15-year mandatory minimum sentence, this testimony was not "material").

Here, Dixon correctly stated that he was not pending state charges when he testified at trial. Dixon was incorrect that no state drug charges were filed, but this statement was immaterial as he admitted to having been convicted of three felonies and pending federal drug charges. Likely, Dixon did not understand the intricacies of being charged both in state and federal courts and truly believed that only federal charges had been filed. Dixon correctly indicated that no plea deal existed, either with state or federal authorities, that involved Dixon's testimony in this case. Appellant's conjecture that there was a sub rosa agreement is purely speculative. There is no evidence to refute that Dixon's testimony at trial was truthful. Thus, Appellant fails both prong one and two of the Giglio test.

Even if Dixon lied about pending state charges or a plea deal in exchange for his testimony against Appellant, Appellant cannot demonstrate that this lie was material. As discussed previously, Dixon's credibility had already been impeached with three felony

convictions and pending federal charges. Further, Dixon's testimony merely corroborated other evidence presented at trial. Appellant's accomplice testified at trial and there was physical evidence linking Appellant to the murder. In addition to Dixon, seven other witnesses testified that Appellant made admissions to them. There is no "reasonable likelihood that" Dixon's testimony about pending state charges or a plea deal "could have affected the judgment of the jury." Shellito, 121 So. 3d at 460. Thus, Appellant fails the third prong of the Giglio test.

Since this claim is untimely and does not raise a reasonable doubt as to Appellant's culpability, this information is not newly discovered evidence. Thus, the post-conviction court was proper in denying this claim. Summary denial was appropriate because the claim is facially insufficient, procedurally barred, and meritless. This Court should affirm the post-conviction court's summary denial of this claim.

Cason's "Plea Deal"

Finally, Appellant argues that the State violated Brady for failing to disclose that Adrian Cason had negotiated a plea deal in exchange for assisting the State in prosecuting Appellant. Since Cason's criminal history was discoverable upon due diligence at the time of Appellant's trial and direct appeal, it is not newly discovered. Even if timely, Appellant's Brady claim is without merit as he had knowledge of and access to Cason's criminal history

throughout the proceedings and is immaterial. Further, Cason did not testify at Appellant's trial. Any impeachment evidence gleaned from Cason's sentencing proceedings is irrelevant. This information also would not negate any of the evidence of Appellant's guilt which was presented at trial. Summary denial of this claim was proper as the claim is facially insufficient, procedurally barred, and meritless.

Appellant claims that after "looking into" the criminal history of Ahmed Dixon, "counsel determined that he also needed to investigate Adrian Cason, even though Cason did not testify at Mr. Thomas' trial." (Motion at 7). As the Appellant admits, he was aware that Adrian Cason would potentially be a witness at his trial. (Motion at 7). The prosecutor stated on the record that Mr. Cason was "an important witness" that he "intended on using in both¹ of these prosecutions" against the Appellant. (R. at 32).

Appellant also knew Cason was pending criminal charges as they were incarcerated together in 1993. Like Appellant's case, Cason's case was tried in Duval County, case number 92-CF-9982. Thus, Appellant's trial and direct appeal attorneys could have easily kept abreast of the happenings in Cason's trial. Indeed, after a recent request, Appellant's counsel simply "was able to obtain a

¹ Appellant was also charged with the murder of his mother, who he killed to keep from talking to the police about his wife's death. Thomas, 693 So. 2d at 953.

copy of the record on appeal in Cason's appeal to the District Court of Appeal for the First District." (Motion at 9).

Further, Appellant should have been aware that Cason might potentially receive a benefit from having cooperated with the State on Appellant's case. The record of Cason's 1993 guilty plea to first-degree murder indicates that the State was not seeking the death penalty due to Cason's plea and assistance with other pending cases in the circuit. (Answer Attachment 3). The record of Cason's 1994 sentencing proceeding indicates that the State made a recommendation of concurrent sentences based on Cason's assistance with other cases including Appellant's. (Answer Attachment 3). Since Appellant knew Cason was pending criminal charges and was potentially a witness in his case, utilizing due diligence, Appellant should have simply requested the records of Cason's criminal proceedings. If he had done so, the latest that Appellant should have discovered this information was at the conclusion of Cason's appeal in 2002. Thus, at the latest, this matter should have been raised in 2003, over fourteen years ago, which is well beyond the one-year requirement for filing. Thus, Appellant cannot meet prong one of the newly discovered evidence test or prong two of the Brady test as the information was not suppressed.

Appellant cannot meet prong three of the Brady test because this information is immaterial. Appellant also cannot meet prong two of the newly discovered evidence test as this immaterial

evidence also would not produce an acquittal on retrial. Adrian Cason did not testify at Appellant's trial. Any impeachment value of a plea deal between Cason and the State could not have been actualized unless Appellant had called Cason as his own witness. Since Appellant made admissions about his wife's murder to Cason, Appellant was unlikely to call Cason as a witness in his defense and the overall impact of his testimony would have harmed Appellant's case. Even though this evidence could technically be favorable to Appellant because it is impeachment evidence, Cason did not testify at trial. Thus, Appellant fails prong three of the Brady test because this information is not material. Appellant also fails prong two of the newly discovered evidence test as it would not produce an acquittal on retrial.

Since this claim is untimely and does not raise a reasonable doubt as to Appellant's culpability, this information is not newly discovered evidence. Thus, the post-conviction court was proper in denying this claim. Summary denial was appropriate because the claim is facially insufficient, procedurally barred, and meritless. This Court should affirm the post-conviction court's summary denial of this claim.

CONCLUSION

WHEREFORE, this Court should affirm the denial of Appellant's post-conviction motion and affirm the conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 18th day of June, 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: J. Jervis Wise, Esq., at jervis@acquitter.com, Bjorn Brunvand, Esq., at bjorn@acquitter.com, and Martin J. McClain, Esq., Attorneys for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Jennifer A. Donahue
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