IN THE SUPREME COURT OF FLORIDA

THOMAS JAMES MOORE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC00-2483

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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PRELIMINARY STATEMENT

Appellant, Thomas James Moore, was the defendant in the trial court; this brief will refer to Appellant as such, Defendant, or by proper name. Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The State will reference the record in a manner similar to the Petition: "R" indicating the direct-appeal record. "PCR" referencing the post-conviction (3.850) record, and "Supp PCR," the supplemental record here. Available volume and page numbers are also provided. "IB" will designate Appellant's Initial Brief, followed by any appropriate page number.

This appeal is from the trial court's denial of DEFENDANT'S SECOND AMENDED MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND (PCR I 1-133), filed pursuant to Fla. R. Cr. P. 3.850. That Motion will be referenced as the "2D AMENDED 3.850." "App" will designate the of the Appendix to this brief, which consists of the trial court's written order at issue here.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State objects to the argumentative nature of Moore's Procedural History, for example his use of "despite," "lack of

public records compliance," (IB 2) "refused to comply" (IB 2 n.2), "a section that clearly did not apply" (4), "confusing nature of these orders" (IB 5), "stating simply" (IB 5), "preventing undersigned from investigating" (IB 6).

At this juncture the State briefly notes that it will rely upon several facts not omitted from the Initial Brief.

The State especially notes at this juncture that the multiple extensions of time that the trial court afforded Moore to file two amended 3.850 motions and extensive public records litigation were after the one-year limitation of Fla. R. Cr. P. 3.851. On April 20, 1998, the United States Supreme Court had denied certiorari in this case in Moore v. Florida, 523 U.S. 1083, 118 S.Ct. 1536 (1998).

The State also notes that in October 1998, the State Attorney's Office for the Fourth Judicial Circuit ("SAO") responded to Moore's public records request with several objections. The SAO also stated:

> 6. The requested public records, with the exception of the noted exemptions in this response, are ready for review at this office at a mutually agreeable time between the hours of 8:30 am to 5:00 pm, except holidays and weekends. Defense counsel is requested to provide at least 48 hours notice in scheduling time to view these records.

(Supp PCR I-part I 48-49)

In a December 10, 1998, letter, the SAO stated, subject to its objections, that its records "remain available subject to reasonable notice." The letter stated that collateral counsel's reliance upon laws effective after collateral counsel's initial request do not apply here. (Id. at 85)

On December 22, 1998, Moore's counsel demanded "additional public records" from the State Attorneys Office. (Id. 149 et seq) This additional demand targeted a long list of names, many of which contained no other identifying information.1 On that date, Moore's collateral counsel demanded "additional public records" from the JSO (Id. 96 et seq).

On March 25, 1999, the SAO filed a Motion to Quash Defendant's Written Demand. It alleged, among other things:

> 3. At that time [i.e., Oct. 21, 1998] records, with the exception of the noted exempted items, were made ready for review.2
> 4. To date no one from the Capital Collateral Regional ["CCR"] Office has contacted the State Attorney's Office regarding those documents.

(Id. at 199) The SAO further pointed out that the "additional demand" listed "63 subjects, 45 of whom had no further identifying data" and argued that CCR was not proceeding in good faith, that it was abusing the process, and that it was attempting to "restart the process, which is expressly forbidden by Rule 3.852." (Id. at 199-200)

On March 29, 1999, CCR filed its Fla. R. Cr. P. 3.850. (Supp PCR I-part II 203 et seq), consisting of 33 claims.

On April 29, 1999, the trial court conducted hearings on various public records demands and responses. (PCR IV 560 et seq); Supp PCR I-part II 265) At the hearing, the SAO stated that its files are available, an to-date, had not been inspected. (See PCR IV 569)

On May 12, 1999, the trial court found that CCR had "not even reviewed the records the agency [SAO] made available to him

through his original demand for production" and that the demand for additional records was "premature, to put it nicely." The trial court's order then invoke the requirements of Fla. R. Cr. P. 3.852(h) and (i) regarding any further demands of the SAO. (Supp PCR I-part II 273). CCR immediately filed a Motion for Reconsideration and/or Clarification. (Id. at 284-94)

CCR subsequently filed pleadings that stated the criteria of Fla. R. Cr. P. 3.852(i) in the language of the rule itself. (See, e.g., PCR III 458-60).

SUMMARY OF ARGUMENT

Moore essentially asserts throughout his brief that he could not proceed with his postconviction proceedings because of the blameworthy conduct of State agencies in stonewalling his attempts to procure public records. The state agrees that there is a connection between public-records aspects of this case and Moore's postconviction claims, but not the one Moore posits. Just as Moore fails to take the blame for any deficient knowledge of his trial counsel and collateral counsel concerning his past, he also fails to take any blame for his counsel's failure to pursue public records that were available for viewing for months.

Moore pretends that facts of his past are locked only in the drawers of State agencies. He overlooks his own intelligence, which was affirmatively established by those who knew him best and by his own words, as he testified in great detail regarding nearly his every step at the time of the murder.

In ISSUE I, the State claims that Moore has failed to specify how has been harmed by any missing or belated public records. He points the "belated" finger at the State, but he should "look in the mirror," which would reflect that his counsel failed to pursue available public records for months, as the one-year limit for his 3.850 expired. Thus, after the year, the trial court gratuitously afforded Moore more records than he has been entitled and gratuitously considered Moore's 2D AMENDED 3.850. Moore was certainly not entitled to amend his 3.850 yet-again (ISSUE III). In any event, ISSUE III falls simply because the Third Amended 3.850, even though endowed with additional information (generally attainable from Moore himself and his defense counsel), is still facially insufficient. Thus, throughout this brief, the State addresses claims that Moore says were better pled in that fourth 3.850.

In ISSUE IV, Moore mistakes the judicially imposed limits, which were well-beyond the bounds of what he was entitled, for judicial bias.

ISSUE II attacks the trial court's summary denial of four claims in Moore's 2D AMENDED 3.850, but, as the trial court ruled, they were all non-starters. All four claims share Moore's hindsighted discovery that he was not so intelligent after all: He was exposed to hazardous materials that impacted his brain as he grew up (IIA), he was drunk out of his mind the day of the murder (IIB), he needed an expert to say the types of things in claims IIA and IIB (Ake claim of IIC), and all these things, and

maybe more like them, could have been mitigation (IID). However, Moore's desire to re-tool his defense down a path different from the one he chose at trial under oath is the stuff of hindsight, not Strickland ineffectiveness or Strickland prejudice and not judicially cognizable newly discovered evidence. Moore chose to testify, and his own detailed testimony belies any claim that he has any mental deficiency worthy of mentioning. In fact, his relatives testified at the penalty phase about how smart he is. He even did his sister's homework for her, even her math.

ISSUES V and VI are additional hindsighted attempts by Moore to re-construct the path he chose at pre-trial and trial. There was a discussion among the judge and attorneys regarding Moore's case, Moore was not present, and apparently neither was a court reporter. Moore contends that if only he had been there, he would have changed his mind about waiving speedy trial. (ISSUE VI) However, Moore overlooks that before and after this discussion, Moore was agreeable to waiving speedy trial and continuing the trial. There is no indication whatsoever that anything occurred when Moore was not there that had not occurred at other times when he was there. The off-the-record discussion bore the theme that Moore personally endorsed at other times: His trial counsel needed more time to prepare for trial. A transcript (ISSUE V) would have shown what Moore already knew and endorsed.

ISSUE VII (Ake claim) resurrects Moore's hindsighted desire to his sworn testimony which, concerning Moore's intelligence, speaks for itself, as well as change the sworn testimony of his

relatives attesting to Moore's intelligence. The expert that the trial court provided to Moore was a dehors-Ake gift and, and as such, more than satisfied Ake. Further, Moore's failure to specify how more Ake expertise would help him pales in contrast to the trial record affirmatively showing Moore's intelligence. Likewise, Moore speculates that additional experts may have been able to assist him and simply concludes that they could have presented evidence inconsistent with the State's case. Moore's bald speculation and conclusion do not entitle him to relief.

This Court has previously rejected claims akin to ISSUES VIII (election option of lethal injection) and X (possibility of electrocution).

ISSUE IX might be raising the specter of the prosecutor sweeping the jury off its feet by convincing it that Moore is truly the "devil." In addition to the far-fetched nature of that suggestion, whatever "evil" lurked in Moore the day of the murder was grounded on the facts of the murder itself, that is, facts in evidence, and the prosecutor's comment was a fair comment on that evidence and a fair response to defense counsel's picture attempting to paint the State's witnesses as evil.

If ISSUE IX is challenging the prosecutor's argument as burden-shifting, case law upholding the type of jury-instruction language the prosecutor used is dispositive. Similarly, this Court has upheld the jury instructions on aggravators challenged in ISSUE XI.

The State also argues that many of these claims could have/should have been brought on direct appeal.

ARGUMENT

ISSUE I

WAS THE TRIAL COURT REASONABLE IN ITS PUBLIC RECORDS RULINGS? (Restated)

This Court applies the abuse-of-discretion standard in reviewing trial court public records rulings. See Mills v. State, 26 Fla. L. Weekly S275 (Fla. April 25, 2001); Glock v. State, 26 Fla. L. Weekly S9 (Fla. January 5, 2001); Bryan v. State, 748 So.2d 1003, 1006 (Fla. 1999). Accordingly, given the law and the totality of the facts, the test on appeal becomes whether "no reasonable [person] would take the view adopted by the trial court," Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). The State respectfully submits that in the instant case, the trial court's rulings were reasonable, meriting affirmance.

On April 20, 1998, the United States Supreme Court denied certiorari. See Moore v. Florida, 523 U.S. 1083, 118 S.Ct. 1536 (1998).

