IN THE SUPREME COURT OF FLORIDA

THOMAS JAMES MOORE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-459

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

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Moore." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

"T" and "R" reference the direct-appeal trial transcript and record, resulting in Moore v. State, 701 So.2d 545 (Fla. 1997)(No. 82,925). Volume numbers and page numbers are included, if applicable.

The following are examples of other references:

PCR/II 160-228	Pages 160 to 228 in Volume II of the record on appeal that resulted in Moore v. State, 820 So.2d 199 (Fla. 2002)(SC00-2483, SC01-708);
PCR2012/II 391-412	Pages 391-412 of Volume II of the record on appeal in this SC12-459 case, and the location in this record where the order on appeal is found (attached as the Appendix to this brief).

The acronym "IAC" is used for "ineffective assistance of counsel."

Generally, bold-typeface and bold-underlining emphases are supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations. The trial court's use of underlining in its Order is maintained in this brief.

STATEMENT OF THE CASE AND FACTS

At this juncture, the State notes that Moore's "facts" are argumentative and self-serving.

For example, Moore's "facts" appear to argue (See IB 14) that agencies failed to provide Moore with records he requested, but he overlooks the reasoning and holding in Moore v. State, 820 So.2d 199, 204-205 (Fla. 2002), that clarified:

> ... Moore argues that, despite his request, he was not provided the complete Jacksonville Sheriff's Office ('JSO') investigative file regarding Moore. The trial court, however, specifically heard arguments regarding this matter during its March 8, 2000, hearing, and subsequently issued an order directing the JSO to provide any such investigative files to Moore no later than March 17, 2000. **Such files were made available to Moore not later than March 25, 2000**. More importantly, **Moore has made no showing that there is any additional information that has not been disclosed**. Also, **the trial court delayed the scheduled *Huff* hearing** so as to provide Moore with an **additional 20 days (subsequent to receiving the records) to amend his 3.850 motion**-should he find any new information in the files.
>
> ... Moore contends that the trial court abused its discretion by refusing to order the JSO and State Attorney's Office to comply with Moore's requests for additional public records. ... [discussion of case law and standards]. Given **Moore's own delays in reviewing available records** and **his failure to comply with the requirements of Florida Rule of Criminal Procedure 3.852(i)** regarding requests for additional public records, we find that the trial court did not abuse its discretion in rejecting Moore's requests for additional public records.

Moore (IB 14) discusses his third amended postconviction motion and overlooks that the trial court essentially struck it because it failed to comply with the trial court's prior directive, and Moore, 820 So.2d at 205-206, held that the trial court's action was reasonable, given the lengthy history leading

up to the trial court's decision. After discussing pertinent case law and some historical facts and approvingly quoting the trial court, Moore reasoned and held:

> Although given the opportunity to amend as established in *Ventura*, Moore has not otherwise tendered to the trial court any properly sworn additional claims or factual allegations made possible by the intervening public records disclosure. Furthermore, there has been no showing that the State caused any material deficiency in Moore's postconviction motions. Given the multiple extensions and opportunities it had already gratuitously provided Moore,[FN7] the trial court's ruling appears reasonable. *See Johnson v. State*, 769 So.2d 990, 994 (Fla.2000) (finding no abuse of discretion in the circuit court's refusal to allow defendant additional time to review the records when defendant was permitted to raise any new facts or claims in amended 3.850).
>
> FN7. On March 26, 1999, Moore filed a 'shell' postconviction motion. Moore subsequently filed an amended motion on June 22, 1999. On July 14, 1999, in response to Moore's request for an extension, the lower court entered an order granting Moore an additional 30 days to file a final amended 3.850 motion. On August 19, 1999, in response to Moore's motion for reconsideration, the lower court granted Moore another 32 days to file his final amended 3.850 motion. On February 9, 2000, the lower court scheduled a *Huff* hearing and a public records hearing for the same day. At that hearing, the lower court ordered the Jacksonville Sheriff's Office to turn over an investigative file and the State Attorney's Office to do a 'computer run' on names supplied by Moore. At the same hearing, the lower court granted Moore 20 additional days (from the date the agencies were to provide the records) 'to file proposed amendments' to his amended 3.850 motion.

Moore (IB 14 n.22) contends that Moore, 820 So.2d 199 (Fla. 2002), "found [non-reversible] merit to" a prosecutorial argument claim, but Moore's discussion overlooks that Moore, 820 So.2d at 207-208, actually indicated that two "references to

Moore as 'the devil'" by the prosecutor were "ill advised," but they were "not so prejudicial as to vitiate the entire trial." Moore also then relied upon the strength of the aggravation in this case:

> Further, given the evidence in this case and the finding of three aggravating circumstances and only one statutory mitigating circumstance given slight weight, there is no reasonable probability that, but for the deficiency, the result of the proceeding would have been different. *See Strickland*,[1] 466 U.S. at 695, 104 S.Ct. 2052. Accordingly, we deny Moore's claim.

Moore also overlooks that Moore, 820 So.2d at 208 (case cites omitted), rejected as non-meritorious aspects of his prosecutorial argument claim:

> Furthermore, we reject Moore's claim that, during voir dire, the prosecutor improperly attempted to shift to Moore the burden of proving whether he should live or die. We have consistently held that the burden-shifting argument is without merit. ... We also note that Moore's claim that the prosecutor improperly argued that the mitigation testimony and evidence presented by the defense should be considered as aggravation by the jury was presented upon direct appeal and found to have no merit. ... Issues that were raised on direct appeal are procedurally barred and cannot be raised in a postconviction motion. ....