Collateral counsel initiated the public records in August 1998. (See Supp PCR 2 et seq) These requests included, inter alia, the Fourth Circuit's State Attorney's Office ("SAO")(Supp PCR 12-14) and the Jacksonville Sheriff's Office ("JSO") (Id. at 15-17). In October 1998, the SAO responded with several objections, but otherwise agreed to the request:

> 6. The requested public records, with the exception of the noted exemptions in this response, are ready for

> review at this office at a mutually agreeable time between the hours of 8:30 am to 5:00 pm, except holidays and weekends. Defense counsel is requested to provide at least 48 hours notice in scheduling time to view these records.

(Supp PCR I-part I 48-49) In a December 10, 1998, letter, the SAO reiterated, subject to its objections, that its records "remain available subject to reasonable notice." The letter contended that collateral counsel's reliance upon laws effective after collateral counsel's initial request do not apply here. (Id. 85)

On December 22, 1998, Moore's counsel demanded "additional public records" from the State Attorneys Office. (Id. 149 et seq) This additional demand targeted a long list of names.

On March 25, 1999, the SAO filed its Motion to Quash Defendant's Written Demand. It alleged, among other things:

> 3. At that time [i.e., Oct. 21, 1998] records, with the exception of the noted exempted items, were made ready for review.
> 4. To date no one from the Capital Collateral Regional ["CCR"] Office has contacted the State Attorney's Office regarding those documents.

(Id. at 199) The SAO contended that the "additional demand" listed "63 subjects, 45 of whom had no further identifying data" and argued that CCR was not proceeding in good faith, that it was abusing the process, and that it was attempting to "restart the process, which is expressly forbidden by Rule 3.852." (Id. at 199-200)

On March 29, 1999, CCR filed its Fla. R. Cr. P. 3.850. (Supp PCR I-part II 203 et seq), consisting of 33 claims.

On April 29, 1999, the trial court conducted hearings on the various public records demands and responses. (PCR IV 560 et

seq); Supp PCR I-part II 265) At the hearing, the SAO indicated that as-yet CCR had not inspected its files. (See PCR IV 569)

On May 12, 1999, the trial court found that CCR had "not even reviewed the records the [SAO] agency made available to him through his original demand for production" and that the demand for additional records was "premature, to put it nicely." The trial court's order then invoke the requirements of Fla. R. Cr. P. 3.852(h) and (i) regarding any further demands of the SAO. (Supp PCR I-part II 273). CCR filed a lengthy Motion for Reconsideration and/or Clarification. (Id. at 284-94)

Subsequently, amongst litigation consuming reams of paper, CCR filed pleadings that baldly stated the criteria of Fla. R. Cr. P. 3.852(i) in the language of the rule itself, without descending to any particulars whatsoever, including one filed April 7, 2000, directed at the SAO (See PCR III 458-60).

The State contends that where Moore sat on his public record rights for months, as his one-year for filing his 3.850 motion ticked away, any access that the trial court afforded Moore after that period was a gratuity. In this context, any public records afforded after that year elapsed was a gratuity, even when the requirements of Fla. R. Cr. P. 3.852(i) were attached to their access.

Thus, given the one-year deadline of Fla. R. Cr. P. 3.851 and Moore's delay in pursuing public records, the trial court could have lawfully conducted a Huff hearing at the end of April 1999.

Instead, Moore had the benefit of an additional year to amend his 3.850 twice and to collect additional records.

Moreover, the trial court's use of Fla. R. Cr. P. 3.852(i) as an "escape valve" for Moore to still pursue pertinent records was reasonable, and CCR's attempted use of it by simply using the language of the rule would afford CCR unbridled discretion in invoking the rule, which would run counter to the rule's intent to limit a defendant's "fishing expedition." As Sims v. State, 753 So.2d 66, 70-71 (Fla. 2000), explained;

> Any concerns that this construction of rule 3.852(h)(3) may lead to harsh results in the nonwarrant situation should be ameliorated by rule 3.852(i), which is patterned on section 119.19(9), Florida Statutes (1999). This provision allows collateral counsel to obtain additional records at any time **if collateral counsel can establish** that a diligent search of the records repository has been made and "the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence." Fla. R.Crim. P. 3.852(i)(1). This provision expressly states that it allows capital defendants to obtain records "in addition to those provided by this rule," including subdivision (h) of the rule. See Fla. R.Crim. P. 3.852(i)(2). Thus, the ability of capital defendants to obtain records under rule 3.852(i) is not contingent upon the signing of a death warrant.

Analogously applying the language of Bryan v. State, 748 So.2d 1003, 1006 (Fla. 1999), Moore "has "not shown good cause why ... new public records requests were not made until after" the period for filing Moore's 3.850 motion.

Moreover, as in Issue III and related points infra, Moore fails to specify the harm that supposedly has been inflicted upon him by whatever records he claims are still missing. Simply wanting additional records does not establish that their content

would likely bear any significance to anything else cognizable in a 3.850. The State respectfully submits that 3.852 public records access is not an end in itself, but rather, it is intended for indigent defendants to develop claims cognizable under 3.850. Thus, for example, as Moore has obtained additional records, he nevertheless has failed to produce a meritorious claim in his Third Amended 3.850. See Issue III infra and discussions of the Third Amended 3.850 throughout this brief.

Accordingly, the trial court's public records rulings were more than reasonable, meriting affirmance.

ISSUE II

DID THE TRIAL COURT REVERSIBLY ERR BY SUMMARILY DENYING CLAIMS IN THE SECOND AMENDED 3.850 MOTION? (Restated)

Moore's 2D AMENDED 3.850 included 25 claims spanning over 130 pages. (See PCR I 1-133) He now raises (IB 27-36) four matters on which he argues he was erroneously deprived of an evidentiary hearing.

At the outset, however, the State responds to the introductory paragraphs of ISSUE II, which argue (IB 25-26) that "[t]he trial court erroneously denied all of Mr. Moore's 3.850 claims without ordering an evidentiary hearing." Moore's position overlooks that the State had no objection to an evidentiary hearing on Claim 24 and, indeed, insisted upon such a hearing until Moore finally withdrew this claim. The State briefly elaborates.

In its December 16, 1999, RESPONSE TO 3.850 (PCR II 160-228), the State pointed out how Claim 24 was insufficiently pled but

announced, "in an abundance of caution," (R PCR II 210-214) that it did not oppose an evidentiary hearing on it. At the hearing conducted pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), and Fla. R. Cr. P. 3.851, and after a lengthy discussion (PCR VI 956-63), in which the State requested a hearing on Claim 24 to "clear the air" (PCR VI 963), Moore withdrew the claim (PCR VI 963). In sum, the State was ready, willing, and able to provide Moore with an evidentiary hearing until Moore withdrew Claim 24.

Turning now to the four matters targeted in ISSUE II, the State submits that the trial court correctly denied each of these matters summarily because of facially insufficiency. See, e.g., Davis v. State, 736 So.2d 1156, 1158-59 (Fla. 1999) ("To be entitled to an evidentiary hearing on a newly discovered evidence claim, Davis must, in addition to satisfying the due diligence requirement of rule 3.850(b), allege that he has discovered evidence which is 'of such nature that it would probably produce an acquittal on retrial'").[1]

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[1] On appeal, this Court "giv[es] deference to the factual findings of the trial court and independently review[s] the court's legal conclusions," Asay v. State, 25 Fla. L. Weekly S959 (Fla. October 26, 2000).

The trial court's denial of the 2D AMENDED 3.850 merits affirmance if correct for any reason. See Dade County School Bd. v. Radio Station WQBA, 731 So.2d 638, 644-45 (Fla. 1999) (collecting authorities); Murray v. State, 692 So.2d 157, 159 n. 2, 159-60 (Fla. 1997) (trial court summarily denied motion to suppress; "the trial court reasonably could have denied Murray's motion to suppress because" of consent); Caso v. State, 524 So.2d 422, 424 (Fla. 1988)("conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it").

IIA. ALLEGED CHILDHOOD EXPOSURE "TO HARMFUL AND POTENTIALLY HAZARDOUS WASTE" AS NEWLY DISCOVERED EVIDENCE. (IB 27-30)

Moore indicates (IB 27 n. 23) that this appellate sub-issue is based upon CLAIM III of his 2D AMENDED 3.850. The trial court properly denied CLAIM III. It correctly reasoned, in part:

> First, this Court finds that this information would not constitute newly discovered evidence in that it was discoverable using due diligence at the time of the defendant's trial. Bolendar, 658 So.2d 82 (Fla. 1995); Johnson v. Singletary, 647 So.2d 106 (Fla. 1994). Second, this Court finds the defendant's conclusory allegations to be facially insufficient. Kennedy, supra [Kennedy v. State, 547 So.2d 912 (Fla. 1989)].

(PCR IV 532, App A) The trial court's Order then analyzed Moore's "back-up claim" that trial counsel was ineffective for failing to present this evidence. (PCR IV 532-33)

The trial court correctly analyzed the implication of Moore's insistence that he did not kill the victim and his trial testimony asserting that defense:

> Further, this Court finds that there is no reasonable probability that had the jury been presented with evidence of the defendant's occasional exposure[2] to hazardous waste and his asserted reduction in mental function that the jury would have recommended a life sentence. The defendant's trial testimony alone sufficiently belied an assertion of mental deficiency sufficient to be a substantial mitigating factor ... .

The trial concluded that the "totality of the evidence overwhelmingly refutes any suggestions that a diminished mental

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[2] Contrary to Moore's assertion (IB 30 n. 29) that there was no basis for the trial court's "occasional" observation, the 2D AMENDED 3.850 alleged that Moore was exposed to hazardous waste on "several occasions" (PCR I 21). In any event, this is inconsequential to the outcome here for the reasons argued in the ensuing paragraphs.

capacity" would have made any difference in the death sentence. (PCR IV 533-34)

Relying upon Jones v. State, 591 So.2d 911 (Fla.1991), this Court in Robinson v. State, 770 So.2d 1167, 1170 (Fla. 2000) (upholding DCA result of reversal of trial court's order granting of a new trial reversed), recently explained the defendant bears a two-prong burden in order to prevail on a newly discovered evidence claim: First, "the evidence was unknown and could not have been known at the time of trial through due diligence," and second, "that the newly discovered evidence "would probably produce an acquittal on retrial."

Sims v. State, 754 So.2d 657, 660 (Fla. 2000), collected cases and elaborated on the defendant's burdens:

> It is well established that 'in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known [of it] by the use of due diligence."' *Jones v. State*, 709 So.2d 512, 521 (Fla.1998) (quoting *Torres-Arboleda v. Dugger*, 636 So.2d 1321, 1324-25 (Fla.1994)); *Robinson v. State*, 707 So.2d 688, 691 (Fla.1998); *Blanco v. State*, 702 So.2d 1250, 1252 (Fla.1997). Second, to warrant relief, 'the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.' *Jones v. State*, 591 So.2d 911, 915 (Fla.1991); *see also State v. Spaziano*, 692 So.2d 174, 176 (Fla.1997). In making this determination, the trial court must '"consider all newly discovered evidence which would be admissible" at trial and then evaluate "the weight of both the newly discovered evidence and the evidence which was introduced at trial."' *Jones*, 709 So.2d at 521 (quoting *Jones*, 591 So.2d at 916). Assuming the defendant's evidence meets the threshold requirement by qualifying as newly discovered, no relief is warranted if the evidence would not be admissible at trial. *See Robinson*, 707 So.2d at 691-92 (denying relief where statements made in affidavit did not expose affiant to criminal liability for perjury and lacked indicia of

reliability for admission as statement against penal interest).

Undergirding the imposition of these "high standard for newly discovered evidence claims" is the presumption that "all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged," Rutherford v. State, 727 So.2d 216, 220 (Fla. 1998) quoting Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Here, Moore failed to allege the factors prerequisite to relief on a newly discovered evidence claim. Although the 2D AMENDED 3.850 alleged (PCR I 21) that post-conviction counsel "recently discovered evidence that on several occasions while [Moore] was growing up," he was exposed to hazardous waste adversely affecting Moore's brain, it failed even allege that "the defendant or his counsel **could not have known** [of it] by the use of due diligence." Moreover, the 2D AMENDED 3.850 failed to allege any facts whatsoever that facially would have supported this prong of the test.[3] For this reason alone, the 2D AMENDED 3.850 was properly denied.

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[3] Even the Third Amended 3.850 (PCR III 332-34) does not allege this prong. Instead, it discusses how post-conviction counsel discovered a 1999 newspaper article regarding a site that was one mile "from the house where Mr. Moore was raised" and then alleges Moore's symptoms while growing up. For example, did counsel do a search for earlier articles and found none? There is not even a bare conclusory allegation that the site was not discoverable by due diligence at the time of pre-trial and trial here. Indeed, Moore's supposed symptoms were certainly known to himself.

Concerning the second prong that Moore failed to meet, he alleged that the hazardous materials "affected the proper functioning of Mr. Moore's brain" so that it "impact[ed] his case in several ways," then simply listed "his ability to act in a premeditated manner," "the application of statutory" mitigators, and the "application of nonstatutory" mitigators.

Baldly concluding that hazardous materials "impact[ed]" an ability to premeditate and "impact[ed]" mitigators does not facially allege a defense to premeditation or facially allege reasonably convincing the jury or trial judge of a mitigator, See Fla. Std. Jury Instr. (Crim) Penalty Proceedings--Capital Cases. Mens rea and mental mitigation can be "impact[ed]" with affecting the case in a legally cognizable way. Put another way, the "impact" can be de minimis. See Asay v. State, 25 Fla. L. Weekly S959 (Fla. October 26, 2000) ("at the *Huff* hearing, Asay's collateral counsel stated that evidence existed to support this claim, without indicating which witness had testified falsely or what evidence now existed to show that the testimony was false"; "Considering the conclusory nature of the allegations as to the *Brady* and *Giglio* claims, we find that the claims were legally insufficient and thus the trial court did not commit error in refusing to grant an evidentiary hearing as to these claims").

Moore needed to allege both prongs sufficiently. See Davis, 736 So.2d at 1158-59 ("must, **in addition to** satisfying the due diligence requirement of rule 3.850(b), allege that he has

discovered evidence which is 'of such nature that it would probably produce an acquittal on retrial'"). He alleged neither.

Even if Moore had otherwise alleged a prima facie newly-discovered-evidence claim, it nevertheless was directly and overwhelmingly contradicted by "the weight of ... the evidence which was introduced at trial," rendering it much less than probable that the new evidence would have made a difference in the outcome. See, e.g., Sims. As the trial court correctly found: "trial testimony alone sufficiently belied an assertion of mental deficiency ... ." Moore testified at trial at length, and his answers demonstrated that he maintained the capacity to reflect (premeditate), perceive, recall, and logically responded to the questions. Moore at trial described **details** of time, places, people, and events surrounding the time of the murder. (See R XI 1088-1143) For example, he testified:

> Q When was the first time that you saw Carlos Clemons and Vincent Gaines?
> A Around 12:00 0'clock that evening when me and Chris Shorter was standing between Johnetta Whitfield's house and Ms. Baker's house. He came down Division Street to Beaumont and proceeded to pull a gun out of his pants and chase this dude named Little Terry or Coonie down the street.
> ***
> ***
> Q [cross exam] Although you claim that you and Chris were together at the house when Mr. Parrish died?
> A I was around the corner. I came back to Chris' house. That's what I testified.

(Id. at 1094, 1127)

At one point Moore corrected counsel's question, "did they [detectives] read you your rights?" by responding, "No. They had me read them off of a form." (Id. at 1116) Other examples of

Moore's detailed testimony include: His description of how he would "cheat" Mr. Shorter in dope deals (Id. at 1093); his distinguishing "associates" from "friends" (Id. at 1141); his recollection of who had testified (See, e.g., Id. at 1142). He even corrected the prosecutor when she indicated that he testified that his mother called him, stating instead that he testified that he called his mother. (Compare R XI 1112, "did you make any phone calls", with XI 1136, "No. I said I called my mother").

Moreover, at trial in the guilt phase, Moore testified that he has lived at a Beaumont street address "all [his] life." (R XI 1088) He "lives" there with his grandmother and Wilhelmina Moore (his mother) and Shirley Moore (his aunt). (R XI 1089) At trial in the jury penalty phase, Wilhelmina Moore testified that Moore was born April 20, 1973, (R XIV 1468) and that Moore was "**very smart.**" More specifically:

> Q Now, would you please describe for the jury the type of student that James Thomas Moore was in elementary school?
> A **Very smart.** they wanted him to skip when he was in elementary school. But I asked them not to.
> Q Okay. Did he get good grades?
> A He was **an A/B honor roll student.**

(R XIV 1473) His mother continued by indicating that Moore posed no more disciplinary problems than "**normal**" and handled chores and would work at her job sometimes. (Id. at 1474-75) She testified that in middle school, Moore was a patrol boy and

played football. (Id. at 1479)[4] He obtained his **high school degree**. (Id. at 1482) On cross exam, she acknowledged that Moore has "**never suffered from any learning disabilities** while he was in school" (Id. at 1487).

Accordingly, Moore's sister testified at the penalty phase that Moore was "**very smart**" and that **he assisted her with her homework**, especially **math**. She testified that Moore "could tell me how to do my homework ... quicker than I could sit there and figure it out on my own." (Id. at 1512)

Thus, the "impact[s]" (2D AMENDED 3.850, PCR I 21) of this claim's new facts were overwhelmingly contradicted by other evidence in the case, and they directly contradicted Moore's own guilt-phase defense that depended upon the jury's belief in his capacity to perceive, recall, and accurately (and honestly) articulate the details of where he was the night of the murder and that depended upon the jury's acceptance of Moore as an otherwise normal human being worthy of saving, not executing. See Blanco v. Wainwright, 507 So.2d 1377, 1382, 1383 (Fla. 1987) ("trial record itself shows that trial counsel perceived a need to 'humanize' appellant by presenting such evidence"; "agree with the trial judge that developing and presenting such evidence would have been directly contrary to trial counsel's adopted

[4] She also indicated that Moore "had a problem with migraine headaches and vomiting a lot." (R XIV 1479) Thus, these facts alleged in the Third Amended 3.850 Motion (PCR III 332) are not new at all.

trial strategy of deemphasizing or avoiding the Mariel background").

Kennedy v. State, 547 So.2d 912 (Fla. 1989), affirmed the summary denial of a 3.850 motion, which had alleged ineffective assistance of counsel "for failing to investigate Kennedy's background adequately in order to present compelling mitigating evidence." This Court reasoned and held:

> It was the trial judge's conclusion, and we agree, that Kennedy did not demonstrate how the failure to introduce any further information regarding his background other than that which was already before the jury prejudicially affected the outcome of his trial. Likewise, we agree with the trial judge that counsel's decision not to present the videotape of Kennedy's surrender and arrest to the jury was a matter of trial strategy. We find the record supports the trial judge's conclusion that there was no reasonable probability that the admission of this evidence would have altered or affected the outcome of the trial.

Here, Moore failed to facially demonstrate how his proposed "new" evidence would have made a difference, and here the patent trial strategy was contrary to the thrust of this "new" evidence. See also LeCroy v. Dugger, 727 So.2d 236, 239, 239 n. 9 (Fla. 1998) (affirmed summary denial of claim that "trial counsel was ineffective in failing to investigate and present mitigation," including long list of mental health evidence, such as "learning disability" and "diminished level of psychological functioning at the time of the offense").