Moore (IB 16-17) attempts to minimize his prior violent felony aggravator, but he overlooks the proportionality discussion of the weighty aggravation and minimal mitigation in Moore v. State, 701 So.2d 545, 551 (Fla. 1997):

---

[1] Strickland v. Washington, 466 U.S. 668 (1984).

> The jury recommended death by a vote of nine to three. The trial court found three aggravating factors: 1) Moore had been convicted of the prior violent felonies of armed robbery and aggravated battery; 2) he committed the murder to avoid arrest; and 3) he committed the murder for pecuniary gain. Although the court found one statutory mitigating factor—that Moore was nineteen years old—it was given only slight weight since Moore was first treated as an adult before the court at the age of fifteen. There were no nonstatutory mitigating factors.

Indeed, penalty phase testimony indicated that Moore was identified "as being the suspect with the pistol" in the armed robbery. (T/XIV 1462)

Moreover, the trial court's discussion of the prior violent felony aggravator that supported its "great weight" (R/III 505), as well as the minimal age mitigator, included the following circumstances:

> 1. The defendant was previously convicted of a felony involving the use, or threat to use, violence to the person. Florida Statutes §921.141(5)(b).
>
> On May 12, 1989, the defendant was placed under community control supervision for the offense of Armed Robbery in Case No. 39-915. Subsequently, the defendant was found in violation of the terms of community control on April 23, 1991 and convicted and sentenced for the crime of Armed Robbery.
>
> On April 23, 1991, the defendant was also convicted of the offense of Aggravated Battery in Case No. 91-2550 CF.
>
> Judgments and sentences have been received in evidence of each of the above cases and the Court is convinced beyond any doubt that the defendant committed these crimes.
>
> 2. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. Florida Statute §921.141(5)(e).
>
> Evidence adduced at trial through various witnesses convinced this Court that the defendant intentionally executed the victim in order to prevent the victim from

> subsequently identifying him as the perpetrator of the armed robbery. [case citations]
>
> 3. The capital felony was committed for pecuniary gain. Florida Statute §921.141(5)(f).
>
> Evidence adduced at trial through various witnesses convinced this Court that the Defendant initially intended to rob the victim of money or other valuables and the capital felony was committed while the defendant was attempting to carry out his plan.
>
> The Court attaches great weight to the aggravating factors set forth above.

(R/III 502-503) In contrast with Moore's brief (IB 17) emphasizing his age, the trial court's sentencing order found in support of "slight weight" on the age mitigator:

> The Defendant was first treated as an adult in the Courts of Duval County at the age of 15 years for the crime of Armed Robbery and was subsequently convicted of this offense, as well as, the offense of Aggravated Battery, and while the Defendant may seem young by calendar years, his continued criminal activity belies his youthfulness and the nature of his criminal activities precludes any excusal because of his age. The Defendant has exhibited a criminal maturity beyond his age. Consequently, this Court attaches slight weight to this mitigating circumstance.

(R/III 503)

Yet further, Moore overlooks his personal insistence on no penalty-phase issues and his attorney's concession that "[**t]here are no penalty-phase issues in the motion**." (PCR2012/V 892-93)

Moore's "facts" (IB 18 n.26) improperly conclude that the State's "rebuttal closing" contained "false argument" that the "State knew" was false. In addition to being improperly argumentative in Moore's "facts," Moore self-servingly cites to

his bare accusations (at PCR2012/I 8) as purported support for these "facts." (Moore's conclusions are wrong.)

Moore's "facts" (IB 20) improperly and baselessly include argument and his conclusion that Clemons and Gaines gave postconviction testimony "that contradicted" their trial testimony and then improperly and baselessly repeats an argument that their trial testimony was "false in material ways." (The State discusses this matter in ISSUE I infra.)

Moore's "facts" (IB 21) conclude that the trial court, after the 2011 postconviction evidentiary hearing, "allowed Mr. Moore to amend his Rule 3.851 with a *Giglio* claim ...," but this oversimplifies the trial court's ruling. The State clarifies that the trial court wrote:

> The State argues that the Defendant should not be allowed to amend his Motion after the evidentiary hearing. The Defendant had the opportunity, prior to the hearing, to depose both Mr. Clemmons and Mr. Gaines. The State asserts that neither of the witnesses were impeached by their post-conviction deposition testimony, indicating that their testimony at both was materially the same. Thus, the Defendant could have raised these claims prior to the evidentiary hearing. Although **the State argues that the Defendant's violation of Rule 3.851's spirit has "grown from the egregious to the absurd,"[FN9]** this Court will nonetheless address the Defendant's newly raised claims as the Defendant could file these claims within one year of discovery.
>
> FN9. **A statement with which this Court agrees**.

(PCR2012/II 404) The trial court's order then explained how the sequence of, and surrounding, events failed to prove the claim. (See PCR2012/II 405)

Moore's "facts," for three pages, then repeat (IB 21-23) his own arguments as if they were actual facts.

These are examples of Moore's argumentative and baseless "facts." The State will reserve further comment on Moore's "facts" when Moore attempts to rely on them in his argument section (IB 56-100).

At this juncture, the State relies upon Fla.R.App.P. 9.210(c) as authorization to submit its own rendition of the case and facts.

Case Timeline.

The following timeline is a summary of the procedural history of this case. The timeline may also serve as an index for the locations of various events in the record.