Essentially, because the jury chose to disbelieve Moore, he would like to try again: "Well, if the jury did not believe that I am smart and knew I did not do it because I was at locations 1, 2, 3 at times a, b, c, then maybe they will believe that I was

too mentally impaired to know what I was doing." "Newly discovered evidence" does not include the right to try mutually contradictory theories until one finally works, especially here where the extant evidence produced at trial overwhelmingly shows that story #2 is unfounded. If the trial as the "main event"[5] is to mean anything, it should preclude an evidentiary hearing here where the "new" evidence is so meager and the trial evidence directly contradicting it, so strong.

Moreover, concerning the guilt phase, mental impairment is not a mens rea defense in Florida unless it is combined with voluntary intoxication. See State v. Bias, 653 So.2d 380, 382 (Fla. 1995). Here, Moore's defense, as he personally swore to it, depended upon the jury believing that he was NOT intoxicated, and therefore able to perceive and remember details of the day of the murder.

In conclusion, on the face of the record, Moore has not met his burden of showing that his new evidence of a hazardous site would "probably produce" any result any different than the conviction and sentence of death. See also discussion of Issue IIB infra.

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[5] See Coleman v. Thompson, 501 U.S. 722, 747, 111 S.Ct. 2546, 2563 (1991) ("state trial on the merits the 'main event,' so to speak, rather than a 'tryout on the road'")

IIB. ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE TO INVESTIGATE VOLUNTARY INTOXICATION DEFENSE AND PROCURE MENTAL HEALTH EXPERTS. (IB 30-32)

Relying upon (IB 30 n. 30) Claim VII of the 2D AMENDED 3.850[6] (PCR I 27-32), Moore contends that trial defense counsel was unconstitutionally ineffective because he failed to properly "investigate the availability of a voluntary intoxication defense, and procure adequate assistance from mental health experts" (IB 30).

Cherry v. State, 659 So.2d 1069, 1072, 1073 (Fla. 1995), is among the many cases explaining the two-prong test that Defendant must allege and establish to show constitutionally cognizable ineffective assistance of counsel:

> Next, we consider the trial court's ruling finding the allegations of ineffective assistance of trial counsel, based on counsel's alleged inadequate performance during the guilt phase of his trial, insufficient to meet the standards set forth under the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, a defendant must establish two components in order to demonstrate that counsel was ineffective: (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense. As to the first prong, the defendant must establish that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' *Id.* at 686, 104 S.Ct. at 2063. As to the second prong, the defendant must establish that 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is

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[6] This issue summarily references (IB 30 n. 30) the Third Amended 3.850 without specifying what part(s) of the Third Amended pertain to this issue or how it would assist Moore's cause. The State respectfully submits that a party should not be required to guess at the opposition's argument and then rebut that guess. In any event, it appears that Claim IV of the Third Amended 3.850 (PCR III 334-40) is virtually (if not) identical to Claim VII of the 2D AMENDED 3.850 (PCR I 27-32).

> reliable.' *Id.* '[U]nless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.' Id. Applying this standard, we find no error by the trial court in rejecting these claims.
> ***
> ... Cherry has not even attempted to demonstrate that these alleged errors would have altered the outcome in this case. The standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result.

See also Johnson v. State, 593 So.2d 206, 209 (Fla. 1992) (penalty phase).

In determining whether Defendant has overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance," Strickland, 466 U.S. at 669, 104 S.Ct. at 2055, it is "almost always possible to imagine a more thorough job being done than was actually done," Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986), but, as the above block-quote indicates, that is not the test.

As a threshold matter, Moore's 2D AMENDED 3.850 failed to specify what evidence he has found that would show he was intoxicated at the time of the crime. Moore's conclusory assertion that such evidence was "plentiful and available" is no substitute for alleging its nature and availability to defense counsel. See LeCroy v. Dugger, 727 So.2d 236, 239 (Fla. 1998) (relying upon the trial court's reasoning, in part, "Defendant failed to detail the nature and/or source of that evidence"); Ragsdale v. State, 720 So.2d 203, 207 (Fla. 1998) ("hearing is warranted on an ineffective assistance of counsel claim only

where a defendant alleges specific facts"; "summary or conclusory allegation is insufficient to allow the trial court to examine the specific allegations against the record"); Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989) ("claimant must identify particular acts or omissions" constituting ground for post-conviction relief; ineffectiveness claim); Raulerson v. State, 462 So.2d 1085, 1087 (Fla. 1985) (adopted trial court ruling: "no factual basis set forth in the motion that this ground was not available to the Defendant at these three prior stages of this case"); Maxwell, 490 So.2d at 932 ("claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards"); Meeks v. State, 382 So.2d 673, 675 (Fla. 1980) ("when ineffective assistance of counsel is asserted, the burden is on the person seeking collateral relief to specifically allege and establish the grounds for relief and to establish whether these grounds resulted in prejudice to that person").

The trial court's order correctly reasoned, citing multiple authorities:

> [A] defense [of voluntary intoxication] would have been diametrically opposed to the trial strategy presented and defendant's own guilt phase trial testimony that he was not even present at the time of the murder. *** Mere impairment of the mental faculties is insufficient to establish the defense. *** Not only would the defendant's trial testimony (which was intended to avoid *any* homicide conviction, as opposed to a conviction for the general intent offense of Second Degree Murder) have been diametrically opposed to this defense, but there is no possibility that the jury would have accepted this defense given the overwhelming evidence of the defendant's knowing and planned commission

> of the charged offenses. *** Given the defendant's reasonable trial strategy and testimony consistent therewith, presentation of this evidence would have had a *negative* impact on the jury during the penalty phase as well. Therefore, this Court finds that the trial record refutes this claim.

(PCR IV 535-36)

Accordingly, Bryan v. State, 748 So.2d 1003, 1007 (Fla. 1999), held, in part, that

> Bryan's recent claim that his mental health experts and trial counsel lacked facts upon which to explore his alleged drug use, drinking problem, and sleep deprivation at the time of the crime is undermined by his own failure to provide such facts himself. Rather, **Bryan insisted that he did not commit the murder**. Bryan **testified at trial** that he slept while Cooper and the victim were on a drug deal from which the victim never returned, and he attributed the murder to Cooper.

Here, as in Bryan, the record patently shows that the defendant's latest defense is inconsistent with the one he chose at trial. See also Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995) ("an involuntary intoxication defense would actually have been inconsistent with Cherry's defense that he had not committed these murders, as well as Cherry's own testimony on the issue of intoxication"); Torres-Arboleda v. Dugger, 636 So.2d 1321, 1324 (Fla. 1994) ("we do not find that counsel's performance relating to the murder weapon was deficient"; "claims that counsel should have argued that the gun could have belonged to the victim and that the shooting could have occurred during a struggle for the weapon. However, counsel cannot be faulted for failure to raise these speculations relating to the weapon when defendant steadfastly maintained his alibi defense").

Instead of providing facts supporting voluntary intoxication, Moore "testified at trial" as to the details of his whereabouts on the day of the murder. See discussion supra (Issue IIA) Thus, intoxication evidence would have undermined Moore's own testimony, making his conviction even more assured and the allegation here insufficient to facially show the Strickland prejudice prong's reasonable probability of any different result.

In conclusion, Moore at trial swore under oath that he remembers the details of where he was at various times the night of the murder, even to the point of testifying which streets he walked down and insisting on who called whom that night, but now, armed with hindsight, he wishes to contradict his own testimony and "try another defense." Moore's hindsight has no place in an ineffective-assistance-of-counsel analysis. See Cherry v. State, 659 So.2d 1069, 1072, 1073 (Fla. 1995) ("standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result").

IIC. CLAIM ALLEGING VIOLATION OF "AKE V. OKLAHOMA." (IB 30-32)

Apparently,[7] Moore contends that this claim is based upon CLAIM VIII of his 2D AMENDED 3.850 (PCR I 33). Moore's admission that this claim was a "shell" (IB 33, PCR VI 930-31) concedes its insufficiency in the 2D AMENDED 3.850. The trial court correctly

[7] Moore's brief indicates "Claim IIX" (IB 32 n. 32) but his argument (IB 33) indicates he meant "Claim VIII."

ruled on that basis. (See PCR IV 536) In an attempt to save the claim, Moore relies upon its presentation in his Third Amended 3.850, which the trial court refused to consider. In response, the State adheres to its position in Issue III infra that the trial court reasonably refused to consider the Third Amended 3.850. However, in an abundance of caution, and to lay some of the groundwork for its argument in Issue III that the Third Amended 3.850 could not have made a difference in the Huff hearing, the State now addresses the claim as presented in the Third Amended Motion, apparently in its CLAIM V (PCR III 340-46).

Arguendo, in the best possible light for Moore, this claim is facially insufficient. Essentially, the claim facially admits that "counsel was successful in having a mental health expert appointed," Cherry, 659 So.2d at 172, thereby rendering the claim meritless.

Further, this claim argues that Dr. Krop, who was appointed for trial counsel to conduct a confidential evaluation, was not provided certain "background information" (PCR III 341-42). However, when it comes to facially alleging what, if any, difference, this information would make here, Moore only states the differences in general terms, citing to reference books (PCR III 34 38). Moore does not allege that providing missing information to the expert would have made a material difference in an evaluation **in this case.**

In preparation for his post-conviction motion, years ago Moore could have presented the "new" information to Dr. Krop or another

expert and asked **whether expert opinion would be any different.** In addition to failing to allege any facts showing that the omission of information in this case made any difference, Moore also fails to allege what that difference would be and thereby fails to show its **materiality to an issue at trial.** See Thompson v. State, 759 So.2d 650, 666 (Fla. 2000) (Ake claim facially insufficient because, inter alia, failed to allege "how their evaluations would have changed had counsel performed effectively").

Moreover, undoubtedly in every case there are facts that could have been brought to the attention of the expert, and, undoubtedly, collateral counsel can always find an expert who would be willing to opine in terms more favorable to the defendant. However, as suggested by Cherry, being able to find some isolated "new" facts or find a more favorable expert is not the test. See, e.g., Harris v. Vasquez, 949 F.2d 1497, 1516 (9th Cir. 1990) ("*Ake* does not guarantee access to a psychiatrist "who will reach only biased or favorable conclusions"), citing Granviel v. Lynaugh, 881 F.2d 185, 192 (5th Cir.1989).[8]

However, even alleging some differences as sufficient would lose sight of the Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), opinion itself. Cherry v. State, 25 Fla. L. Weekly S719 (Fla. Sept. 28, 2000), parenthetically captured the

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[8] Indeed, the State asserts that there is no constitutional right to an "effectiveness" of expert opinion under Ake. See Wilson v. Greene, 155 F.3d 396, 400-404 (4th Cir. 1998).

essence of Ake: "defendant entitled to competent mental health evaluation where defendant's mental condition is serious issue in case." Here, as discussed supra concerning Issues IIA and IIB, the testimony at trial, especially that of Moore himself, assured that his "mental condition" was not a "serious issue."

Indeed, each item of the alleged new "information" (PCR III 342) would have been stored in Moore's memory, the same memory that enabled him to lay out his story consisting of the details of what he supposedly did every step of the way the day of the murder, and the same memory that enabled him to be "very smart," an "A/B student," "never suffer[ing] from any learning disabilities while he was in school," and assisting his sister with her homework (R XIV 1473, 1487, 1512). If blame is to be laid for Dr. Krop not possessing any of this information, it falls right at Moore's feet.

In Bryan, 748 So.2d at 1007, and here, "information in support of this claim was available at the time of trial," and the claim that mental health expert lacked facts was "undermined by [the defendant's] own failure to provide such facts himself." As in Bryan the defendant claimed he was innocent.

Accordingly, if blame is to be laid for post-conviction counsel not possessing this "new" information, it also falls upon Moore himself. Moreover, Dr. Krop's appointment has been a matter of record for years (See, e.g., R V 107), as has Moore's "problem with migraine headaches and vomiting a lot" (R XIV 1479).

IID. CLAIMED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO INVESTIGATE AND PRESENT AVAILABLE MITIGATING EVIDENCE (IB 33-36)

Moore states that this sub-issue is based upon CLAIM IX of his 2D AMENDED 3.850 (PCR I 33-40).[9] The trial court correctly ruled, as it had concerning other supposed mental-mitigation evidence, that Moore's claim was facially insufficient. Moore failed to allege "any facts in support of these allegations." (PCR IV 536). CLAIM IX discusses for pages the general duties of trial counsel. (See PCR I 34-37). In paragraph 7, Moore alleges that "counsel failed to fully investigate and develop crucial evidence in mitigation" (PCR I 37), but he failed to indicate the nature of that "crucial evidence." Similarly, he continues with generalities that provide no notice of the specific facts that he claims trial counsel unconstitutionally failed to use: "substantial and compelling mitigating evidence" (Id.), "wealth of statutory and non-statutory mitigating factors" (Id. at 38), and "horrid reality Mr. Moore lived with" (Id.). In paragraphs 10 and 11, Moore alleges that he had a "serious abuse problem" and that he was "extreme[ly]" intoxicated at the time of the offense (Id. 38), without specifying any facts regarding the nature of the abuse or intoxication.

Moreover, as has already been discussed supra, emphasis upon substance abuse would have undermined the evidence to which Moore himself swore; such an emphasis would have contradicted a

[9] It appears to be identical to CLAIM VIII in Moore's Third Amended 3.850 (PCR III 355-61).

plethora of other evidence that any abuse problem failed to materially affect Moore's rationally concocted and detailed story of his steps the day of the murder, his actual behavior during the murder, or his "normal" and "smart" upbringing. Thus, the State adopts its sub-issue IIA, IIB, and IIC discussions of these matters as its response here.

ISSUE III

DID THE TRIAL COURT REVERSIBLY ERR BY NOT CONSIDERING MOORE'S THIRD AMENDED 3.850[10] (Restated)

Moore argues:

> Due to the fact that Mr. Moore had filed a timely 3.850 motion on June 22, 1999, and due to the fact that the lower court had not adjudicated any of Mr. Moore's postconviction claims. the lower court should have accepted his April 20th [third] amendment in accordance with Fla. R. Cr. P. 3.851(b)(3).

(IB 42) Moore then argues that the trial court's refusal to consider the Third Amended 3.850 "deprived him of the benefit of this Court's precedent allowing amendments after public records have been provided" (IB 43).

Moore argues (IB 45-46) that the trial court's rulings violate his due process and equal protection rights. However, these arguments were not posed to the trial court when it determined whether to consider the Third Amended 3.850, (See PCR V 888-909,

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[10] The Third Amended 3.850 is found at PCR III 308-452. The 2D AMENDED 3.850, on which the trial court conducted the *Huff* hearing, is at PCR I 1-133.

VI 910-12) and thereby, they were not preserved. See, e.g., Swafford v. State, 636 So.2d 1309, 1311 (Fla. 1994) ("*Espinosa* *** claims are cognizable in postconviction proceedings if they have been preserved, but Swafford did not preserve the claims he now makes, and they are procedurally barred"); Hill v. State, 549 So.2d 179, 182 (Fla. 1989)("constitutional argument grounded on due process and Chambers was not presented to the trial court. Failure to present the ground below procedurally bars appellant from presenting the argument on appeal."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Instead of due process or equal protection, Moore's counsel essentially argued that the Third Amended 3.850 was "properly filed based on the records" that had been received (PCR V 890), based upon a clarification in communication between collateral counsel and Moore (PCR V 893-94), the result of paring down and combining pre-existing arguments (PCR V 894), a consequence of the trial court scheduling a Huff hearing (PCR V 904), and due to collateral counsel's understanding that the trial court had authorized amendments (PCR V 905). At one point Moore's counsel simply asserted that the 2D AMENDED 3.850 no longer exists because it was amended (PCR VI 910), thereby suggesting that a defendant's collateral counsel has the unbridled discretion to file any amendment at any time.

Analyzing the "merits" of Issue III, the State contends that the trial court, given the multiple extensions and opportunities it had already gratuitously provided Moore, See, e.g., Issue I

supra, the trial court's ruling was reasonable[11] and that Moore has failed show any claim alleged in the Third Amended 3.850 but not alleged in the 2D AMENDED 3.850 has any merit, rendering the trial court's ruling non-prejudicial and this claim unripe. The State first discusses the absence of prejudice to Moore and the absence of ripeness.

Throughout this brief, under each issue the State has endeavored to respond to each of Moore's arguments that Moore tenders as based upon the Third Amended 3.850. The State respectfully submits that it has demonstrated that, as a matter of law, each one would not have entitled Moore to post-conviction relief. Therefore, the failure to have a Huff hearing on the matters that Moore identifies in his Initial Brief as added in the Third Amended 3.830 is not reversible error. See Davis v. State, 736 So.2d 1156, 1159 n. 1 (Fla. 1999) ("In view of the fact that the instant motion is successive and legally insufficient on its face, we find this error harmless"), citing Groover v. State, 703 So.2d 1035, 1038 (Fla. 1997) ("[E]ven if a *Huff* hearing had been required in the instant case, the court's

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[11] Compare Glock v. State, 26 Fla. L. Weekly S9 (Fla. January 5, 2001) (pending death warrant; "Glock has not made a showing as to how any of the records he has requested and has not received relate to a colorable claim for postconviction relief or to a 'focused investigation into some legitimate area of inquiry'"; "trial court did not **abuse its discretion** in denying the motions to compel and in determining that Glock's right to public records was not denied under section 119.19, Florida Statutes, and rule 3.852"), with Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980) (abuse of discretion defined at "no **reasonable** [person] would take the view adopted by the trial court").

failure to do so would be harmless as no evidentiary hearing was required and relief was not warranted on the motion.").

In contrast to the lack of prejudice demonstrated by the content of the Third Amended 3.850, two salient facts are noteworthy:

1. Before the Huff hearing, the trial court expressly invited Moore to tender any claims that arise due to recently provided public-records information, and Moore's counsel could not show the trial court any substantive post-conviction allegation that has thus far come to light due to any public records that had been belatedly provided (See PCR V 888-909, VI 910-12; accordingly, the trial court found that "there are no proposed amendments that met the criteria that I set forth on March 8th" (PCR V 908); and,

2. Moore has not otherwise tendered to the trial court any properly sworn additional claims that arose due to newly provided public records.

Therefore, if and when Moore tenders to the trial court otherwise meritorious claims that he adds due to information he receives from any belatedly supplied public records, the issue he now presents would be ripe for trial court, and ultimately this Court's, consideration. At that juncture, the source of the information could be scrutinized and the "blame" for any delay analyzed:

- Is the new claim, in fact, based upon information newly acquired by collateral counsel from a state agency?

- Was that information previously available in other records or through collateral counsel's due diligence?
- Was Moore, as a matter of law, entitled to the public record and did he request it in a reasonable and diligent manner?
- Generally, was the agency primarily responsible for the delay or was Moore's counsel?[12]

However, as of now, these types of questions cannot be addressed because this issue has not ripened.

Accordingly, here the trial court at the April 20, 1999, Huff hearing invited post-conviction counsel to file "something" regarding public records if prejudice could be shown. The trial court indicated, "We will talk about it." (PCR V 853)

Ventura v. State, 673 So.2d 479, 480 (Fla. 1996), supports the foregoing position:

> Five days before the status hearing set in this cause, Ventura amended his still outstanding motion for rehearing on the original rule 3.850 motion to include factual allegations made possible by the intervening public records disclosure. At the status hearing, the trial judge denied the motion for rehearing on the grounds that no provision existed for amending a motion for rehearing.