1/21/1993	Murder of Johnny Parrish (See, e.g., T/VIII 490-91; T/IX 734; T/X 925-26);
10/29/1993	Jury found Moore guilty of First Degree Murder with a Firearm and other felonies (T/XIII 1381-84; R/III 428-32);
11/1993 & 12/1993	Jury recommended death by 9-3 vote (T/XIV 1553; R/III 489), and the trial court sentenced Moore to death, finding that the aggravating factors (Moore's previous convictions of two violent felonies of Armed Robbery and Aggravated Battery; avoid arrest; and for pecuniary gain through evidence of attempted robbery) outweighed the "minimal" mitigation (T/XV 1582-86; R/III 501-506);
10/1997	Moore v. State, 701 So.2d 545 (Fla. 1997)(No. 82,925), affirmed the convictions and sentence of death;
4/1998	United States Supreme Court denied certiorari review in Moore v. Florida, 523 U.S. 1083

	(1998); this denial made, for state postconviction purposes, the conviction and death sentence "final" and Moore's postconviction motion due within one year of April 20, 1998, See In re Rule of Criminal Procedure 3.851 (Collateral Relief After Death Sentence has been Imposed), 626 So.2d 198, 198, 199 (Fla. 1993);
3/1999	Moore filed his **first postconviction motion** pursuant to Fla.R.Crim.P. 3.850, consisting of 33 claims (PCR-Supp I-part II 203 et seq.);
6/1999	Moore filed an amended postconviction motion (**second** version of his postconviction motions), See, e.g., PCR II 162);
9/1999	Moore filed his second amended postconviction motion (**third** version of his postconviction motions, PCR I 1 et seq.);
4/2000	Moore filed a third amended motion for post-conviction relief (**fourth** version of his postconviction motions, PCR III 308 et seq.), which the trial court essentially struck on April 20, 2000, because Moore's collateral counsel failed to meet the Court's "criteria" for amending the postconviction motion (See PCR V 908);
4/2000	After a hearing pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), the trial court denied all claims in the second amended postconviction motion (third version of the postconviction motion) without an evidentiary hearing (PCR/IV 529-44);
2002	Moore v. State, 820 So.2d 199 (Fla. 2002)(SC00-2483, SC01-708), affirmed the trial court's summary denial of postconviction relief, including affirming the trial court's striking Moore's third amended postconviction motion (**fourth** version); denied Moore Petition for Writ of Habeas Corpus;
2002	Moore filed a successive motion for post-conviction relief (**fifth** version of Moore's postconviction motions) challenging the

	constitutionality of his death sentence by arguing Ring v. Arizona, 536 U.S. 584 (2002); which the trial court denied, Moore appealed, and Moore v. State, 886 So.2d 227 (Fla. 2004)(table; SC03-489), affirmed;
2004	Moore v. Crosby, 900 So.2d 554 (Fla. 2004)(table; SC04-834), denied Moore's petition for habeas corpus;
2005	Moore v. Crosby, 923 So.2d 1163 (Fla. 2005)(table; SC05-498), denied Moore's petition for habeas corpus;
1/2006	Moore filed another successive motion for post-conviction relief (in essence, Moore's **sixth** postconviction motion) alleging three claims (PCR2012/I 1-26), and the State responded (PCR2012/I 27-52, 53-79); **this sixth version of Moore's postconviction motions initiated the litigation from which the appeal arose**;
2006	Moore sought review of the trial court's denial of a Motion to Disqualify, and Moore v. State, 944 So.2d 987 (Fla. 2006)(table; SC06-1716), denied prohibition;
7/2008	Moore filed the first amendment to his January 2006 second successive motion for postconviction relief (in essence, **seventh** postconviction motion), (PCR2012/I 106-135) and the State responded (PCR2012/I 136-73);
7/2009	Hearing at which State asserted that Moore's postconviction motion fails to specify due diligence (PCR2012/III 575-77) and the trial court afforded Moore the opportunity to amend his postconviction motion to remedy procedural deficiencies on pre-existing claims (See PCR2012/III 591-602);
8/2009	Moore filed a second amendment to his 2006 second successive postconviction motion (in essence, **eighth** version of Moore's postconviction motions) (PCR2012/I 180-211);
9/2009	Trial court's Order to Show Cause requiring Moore's collateral counsel to show cause why Defendant's eighth version of the

	postconviction motions should not be struck because it "failed to comply with this Court's Order directing the Defendant to file an Addendum" (PCR2012/II 212-13);
9/2009	State's response to Moore's second amendment to the 2006 second successive (**eighth**) postconviction motion (PCR2012/II 214-32);
9/2009	After a hearing on the matter, trial court's order striking the 8/2009, "Amended Motion to Vacate Judgment of Conviction and Sentence with Request for Leave to Amend," that is, striking the **eighth** postconviction motion, and granting Defendant 10 days to file the Addendum and granting the State 10 days to respond (PCR2012/II 241-42);
9/2009	Moore's "Addendum to the Pending Amended Motion" (PCR2012/II 243-48), to which the State responded (PCR2012/II 249-65);
1/27/2011[2]	Case management conference, Huff-type[3] hearing, (PCR2012/IV 641-78);
2011	Weeks prior to the 3/2011 evidentiary hearing, Carlos Clemmons and Vincent Gaines were deposed by Moore's postconviction counsel (See, e.g., PCR2012/V 858-59, 871-73);
3/22/2011	Postconviction evidentiary hearing (PCR2012/IV 681 to PCR2012/V 895);
4/6/2011	Moore's Motion to Amend... (PCR2012/II 279-304), which the State, in writing, opposed (PCR2012/II 350-56);
4/29/2011	Parties' post-evidentiary hearing memoranda

[2] The record indicates the date of this Huff hearing as January 27, **2010**, (See PCR2012/IV Index and 679), but undersigned's calendar indicates that the "Huff hearing" transpired January 27, **2011**, which is consistent with the discussion of other dates at that hearing.