Thus, in Ventura, unlike here, the content of new claims was causally tied to "the intervening public records disclosure." continued:

> The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits

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[12] On "blame" at this juncture, see Moore's delay, outlined in Issue I supra.

> because of an asserted **procedural default that was caused by the State's failure to act.**

673 So.2d at 481. Here, there has been no showing that the State "caused" and material deficiency in Moore's postconviction motions. Thus, the remedy in Muehleman v. Dugger, 623 So.2d 480, 481 (Fla. 1993), was to allow the defendant "to amend his 3.850 petition to include any facts or claims contained in the sheriff's records."

At this juncture, in addition to this issue being not ripe, the State respectfully submits that the trial court's rulings have been reasonable, See also Issue I supra, including its decision not to consider the Third Amended 3.850, in light of the totality of facts in this case, thereby meriting affirmance.

As a basic premise for the trial court's reasonableness, it should not be overlooked that Fla. R. Cr. P. 3.851 limits the time in which a motion for postconviction relief should be filed, and this Court has expressed its concern over delays in the postconviction process. The trial court has attempted to move this case along consistent with these concerns. Given these overarching concerns, Moore bears the burden of demonstrating a valid reason for filing beyond that deadline. Cf. Parker v. Dugger, 537 So.2d 969, 973 (Fla. 1988) ("Petitioner has presented no valid reason for this untimely filing"). By and large, his post-conviction claims are based on the law and the trial record that has existed for years.

Further, on March 8, 2000, in spite of Moore's delay, See Issue I supra, the trial court expressly invited Moore to amend

his 3.850 motion based upon any new information he receives from the records he was pursuing:

> If they come up with something as a result of obtaining the investigative file that they feel is something that can be added to the second amended or third amended, whatever we are on, 3.850, they are to, within 20 days from the March 17th, furnish proposed amendments to the state attorney's office and/or the attorney general.

(PCR V 769) The trial court's ruling reasonably afforded Moore the opportunity to present any new claims.

ISSUE IV

DID THE TRIAL COURT REVERSIBLY ERR BY DENYING MOORE'S MOTION TO DISQUALIFY THE TRIAL JUDGE? (Restated)

It appears that this issue is based upon the trial court's Order Denying Defendant's Motion to Disqualify Judge (Supp PCR 498). This claim and the underlying August 27, 1999, motion (Supp PCR 479-96) are predicated upon a statement the trial court made in its August 19, 1999, Order on Defendant's Motion for Reconsideration and Request for Hearing, and the Defendant's Supplement to that Motion (Supp PCR 475-77). The August 19 order laid out some of the details leading to the statement targeted here (Supp PCR 476) that the trial court intended[13] to grant no more extensions of time for Moore to file his final motion for post-conviction relief and that the order was not subject to a motion for rehearing.

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[13] It is noteworthy that this same circuit judge at the April 20, 1999, public records/Huff hearing invited post-conviction counsel to file "something" regarding public records if prejudice could be shown. (PCR 853)

Especially in the context of this case, involving multiple extensions of time, the trial court's statements were no more than an a caveat or, at worst, an adverse ruling, which is not a ground for disqualification. See Barwick v. State, 660 So.2d 685, 692 (Fla. 1995) (collecting authorities); Rivera v. State, 717 So.2d 477, 481 (Fla. 1998). For example, Correll v. State, 698 So.2d 522, 524-25 (Fla. 1997), upheld the denial of a motion to disqualify, which had alleged, inter alia, that

> Judge Stroker demonstrated bias against Correll's counsel when he suggested that the Office of Capital Collateral Representative (CCR) uses chapter 119 as a delaying tactic in death penalty cases *** and that the trial court ruled against him in denying his request for an evidentiary hearing on his public records claim.

Indeed, it is common practice among Florida appellate courts to put counsel on notice that no more extensions will be granted. In the instant case, this Court's March 14, 2001, order stated that "NO FURTHER EXTENSIONS OF TIME WILL BE GRANTED TO APPELLANT FOR FILING THE INITIAL BRIEF ON THE MERITS." See also, e.g., The Florida Bar v. Nesmith, 707 So.2d 331, 332 (Fla. 1998) ("On December 29, 1995, respondent filed a second request for an extension of time"; "district court granted an extension until January 30, 1996, with the caveat that no more extensions would be granted").

ISSUE V

IS MOORE ENTITLED TO RELIEF IN THIS APPEAL FROM THE DENIAL OF HIS MOTION FOR POST-CONVICTION RELIEF BECAUSE HE WAS ALLEGEDLY PREJUDICIALLY DENIED AN APPELLATE RECORD IN HIS DIRECT APPEAL? (Restated)

and

ISSUE VI

IS MOORE ENTITLED TO RELIEF IN THIS APPEAL FROM THE DENIAL OF HIS MOTION FOR POST-CONVICTION RELIEF BECAUSE HE WAS NOT PRESENT AT A JUNE 22 DISCUSSION AMONG COUNSEL AND THE TRIAL JUDGE? (Restated)

These two issues (IB 51-53, 53-54) concern the same event, that is, Moore's absence from discussion among counsel and the trial judge on June 22, 1993. Neither of these claims is properly heard here.

This is an appeal from the trial court's order that denied Moore's 2D AMENDED 3.850,[14] which did not present either of these issues to the trial court for a ruling. (See I 1-133) Therefore, if either of these claims would have been otherwise cognizable in a motion for post-conviction relief, they would be procedurally barred due to a failure to present them to the trial court. See, e.g., Swafford v. State, 636 So.2d 1309, 1311 (Fla. 1994) ("*Espinosa* *** claims are cognizable in postconviction proceedings if they have been preserved, but Swafford did not preserve the claims he now makes, and they are procedurally barred"); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

[14] While CLAIM XII of the 2D AMENDED 3.850 (PCR I 42-44) presented a claim that Moore was absent from the swearing of the jury, it did not discuss alleged absence from a pre-trial discussion.

Further, because these issues were not presented to the trial court, the trial court's order does not rule upon them. Therefore, there is no trial court order or ruling to appeal concerning these issues, providing yet another reason for rejecting these issues. As Frazier v. State, 107 So.2d 16, 19 (Fla. 1958), put it:

> [N]o ruling having been secured by the defendant by the trial court as to the composition of either the grand jury or the petit jury, there is no action, request, or ruling had or made in the proceedings below properly before us for review.

See also Armstrong v. State, 642 So.2d 730 (Fla. 1994) ("trial judge reserved ruling on this issue and apparently never issued a ruling ..., this issue is procedurally barred"); Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983) ("appellant did not pursue his" objection "even though the judge did not rule on" it. "Under these circumstances, appellant has not preserved the issue for appeal").

Moreover, absence at an alleged critical stage is not cognizable on collateral review, See Blanco v. Wainwright, 507 So.2d 1377, 1380 (Fla. 1987) (claim that "not present at bench conferences held outside the hearing of the jury").

Further, these issues are procedurally barred. They are improper attempts at a second appeal, See Medina v. State, 573 So.2d 293, 295 (Fla. 1990) (Proceedings under rule 3.850 are not to be used as a second appeal; Kight v. Dugger, 574 So.2d 1066, 1073 (Fla. 1990) ("A procedural bar cannot be avoided by simply couching otherwise-barred claims in terms of ineffective

assistance of counsel"), and they try to raise matters for which no objection put the trial court on notice, See, e.g., Cole v. State, 701 So.2d 845, 850 (Fla. 1997) ("claim is also procedurally barred because Cole did not make a contemporaneous objection to any bench conferences being held in the hallway or to his desire to participate in any of the conferences"); U.S. v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482 (1985).

Arguendo, in an abundance of caution, however, the State presents a brief argument on the merits, which substantially overlaps, albeit in a much more abbreviated form, the arguments presented in its habeas response filed the same day as this brief.

Here, in contrast to allegations rooted in the Confrontation Clause or fairness-based due process, See generally Muhammad v. State, 26 Fla. L. Weekly S37 (Fla. 2001), Moore speculates (IB 54) that if he were present on June 22, he would have changed his mind regarding the waiver and continuance(s) he had endorsed before and after the June 22 "discussions" regarding the procedural matter, i.e., procedural speedy trial. As here, in Stano v. State, 473 So.2d 1282, 1288 (Fla. 1985) ("state presented two motions at the status conference"), the totality of the record demonstrates that Moore suffered no prejudice. Here, not only were a plethora of pleadings filed by his counsel on his behalf in that period (See R I 12 et seq, II; transcript of 10/20/1993 motions hearings at R V 30-109), but also, nothing was decided differently on June 22 than had been decided at other

junctures with Moore present. The State briefly elaborates on the latter point.

On May 11, the month prior to the "discussion" targeted here, **Moore was present** in open court (See R V 16-17), when defense counsel discussed delaying the trial date due to "a great deal of discovery that has to be done." (R V 18-20) Defense counsel expressly indicated that he had discussed the matter with Moore and announced that Moore's willingness to waive speedy trial. (R V 19-20, 22) The parties subsequently announced they had coordinated calendars and jointly recommended a trial date of July 12. On May 11, 1993, **Moore personally executed** a written waiver of speedy trial, which was filed on June 23, 1993. (R II 240) On June 23, 1993, at the open-court hearing Moore excerpts (IB 51-52, 54), the trial court and counsel discussed possible trial dates beyond July 12. (R V 25) At the June 23 hearing, defense counsel again indicated his need for further discovery (R V 24-25) and again confirmed the waiver of speedy trial. (See R V 25-26) At the June 23 hearing, the trial was scheduled for August 30. (R V 25)

On August 27, 1993, in open court, defense counsel requested another continuance, and the trial court elicited Moore's explicit and personal consent to a new trial date of October 25th. (R V 28) The trial court then announced, in Moore's presence, that speedy trial previously had been waived by the defense's prior motion for continuance. (R V 28)

In sum, within a few weeks prior to the June 22 "discussions," reported events show that Moore personally agreed to waive speedy trial. The day after the "discussions," Moore failed to contest his defense counsel's efforts to delay the trial and failed to contest or even question the waiver he had previously executed. And, then a few weeks later, Moore explicitly endorsed continuing the case. Thus, the June 22 "discussions" merely mirrored what Moore had agreed to on other days.