[3] Huff v. State, 622 So.2d 982 (Fla.1993).

& 5/2/2011	(PCR2012/II 305-361, 362-90);
1/4/2012	Seventeen-page written Order Denying Defendant's Motion to Vacate Judgment of Conviction and sentence (PCR2012/II 391-412; attached as the Appendix to this brief infra);
1/23/2012	Moore's Motion for Rehearing (PCR2012/III 413-25), to which the State responded (PCR2012/III 426-36), and the trial court denied (PCR2012/III 437-38);
3/2/2012	Notice of appeal (PCR2012/III 439).

The Trial Guilt-Phase Proceedings.

The State's postconviction post-evidentiary hearing memorandum (See PCR2012/II 325-28) provided a detailed "bulleted list" of trial evidence corroborating early statements (See Clemmons' statement at PCR2012/II 358-61 and Clemmons' and Gaines' statements discussed at PCR2012/II 321-25) and corroborating Clemmons' and Gaines' trial testimony. The trial court relied on the "bulleted list" in its postconviction order for its conclusion that the evidence of Moore's guilt was "overwhelming" (Compare, e.g., PCR2012/II 400, 406, 407 with PCR2012/II 325-28).

Moore v. State, 701 So.2d 545, 547-48 (Fla. 1997), provided a brief summary of the guilt-phase trial facts:

> Moore was convicted of robbing and killing Johnny Parrish—an adult resident of his neighborhood—and burning down Parrish's house. The two were friends, and Moore occasionally visited Parrish's home. On January 21, 1993, at about 3 p.m., Moore sat outside Parrish's house drinking with the victim. Moore claims that two other youths, Clemons and Gaines, approached the house. Moore claimed he

saw the pair chase a neighborhood youth named "Little Terry" with a gun earlier that day, but Clemons denied it at trial. Clemons and Gaines testified that they had a conversation with Moore about robbing Parrish. Clemons said he agreed to go in the house with Moore, and Gaines was to be the lookout. Gaines said he stood outside but did not see either man go in. He said he heard two shots and then saw Clemons come out of the house and go back in. When Gaines started to walk away, Clemons caught up with him and told him Moore had shot Parrish.

Clemons said that when he and Moore went into the house, Moore pulled out a gun. Moore asked Parrish where his money was and then shot him when he got no response. Later, neighbors saw smoke in Parrish's house and ran in and pulled out Parrish. Parrish was already dead when exposed to the fire, and a fire investigator, Captain Mattox, said that there were two separate fires in the house, both of which were intentionally set.

A witness named Shorter testified that Moore brought him a bag of clothes and asked him to burn them. Shorter also testified that Moore told him he had shot Parrish and set fire to the house. Shorter stated that Moore said he shot Parrish twice, that Clemons ran out of the house, and that Moore took the top off a lawn mower he found and set it on fire to clean the house of fingerprints. Shorter did not call the police but did call his mother, who called the police.

A jail inmate, Jackson, testified that Moore told him that he did not mean to kill Parrish but had to because Parrish would recognize him. Another neighbor, Dean, testified that Moore asked him to rob Parrish.

The Penalty-Phase Proceedings.

While the penalty-phase is not at issue in these postconviction proceedings, Moore, 701 So.2d at 548, 551 (Fla. 1997), briefly summarized that aspect of the case.

The Direct Appeal.

Moore, 701 So.2d at 548, summarized the seven issues on direct appeal and the results. Concerning the one meritorious but harmless issue, Moore, 701 So.2d at 549-50, reasoned:

> Claim four, in which Moore argues that it was error to admit a witness's testimony that Moore possessed a firearm two days after the victim's death, has merit, but we find that the error was harmless. Before witness Dawsey testified that Moore waved a gun at him, defense counsel objected to the question and had the State proffer testimony. The State advised that Dawsey was expected to say that the 'defendant showed him a gun and said, "If they don't stop saying that I killed the victim, somebody is going to be dead for real," and he showed him a black snub-nosed—long-nosed .33.' Defense counsel objected, arguing that there was no evidence that the gun had anything to do with the victim's death and all it would show was that the defendant habitually carried a gun for no purpose. The State argued that it showed a guilty mind and that he had threatened a witness. The judge allowed the question, stating, 'If it's all the same incident, he showed it to him and testified to it and made the statement to him, I'm going to let him testify to that. Verbal acts or demonstrative acts by the defendant, they are certainly admissible against him I think.' The substance of Dawsey's testimony matched the proffer.
>
> Although a party's own statement, offered against the party, can satisfy the admissions exception to the prohibition against hearsay, it is still subject to the general requirement that only relevant evidence may be admitted. See § 90.803(18)(a), Fla. Stat. (1995); § 90.402, Fla. Stat. (1995). Here, the evidence was not relevant to whether or not Moore committed the murder, so it was error to admit it. Evidence which tends only to show bad character or propensity is not relevant and should not be admitted. § 90.404(2)(a), Fla. Stat. (1995); *Bryan v. State*, 533 So.2d 744, 746 (Fla. 1988). The evidence could only show that Moore was upset because people were accusing him of committing the crime or that he regularly carried a gun. Neither piece of information helps establish whether or not he killed the victim.
>
> However, the erroneously admitted testimony was harmless. Error is harmless where 'there is no reasonable possibility

> that the error contributed to the conviction.' *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla.1986). Because there was direct evidence from other witnesses that Moore possessed a gun on the actual day of the murder and direct evidence that Moore shot the victim, there is no reasonable possibility that the error contributed to the conviction here.