Nothing "critical" occurred on June 22 because, first, nothing occurred that day contrary to what Moore had agreed at other times; second, the defense had requested more than one continuance, any one of which would have waived speedy trial, See Stewart v. State, 491 So.2d 271, 272 (Fla. 1986) (collecting authorities); and, third, because speedy trial discharge is not self-executing, but rather, requires Moore to invoke it and satisfy the processes of Fla. R. Cr. P. 3.191(h),(j), and (p) (1993),[15] which are matters that his brief does not even perfunctorily allege.

See also Garcia v. State, 492 So.2d 360, 363 (Fla. 1986) ("no adverse rulings were made on the motions"); Provenzano v. Dugger, 561 So.2d 541, 547-48 (Fla. 1990) (alleged defendant's absence at "several pretrial motions"; as basis for ineffective assistance of appellate counsel claim; "Provenzano could not have made a

[15] Indeed, Fla. R. Cr. P. 3.191(j)(2) provides that the actions of defense counsel alone can prevent procedural-speedy-trial discharge.

meaningful contribution to counsel's legal arguments on these occasions"); Cotton v. State, 764 So.2d 2, 3 (Fla. 4th DCA 1998).

Issue V (IB 51-53), concerning the absence of the transcript, fails to, in any way specify, what significant would have appeared in the June 22 transcript. To the contrary, all of the reported proceedings immediately before and after June 22 indicate an unabated and uninterrupted theme that defense counsel, with Moore's consent, needed more time to prepare for trial and to prepare a multitude on motions (See R I 12 et seq, II; transcript of 10/20/1993 motions hearings at R V 30-109).

Moore cites (IB 52) to Delap v. State, 350 So.2d 462 (Fla. 1977), but the stark contrast between the facts there and those here belie Moore's claim. In Delap, 350 So.2d at 463, the trial court summarized the missing transcripts:

> It further appears to the Court that no portions of the transcript of the jury charge conferences; charge to the jury in both the trial and penalty phases; voir dire of the jury; or closing arguments of counsel in both the trial and penalty phases regarding the trial of this cause have been filed with the Clerk as directed by said Order of May 11, 1977.

See also Hardwick v. Dugger, 648 So.2d 100, 105 (Fla. 1994) (rejected an ineffective assistance of trial counsel claim regarding bench conferences at which he was not present and that were not recorded; test is whether the "absence of recorded bench conferences ... renders review impossible"); Songer v. Wainwright, 423 So.2d 355, 356 (Fla. 1982) (rejected a claim of ineffective assistance of appellate counsel; "appellate counsel

failed to include the charge conference in the record and failed to contest its absence"; no prejudice).

In conclusion, because the record shows that nothing transpired June 22 of a "critical" magnitude or otherwise adverse to Moore, neither issue presents Strickland deficiency or prejudice necessary for Moore to prevail on his ineffectiveness arguments.

ISSUE VII

IS MOORE ENTITLED TO RELIEF BASED UPON HIS AKE ALLEGATIONS INDEPENDENT OF HIS MOTIONS PRESENTED TO THE TRIAL COURT? (Restated)

This issue substantially repeats the argument addressed supra, especially under IIC, which the State adopts for Issue VII. For example, Moore, in fact, received a mental health evaluation satisfying Ake, Dr. Krop's report has been available in the record for years, information regarding Moore's headaches and vomiting has been available in the record for years, Moore's background has been in Moore's head for years, and supposed mental deficiencies are overwhelmingly and patently contradicted by the trial record, including Moore's testimony and personally-sworn defense.

In addition to an Ake claim, Issue VII adds contentions concerning other experts purportedly based upon "evidence and records in the defense attorney's possession" (IB 62-63). Thus, this information was not the subject of the State supposedly withholding its public records, and patently any such allegations should have been made by the 2D AMENDED 3.850, at the very

latest. The trial court was thus reasonable in not considering these aspects of Issue VII, and considering them de novo here would belie the purpose of appellate review qua review.

Arguendo, even now, erroneously looking at the additional allegations in Issue VII, they would not entitle Moore to relief. Moore complains that trial counsel was ineffective because trial counsel did not expose "inconsistencies" in the State's fire expert and because defense counsel did not retain a fire expert to rebut the State's. However, even now armed with compounded hindsight, Moore fails to specify the inconsistencies, but instead, merely points (IB 62) to general areas of possible interest: times, a codefendant, and "other witness testimony." Moore fails to allege what specifically it is that is inconsistent about each of these matters. Thus, Moore fails to allege a prima facie case of either Strickland prong. See, e.g., LeCroy; Ragsdale; Kennedy; Raulerson; Meeks. These same arguments apply to Moore's complaint (IB 62-63) about the medical examiner.[16] "[E]vidence and records in the defense attorney's possession" supposedly revealed contradictions, but one can only guess at what they might be.

Moore also throws in a complaint about "not retaining the services of a pharmacologist" (IB 63), but as in the Ake and mitigation complaints addressed in Issue II supra, this evidence would have been belied by, and counter to, Moore's own testimony,

[16] The State does not concede that Ake applies to other experts, but that issue need not be reached here.

thereby patently undermining that testimony. Highlighting Moore's substance abuse any further would have also undermined the patent tactic of humanizing Moore as bright, helpful, and worth saving from the death penalty.

In conclusion, any potential significance of Dr. Krop, Moore's background, Moore's drug use, fire experts, pathologists, and pharmacologists were all apparent from the record and, by Moore's own pleading, defense counsel's file. Their speculative "potential"pales in comparison to the evidence adduced at trial.

ISSUE VIII

IS A FLORIDA STATUTE UNCONSTITUTIONAL BECAUSE IT PROVIDES THAT MOORE WILL BE EXECUTED BY LETHAL INJECTION UNLESS HE CHOOSES TO BE ELECTROCUTED? (Restated)

Moore's instant brief states (IB 66) that the trial court failed to consider this issue because it struck his Third Amended 3.850.[17] Other than summarily arguing that Moore had a right to amend a post-conviction motion (See PCR VI 910), Moore, through

[17] The State respectfully submits that it should not be required to search through the over-140-page Third Amended 3.850 (PCR III 308-452) to find the alleged origin of this issue. See Beech v. State, 436 So.2d 82, 85 (Fla. 1983) (since appellant failed to show where record on appeal established reversible error, "the presumption of correctness stands"; rejecting due process argument); U.S. v. Giovannetti, 919 F.2d 1223, 1230 (7th Cir. 1990) ("litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is a good point despite a lack of supporting authority or in the face of contrary authority, forfeits the point"); U.S. v. Williams, 877 F.2d 516, 518-19 (7th Cir. 1989) (failure to designate on appeal specific evidence contested waives the issue; "Neither this court nor the United States Attorney has a duty to comb the record in order to discover possible errors").

counsel, failed to point out to the trial court why it should consider this claim. (See PCR V 888-909, VI 910-12) As such, the trial court reasonably did not consider this claim, and Moore failed to obtain a ruling on it. Therefore, this issue is procedurally barred from this appeal. See, e.g., Swafford; Steinhorst; Frazier; Armstrong; Richardson.

On the merits, if they are reached, this issue has none. Moore argues that Section 922.105 allows for him to elect lethal injection rather than be electrocuted. It is apparent by his description of electrocution as "disfiguring" (IB 64) that he personally prefers the alternative of lethal injection. Yet he suggests that his constitutional right to waive electrocution was thwarted. Moore overlooks that both methods of execution have been upheld. See, e.g., Jones v. State, 701 So.2d 76 (Fla. 1997); Hunt v. Nuth, 57 F.3d 1327, 1337-38 (4th Cir. 1995) ("existence and adoption of more humane methods does not automatically render a contested method cruel and unusual"). Bryan v. State, 753 So.2d 1244, 1255 (Fla. 2000), resolved the matter of inmate choice:

> Bryan's argument that the new statute violates the constitutional requirement for a knowing and voluntary waiver of one's rights is without support given this Court's ruling thereon in *Sims*. Sims also argued that "the law may not presume that a method of execution has been waived merely by being silent"; however, the Court rejected the claim. *See Sims*, 754 So.2d at 664 n. 10. Federal courts have rejected related claims where defendants argued that having a choice as to execution methods constituted cruel and usual punishment. *See Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir.1997) ("Poland need make no choice. If he says nothing, he will be executed by lethal injection. The mere existence of the option is not a violation of Poland's constitutional rights."), *cert. denied*, 523 U.S. 1082, 118 S.Ct. 1533, 140 L.Ed.2d 683 (1998); *Campbell v. Wood*, 18 F.3d 662, 688 (9th Cir.1994) ("We cannot say the State

> descends to inhuman depths by allowing the condemned to exercise ... an election [of execution method]. We believe that benefits to prisoners who may choose to exercise the option and who may feel relieved that they can elect lethal injection outweigh the emotional costs to those who find the mere existence of an option objectionable.") (en banc). Similarly, we hold that the default mechanism in the instant case does not result in an unconstitutional waiver since the decision to affirmatively elect a preferred method or to simply default to lethal injection is completely within the control of the defendant.