Postconviction Proceedings.

The Timeline supra reflects that prior to the March 2011 evidentiary hearing, Moore had filed at least eight versions of his postconviction motions, including two amendments to his 2006 second successive postconviction motion, through which this appeal is taken.

The Timeline lists the January 27, 2011, Huff-type hearing. At that case management conference (PCR2012/IV 641-78), the State re-asserted procedural bars but agreed to "the next step" concerning the "specific allegations in his [Moore's then-existing] pleadings" regarding Carlos Clemmons and Vincent Gaines by providing them for Moore's postconviction counsel to depose. (PCR2012/IV 646-53, 668-69, 671-72) The State agreed to an evidentiary hearing only on the newly discovered evidence sub-claim that Clemons and Gaines committed the murder and blamed it on Moore (PCR2012/IV 661-62) and made statements to others concerning their relative roles in the murder events. (See PCR2012/IV 665-67) The prosecutor requested the evidentiary hearing be held the "[s]ooner the better" (PCR2012/IV 659) and suggested March 22 and 23 (PCR2012/IV 668), which the trial court confirmed (PCR2012/IV 673). The trial court indicated that

the evidentiary hearing will be limited to allegations in item "3-A" on pages 14-17 of the 8/2009 postconviction motion. (Compare PCR2012/IV 663-64, 670 with PCR2012/I 193-97)

On March 22, 2011, the trial court conducted the postconviction evidentiary hearing. (See PCR2012/IV 681 to PCR2012/V 895) At the evidentiary hearing, Moore called the following witnesses: David Hallback (PCR2012/IV 698-730); Michael Dean (PCR2012/IV 731-35); Wilhelmenia Moore (PCR2012/IV 737-43); Mandell Rhodes (PCR2012/IV 745-57); Raimundo Hogan (PCR2012/IV 761-72); Charles Simpson 9PCR2012/IV 773-93); John Jackson, Esq. (PCR2012/IV 798-PCR2012/V 814); Daniel Ashton (PCR2012/V 815-54).

The State called the following witnesses: Carlos Clemmons (PCR2012/V 855-66); and Vincent Gaines (PCR2012/V 868-82).

Moore's April 2011 proposed post-evidentiary hearing amendment to his postconviction motion, listed in the Timeline supra, would be his **ninth** version of his postconviction motion. The State opposed it. (See PCR2012/II 350-56) As discussed supra, the trial court agreed with the State's position that the "Defendant's violation of Rule 3.851's spirit has "grown from the egregious to the absurd," but, on the merits, of that claim, rejected Moore's proposed amendment. (See PCR2012/II 404-406)

On January 4, 2012, the trial court rendered its 17-page written Order Denying Defendant's Motion to Vacate Judgment of Conviction and sentence. (PCR2012/II 391-412)

The State will discuss details of the evidence and order under each appellate claim/sub-claim.

SUMMARY OF ARGUMENT

On appeal, Moore unsuccessfully attempts to shore up fatal deficiencies in his latest batch of postconviction motions and in his evidentiary hearing proof. According to the face of Moore's batch of postconviction motions, the alleged factual basis for most of the latest claims arose in 2005, but he waited to allege those claims until 2009, making them prima facie untimely. This untimeliness is dispositive standing on its own, and it is especially serious in this case due to its history.

In 2011, in an abundance of caution, Moore was provided a full and fair evidentiary hearing on a number of sub-claims, and Moore still failed to prove requisite due diligence or the merits of any of his claims.

None of the appellate issues and their sub-claims merit any relief. The trial court's order denying postconviction relief on Moore's multiple-amended second successive postconviction motion should be affirmed.

ARGUMENT[4]

OVERARCHING STANDARD OF APPELLATE REVIEW.

Because rulings of the trial court[5] are purportedly the subject of an appeal, the "Tipsy Coachmen" principle applies: a "trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment." "[T]he reviewing court may not preclude an appellee from raising an alternative basis to support the trial court's ruling solely because the argument was not preserved." State v. Hankerson, 65 So.3d 502, 505-507 (Fla. 2011). Accord Robertson v. State, 829 So.2d 901 (Fla. 2002)(collected cases and analyzed the parameters of "right for any reason" principle of appellate review); Butler v. Yusem, 44 So.3d 102, 105 (Fla. 2010)("key to this ["Tipsy Coachman"] doctrine is whether the record before the trial court can support the alternative principle of law"); Caso v. State, 524 So.2d 422, 424 (Fla. 1988)("... affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it").

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[4] Moore claims that the trial court's order denying postconviction relief erred. As noted in the Timeline supra, the State attaches the trial court's order as the Appendix to this brief.

[5] Even in cases of fundamental error, the focus is on a trial court ruling, that is, one that, subject to fundamental-error's high appellate burden, should have been rendered.

Therefore, because the trial court's order or ruling is the subject of the appellate review, even an argument that an appellee does not make on appeal should be considered as a basis for affirmance if it supports the trial court's decision. See Jaworski v. State, 804 So.2d 415, 419 (Fla. 4th DCA 2001)("we are obligated to entertain any basis to affirm the judgment under review, even one the appellee has failed to argue"). See also Ochran v. U.S., 273 F.3d 1315, 1316 (11th Cir. 2001)("We conclude that summary judgment for the defendant was appropriate, but for a different reason").

ISSUE I: GIGLIO CLAIMS (IB 58-82, RESTATED)

In "Argument I," Moore argues that a Giglio violation was proved[6] regarding Carlos Clemmons (IB 58-69), Vincent Gaines (IB 69-76), and Randy Jackson (IB 76-82). Moore proved none of his burdens, and, beyond a reasonable doubt, there was no prejudice.

A. GIGLIO STANDARD

Davis v. State, 26 So.3d 519, 532 (Fla. 2009), summarized the burdens under Giglio v. United States, 405 U.S. 150 (1972):

> A *Giglio* violation is demonstrated when (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. *See Guzman v. State*, 941 So.2d 1045,

[6] The Initial Brief's first-issue section ("Argument I") does not attempt to develop any theory other than Giglio, so the State focuses on Giglio.

> 1050 (Fla. 2006). Once the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. *See id.* at 1050-51."

See also, e.g., Phillips v. State, 608 So.2d 778, 781 (Fla. 1992)("Ambiguous testimony does not constitute false testimony for the purposes of *Giglio*"; "Phillips contends that both Farley and Watson lied about their criminal records"; "no reasonable probability that the false testimony affected the judgment of the jury. The jury was made aware that these witnesses were convicted felons; the admission of an additional conviction or probationary sentence would have added virtually nothing to further undermine their credibility"). Guzman, 941 So.2d at 1050-51, explained that, after the defendant proves the first two Giglio prongs, the test for the third Giglio prong of materiality, in contrast to the defense's burden under Brady v. Maryland, 373 U.S. 83 (1963), requires the State to meet a burden akin to the one for harmless error.

The test for the third, prejudice, prong is "no reasonable possibility that the error contributed to the [result]," Johnson v. State, 44 So.3d 51, 72 (Fla. 2010)(citing Guzman, 941 So.2d at 1050). Guzman, 941 So.2d at 1050-51, explained that "[w]hatever terminology is used, the dispositive question is whether the State has established beyond a reasonable doubt that the ... [Giglio violation] did not affect the verdict.

"A court's decision with respect to a *Giglio* claim is a mixed question of law and fact, and a reviewing court will defer to the lower court's factual findings if they are supported by competent, substantial evidence, but will review the court's application of law to facts de novo. *Sochor v. State*, 883 So.2d 766, 785 (Fla. 2004)." Johnson v. State, 44 So.3d 51, 65 (Fla. 2010)

The State next discusses each of Moore's ISSUE I appellate arguments.

B. UNTIMELINESS OF GIGLIO CLAIMS CONCERNING CLEMMONS AND GAINES (IB 58-76).

Agreeing with the State's argument (at PCR2012/II 350), the trial court found that the Giglio claims concerning Clemmons and gaines were "absurd[ly]" untimely but, alternatively, addressed its merits anyway:

> In the Defendant's Motion to Amend or Alternative Motion to Vacate Convictions, he claims that, during the evidentiary hearing, Mr. Clemmons and Mr. Gaines gave testimony which revealed that their trial testimony was false in material ways. Thus, the Defendant claims that this testimony gives rise to a newly discovered Giglio claim that the State knowingly presented false evidence at the Defendant's trial.
>
> The State argues that the Defendant should not be allowed to amend his Motion after the evidentiary hearing. The Defendant had the opportunity, prior to the hearing, to depose both Mr. Clemmons and Mr. Gaines. The State asserts that neither of the witnesses were impeached by their post-conviction deposition testimony, indicating that their testimony at both was materially the same. Thus, the Defendant could have raised these claims prior to the evidentiary hearing. Although the State argues that the Defendant's **violation of Rule 3.851's spirit has 'grown**

> **from the egregious to the absurd**,'[FN9] this Court will nonetheless address the Defendant's newly raised claims as the Defendant could file these claims within one year of discovery.
>
> FN9. **A statement with which this Court agrees**.

(PCR2012/II 404)

Moore incorrectly asserts (IB 60-61 n.55) that, since the State did not appeal the trial court reaching the merits of the Clemmons-Gaines' Giglio claims, the State cannot assert the untimeliness of those claims now. Moore overlooks that the standard of appellate review includes affirming the trial court's rejection of a claim if it was correct for any reason that the record supports. See Hankerson, 65 So.3d at 505-507; Robertson, 829 So.2d 901; Butler, 44 So.3d 102, 105; Caso, 524 So.2d at 424; Jaworski, 804 So.2d 415, 419; Ochran, 273 F.3d at 1316.

Here, especially where Moore's proposed 2011 amendment to his second amended second successive postconviction motion (i.e., the third amendment to the second successive postconviction motion) would be the **ninth version of Moore's postconviction motion** and where the amendment was **after the evidentiary hearing**, (See Timeline supra), the procedural rule should bar these claims. Moore overlooks that Fla.R.Crim.P. 3.851(d) has two requirements: (1) the facts predicating the claim were "unknown" AND the defendant exercised "**due diligence**." Moore's motion to amend detailed **no due diligence**. Instead, the motion

merely stated that Moore found out about the supposed basis for the amendment at the 2011 evidentiary hearing. (See PCR2012/II 286-99) Date of discovery of an alleged factual basis for a claim does not demonstrate the exercise of due diligence prior to the discovery.

Here, Moore claims that the trial testimony of Clemmons and Gaines were important, but he tenders no specific due diligence why he waited 12 years after his postconviction deadline to pursue this claim.[7]

Indeed, Moore tenders no specific reasons why he could not have discovered this claim prior to the 2011 evidentiary hearing by, for example, exercising some diligence at the pre-evidentiary-hearing depositions his counsel conducted of Clemmons and Gaines. It was Moore's burden to show that had due-diligently pursued this matter from 1999 to 2011, including at the 2011 depositions. Moore failed to make such a showing.