See also Sims v. State, 754 So.2d 657, 665 (Fla. 2000) ("new law does not affect the penalty for first-degree murder, which has remained the same (i.e., death). Further, the legislative switch to lethal injection merely changes the manner of imposing the sentence of death to a method that is arguably more humane. The fact that the new law gives inmates the option of choosing the method of execution does not, we believe, violate any constitutional rights of the prisoner under sentence of death").

ISSUE IX

DID THE TRIAL COURT REVERSIBLY ERR BY DENYING THE POST-CONVICTION CLAIMS PERTAINING TO PROSECUTORIAL COMMENTS AND JURY INSTRUCTIONS ? (Restated)

This issue argues that "the trial court erred in denying Mr. Moore's claim[s]" concerning the "prosecutors' acts of misconduct" (IB 66), and jury-instruction burden-shifting (IB 68 n. 52) deprived him of constitutional rights. He alleges (IB 70) that defense counsel was "unreasonable" in failing to object to the prosecutor's "improper acts."

Moore indicates (IB 66 n. 51, 68 n. 52) that this issue originated with CLAIM XIII of his 2D AMENDED 3.850. CLAIM XIII of

the 2D AMENDED 3.850 contended (PCR I 44) that "the Court and the prosecutor shifted to Mr. Moore the burden of proving whether he should live or die." The trial court correctly determined that these are matters that could have or should been raised on direct appeal. (See PCR IV 538, App, and authorities cited there; see also coverage of this type of claim in defendant's pending habeas, SC00-2186, CLAIM VII).

Viewing each of the junctures in the record cited in this issue (R VI 199, XIV 1543, 1544), apparently they each concern alleged burden-shifting but, because each was based upon, or constituted the standard jury instruction, each was not erroneous. See San Martin v. State, 705 So.2d 1337, 1350 (Fla. 1997) (burden-shifting "claim has been rejected by both the United States Supreme Court and this Court"), citing Walton v. Arizona, 497 U.S. 639 (1990); Shellito v. State, 701 So.2d 837, 842 (Fla. 1997) ("we do not find that the standard instructions improperly shift the burden of proof"); Harvey v. Dugger, 656 So.2d 1253, 1257 n. 5 (Fla. 1995) ("claim 9 ["penalty-phase jury instructions improperly shifted the burden"] to the extent it pertains to ineffective assistance of counsel is without merit as a matter of law"); Preston v. State, 531 So.2d 154, 160 (Fla. 1988) ("instructions given by the court did not shift the burden of proof to the defendant"); Arango v. State, 411 So.2d 172, 174 (Fla. 1982) (upheld standard jury instruction and rejected burden-shifting claim).

In addition to burden-shifting, this issue also attacked, in general terms, the prosecutor's arguments on the grounds that they "relied on facts not in evidence" (IB 66) and appealed "to the jury's passions and prejudices" (IB 69). However, throughout these condemnations, Moore does not specify the prosecutor's comments. Because they are not specified, the State submits that it should not be required to hazard guesses here then rebut its own guesses. However, if Moore is referring to the arguments that he attacks in his habeas petition in SC00-2186, then, with the indulgence of the Court, the State adopts here the CLAIM IV arguments in its habeas Response in SC00-2186, except here the contentions regarding Strickland would apply to trial counsel, not appellate counsel.

Accordingly, Moore's brief (IB 70) cites to "PCR p. 534," the record page in which the trial court ruled upon CLAIM VI of the 2D AMENDED 3.850. He contends (IB 70) that, contrary to the trial court's ruling that "[t]his claim could have and should have been raised on direct appeal" (PCR IV 534), ineffective assistance of counsel is a proper vehicle to raise the "failure to object to numerous instances of prosecutorial misconduct." Moore is incorrect concerning the matters at issue. Numerous authorities support the trial court's ruling. See, e.g., Cherry v. State, 659 So.2d at 1072 ("we find no error in the trial court's holding that claims ... 12, ... 17... are procedurally barred because they could have been raised on direct appeal"); Torres-Arboleda v. Dugger, 636 So.2d 1321, 1324 (Fla. 1994) (claim that

"prosecutorial comments rendered his trial unfair *** procedurally barred because ... should have been raised on direct appeal").

ISSUE X

DID THE TRIAL COURT REVERSIBLY ERR BY DENYING THE CLAIM ATTACKING ELECTROCUTION AS UNCONSTITUTIONAL? (Restated)

No. the trial court correctly ruled (PCR IV 541) that CLAIM XVIII of the 2D AMENDED 3.850 was procedurally barred and unfounded on the merits. See, e.g., Hall v. State, 742 So.2d 225, 226 (Fla. 1999) ("claim, that execution by electrocution is cruel or unusual punishment or both under the Florida and United States Constitutions, is procedurally barred because it was not raised on direct appeal"); Jones v. State, 701 So.2d 76; Ferguson v. State, 105 So. 840 (Fla. 1925) ("Infliction of the death penalty by electrocution is not cruel or unusual punishment").

Moreover, Moore, at his option, may be executed by lethal injection, which also has been upheld. See ISSUE VIII supra and authorities cited there.

ISSUE XI

IS MOORE ENTITLED TO RELIEF IN THIS APPEAL FROM THE DENIAL OF HIS MOTION FOR POST-CONVICTION RELIEF BECAUSE OF CONSTITUTIONALLY DEFECTIVE JURY INSTRUCTIONS REGARDING THE PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE? (Restated)

It appears that this issue is based upon CLAIM XV of the 2D AMENDED 3.850 (PCR I 46-50), which the trial court correctly denied because it could and should have been raised on direct

appeal (PCR IV 539). See Clark v. State, 690 So.2d 1280, 1281-82 n. 2 & n. 3 (Fla. 1997) (claim of doubling pecuniary gain with another aggravator procedurally barred because it was or should have been raised on direct appeal); Cherry v. State, 659 So.2d 1069 (Fla. 1995); Ferguson v. Singletary, 632 So.2d 53, 56 (Fla. 1993) (belated challenge to HAC aggravator on the otherwise correct ground of vagueness procedurally barred because not objected-to and not raised on direct appeal); Henderson v. Singletary, 617 So.2d 313, 315 (Fla. 1993) ("in denying relief the trial court correctly found Henderson's challenges to the heinous, atrocious, or cruel instruction and the standard instruction on the cold, calculated and premeditated aggravator procedurally barred" because, even though trial defense counsel requested expanded jury instructions, not raised on direct appeal).

If the merits were reached, they have none. The standard jury instruction on pecuniary gain, used here (Compare R XIV 1544 with Fla. Std. Jury Instr. (Crim) Penalty Proceedings--Capital Cases F.S. 921.141 6.), has been repeatedly upheld. See Kelley v. Dugger, 597 So.2d 262, 265 (Fla. 1992), cited as controlling in Gaskin v. State, 737 So.2d 509, 513 n. 7 (Fla. 1999); Walker v. State, 707 So.2d 300, 316 (Fla. 1997) ("standard instruction [on pecuniary gain] which the jury received in this case was appropriate in light of the evidence showing that Walker did not want to take responsibility for Quinton Jones, asked Joanne Jones to get the support payments reduced, and killed both victims

after arguing with Ms. Jones about child support). Further, contrary to Moore's conclusory, and therefore facially insufficient allegation, that there was "improper doubling" (IB 74, PCR I 50), distinctive features of the crime were involved, rendering this claim meritless. See Fotopoulos v. State, 608 So.2d 784, 793-94 (Fla. 1992) ("two aggravating factors at issue were properly found in this case because ... they 'are not based on the same essential feature of the crime or of the offender's character'"); Green v. State, 641 So.2d 391, 395 (Fla. 1994) ("Improper doubling occurs when aggravating factors refer to the same aspect of the crime"; rejected as meritless claim alleging pecuniary gain doubled with commission-during-kidnapping). Moreover, due to the other two aggravators in this case, (1) previously convicted of the prior violent felonies of armed robbery and aggravated battery and (2) murder to avoid arrest, any supposed deficiency was not prejudicial. Thus, this Court analyzed the aggravators vis-a-vis the mitigators on direct appeal:

> **We have upheld the death sentence in other cases based on only two of the three aggravating factors present here**. In *Pope v. State*, 679 So.2d 710 (Fla.1996), cert. denied, 519 U.S. 1123, 117 S.Ct. 975, 136 L.Ed.2d 858 (1997), we held the death penalty was proportionate where there were two aggravating factors (the murder was committed for **pecuniary gain and the defendant had been convicted of a prior violent felony**), two statutory mitigating circumstances (commission while under the influence of extreme mental or emotional disturbance and impaired capacity to appreciate the criminality of the conduct), and three nonstatutory mitigating circumstances (defendant was intoxicated, committed the murder subsequent to a disagreement with his girlfriend, and was under the influence of mental or emotional disturbance). In Melton v. State, 638 So.2d 927 (Fla.1994), we held the death penalty was proportionate

> where there were two aggravating factors (the murder was committed for **pecuniary gain and the defendant had been convicted of a prior violent felony**) and some nonstatutory mitigation. We find that the death penalty was proportionate here. *See also Consalvo v. State*, 697 So.2d 805 (Fla.1996) (holding death penalty was proportionate where there were two aggravating factors--avoiding arrest and commission during the course of a burglary--with some nonstatutory mitigation).

Moore v. State, 701 So.2d 545, 551-52 (Fla. 1997).

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the trial court's denial of the 2D AMENDED 3.850 in all respects.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy of this brief and its Appendix have been furnished to John M. Jackson, Capital Collateral Regional Counsel, Northern Region, P.O. Box 5498, Tallahassee, FL 32314-5498, by MAIL on May 17th, 2001.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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IN THE SUPREME COURT OF FLORIDA

THOMAS JAMES MOORE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC00-2483

APPENDIX

Order Denying Defendant's Motion for Post-Conviction Relief (PCR IV 529-44)