---

[7] At one point in the evidentiary hearing, Moore's investigator testified that, after he was hired in 2005, he "may have located" Clemmons but could not "really recall." (PCR2012/V 817) He then said he did not "find" Clemmons, (Id. at 817-18) but, even then, he failed discuss what, if any, efforts were made to "find" Clemmons after he had "located" Clemmons. The investigator also testified that he found and "saw" Gaines in 2005. (Id. at 818) **Moore bore the burden** of proving due diligence in timely discovering these claims. He failed to meet that burden.

Moreover, Moore's failure to show due diligence in this case, resulting in these claims being raised after the evidentiary hearing, has lead to a record that is not fully developed, as the trial court found:

> This Court also finds it necessary to point out that during the evidentiary hearing, when Mr. Clemmons testified regarding his plea agreement, he was never asked to clarify whether he was referring to the plea agreement entered into before or after the Defendant's trial.[FN10]
>
> > FN10. The State asked no clarifying questions because it was **not on notice of this claim**. The Defendant, however, acknowledged that he had notice of the facts giving rise to this claim prior to the evidentiary hearing (Defendant's April 6, 2011 Motion at 15-6) and still failed to ask any clarifying questions or further explore Mr. Clemmons' testimony in regard to this claim.

(PCR2012/II 405) As the trial court found, Moore's 2011 motion to add the Clemmons claim explicitly asserted that the factual basis of the claim was revealed to him in Clemmons' pre-hearing deposition (See PCR2012/II 293-94).

Accordingly, Moore's amendment attempting to add these claims clearly violated Fla.R.Crim.P. 3.851(f)(4) that allows for amendments "up to 30 days **prior to** the evidentiary hearing." This case illustrates the wisdom of that rule.

In sum, Moore's proposed amendments that supposedly form the basis of the Clemmons-and-Gaines Giglio claims of "Argument I" were clearly untimely. The trial court's rejection of these claims was correct for this alternative reason, meriting affirmance.

If the merits of these claims are reached, they have none.[8] The State discusses the claims' lack of merit next.

C. CARLOS CLEMMONS. (IB 58-69)

1. The Soundness of the Trial Court's Ruling.

In "Argument I," Moore argues (IB 58-69) that he proved a Giglio violation because Clemmons actually had a deal with the State at the time of Moore's trial, contrary to his (Clemmons' trial testimony. However, in addition to being extremely untimely, this claim remains meritless.

Concerning Moore's proposed Clemmons Giglio claim, the trial court's ruling placed the significance of specifying which plea agreement in context and also detailed why there is no prejudice:

> The Defendant asserts that during the Defendant's trial, Mr. Clemmons testified he had entered into a plea agreement with the State, which was vacated days before the Defendant's trial because it was illegal. Thus, at the time of trial, Mr. Clemmons was not testifying pursuant to a plea agreement. Whereas, at the evidentiary hearing, Mr. Clemmons made a statement to the contrary that he testified during the Defendant's trial pursuant to a plea agreement.
>
> This Court finds it necessary to first clarify the time-line with regard to Mr. Clemmons' plea agreements. On March 25, 1993, in Duval County Case Number 16-1993-CF-1658, Mr. Clemmons entered into a plea agreement. On October 25, 1993, days before the Defendant's trial, Mr. Clemmons

[8] If somehow this Court finds that Moore's belated claims have prima facie merit and should be heard, even though they are "absurd[ly]" untimely, then, at most, the case should be sent to the trial court for full development of the record.

> withdrew his plea of guilty. On December 3, 1993, just over a month after the Defendant's trial, Mr. Clemmons was permitted to withdraw his plea of not guilty and enter a guilty plea. This Court also finds it necessary to point out that during the evidentiary hearing, when Mr. Clemmons testified regarding his plea agreement, he was never asked to clarify whether he was referring to the plea agreement entered into before or after the Defendant's trial.
>
> Even if Mr. Clemmons' statement that he had previously testified pursuant to a plea agreement was before the jury, it would not have affected the jury's verdict, nor would it probably produce an acquittal on retrial. First, Mr. Clemmons' motive to testify as part of a plea agreement was th[o]roughly explored for the jury. (T.T. at 809-23.) Evidence that Mr. Clemmons had already entered into a phenomenal deal with the State was before the jury, who heard that Mr. Clemmons had originally agreed to testify truthfu1Iy in exchange for a plea to second degree murder and attempted armed robbery with a sentence involving juvenile sanctions and home detention. (T.T. at 809-18.) Mr. Clemmons also testified that, despite the fact that the original agreement had been vacated, he still hoped for leniency from the State. (T.T. at 821-23.) Further, the State acknowledged that it dealt with Mr. Clemmons and that deals had to be made with 'sinners.' (T.T. at 1277-78.) Moreover, the statement that Mr. Clemmons provided to the police, at a time when there were no deals, was before the jury. Finally, as discussed supra in Claim Two, there was overwhelming evidence implicating the Defendant. Therefore, even if evidence was before the jury that Mr. Clemmons testified pursuant to a plea agreement, it would not produce an acquittal on retrial.

(PCR2012/II 404-405; FN10 omitted because it was included supra)

The trial court's documented reasoning stands on its own as meriting affirmance. However, the State adds the following concerning Moore's failure of proof. Moore had the burden of proving Giglio's first two prongs: "(1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false . . . ." Davis, 26 So.3d at 532. Here, as a threshold requirement of his Giglio claim, Moore bore the

burden of proving at least that **when Clemmons testified at trial**, there was an actual plea deal in effect. Contrary to Moore's self-serving inference, Clemmons did not testify at the postconviction evidentiary hearing that there was a plea agreement in effect at the time he testified at trial. (See PCR2012/V 855-67) Instead, on direct examination, without indicating that the timing of a plea agreement, he testified that there was **a** plea agreement (PCR2012/V 860-61), "**an** agreement" (PCR2012/V 864). As the trial court found, that plea agreement was voided prior to Moore's trial. Thus, Clemmons' attorney, Ms. Watson, testified at trial:

> Q. Did you and Ms. Corey [the prosecutor] enter into a plea agreement on behalf of Carlos Clemons?
>
> A. Yes.
>
> Q. What was the plea agreement?
>
> A. It was that he would plead guilty to second degree murder and attempted armed robbery as charged in the indictment;
>
> That he would testify truthfully in all proceedings, depositions, court appearances as called upon to do so by the State;
>
> That he would receive juvenile sanctions; and,
>
> That Ms. Corey would place a letter in his file explaining why she found it necessary to indict someone so young.
>
> Q. At the time that you entered that plea agreement did you know it was not a proper agreement?
>
> A. There is a, I think, sort of an anomaly in the law that in this very narrow circumstance when you have a young child who is indicted for a life felony, -- under that circumstance alone you cannot treat that child as a juvenile. You have to treat him as an adult.

(T/X 866-67) On cross-examination by Moore's trial counsel, Clemmons' attorney continued:

> Q. Ms. Watson, you were first alerted of the fact that the plea agreement that you had negotiated on Mr. Clemons' behalf was illegal and unenforceable through the State Attorney's office, were you not?
>
> A. I was first notified when you filed a motion in your case seeking to bring it to the Court's attention. And I received a copy of your pleading. I believe you served it on me. And when reading it[,] it cited to the statute. And that's the first I had seen it, and I believe that the Court and State as well.
>
> Q. And in all the years of your handling juvenile cases, both as a prosecutor and a defense attorney, you did not realize that it was inappropriate and impossible disposition?
>
> A. No, Mr. Cofer [trial defense counsel]. As a matter of fact, I believe it's been used before. Especially by your office.

(T/X 869-70)

Therefore, the plea agreement that Clemmons referenced in the postconviction evidentiary hearing was the one negotiated with Ms. Watson as Clemmons' attorney. (See PCR2012/V 860-61)

Consistent with Clemmons' attorney testifying that the plea deal was voided, Moore's trial counsel argued the point on October 20, 1993, just a few days before the start of the jury trial. (See T/V 36-42)

Clemmons acknowledged at trial that, at that time, he was charged "right now with second degree murder and attempted robbery" (T/X 781) and that his lawyer is Ms. Watson (Id. at 782). At trial, Clemmons admitted that he wanted to cut a deal

with the State for the least amount of prison time that he could get. (T/X 816-17) At trial, Clemmons testified that, pursuant to a deal with the State, he pled guilty, and, as a result, he expected "to get juvenile sanctions" (T/X 817) and provided a sworn statement (T/X 821, 844). However, because it was discovered that the negotiated plea deal was illegal (T/X 821), two days prior to Moore's trial, Clemmons withdrew his plea, **but he still hoped that the State would treat him leniently**, (T/X 822-23) rendering his trial testimony substantially the same as if he had been testifying pursuant to a plea agreement.

Thus, concerning Giglio's **prejudice prong**, as the trial court found, Clemmons admitted at trial that he "still hoped for leniency from the State" (PCR2012/II 405). At trial, Clemmons testified on cross-examination:

> Q. ... You hope that whenever something is worked out for you it will be close to the same thing you had originally signed up for, don't you?
>
> A. Yes, sir.

(T/X 823) Indeed, it was more helpful to the defense at trial for Clemmons to admit that he wanted to motivate the State to offer him another deal than for any plea deal, in which he would have already been provided the benefit of leniency, to still remain in effect.

Moreover, **prior to any plea bargaining** and on the day that Clemmons was arrested, on January 29, 1993, Clemmons provided a statement to Detective Conn, consistent with his trial

testimony, in which he indicated that Moore was the person who killed the victim in this case. (See T/X 808-809, 843-44, 853, 926-37, 952, 953; State's Exhibit #34 at trial) In this January 29, 1993, statement, Clemmons told the police that Moore solicited him and Gaines to rob the victim, with Moore's planning for Clemmons to assist getting the victim's money and Gaines to act as lookout. (PCR2012/II 359) After Clemmons and Moore entered the victim's residence, Moore pulled out a revolver and demanded money from the victim. The victim said nothing and looked surprised. Moore pointed the gun straight at the victim's chest and fired two times at the victim. (PCR2012/X 359-60) Indeed, at trial Clemmons testified on redirect-examination:

> Q. Did you ever tell the police that anybody other than the defendant right there was the shooter?
>
> A. No, ma'am.

(T/X 854) As the trial court found (PCR2012/II 405), defense counsel hammered Clemons' plea bargaining and bias as a co-accused (T/X 814-818; see also, e.g., T/XII 1256-58).

Further, again as the trial court found (PCR2012/II 405), the prosecutor conceded that deals had to be made with "sinners" and that Clemons [and Gaines] were not angels. (See T/XII 1262, 1270, T/X 1277-78)

Also as the trial court found (PCR2012/II 406), the additional, corroborating evidence of Moore's guilt was

"overwhelming." (See, e.g., summary of other evidence bulleted at PCR2012/II 409-412)

In conclusion, **if** Moore had actually timely presented his Giglio claim concerning Clemmons and **if** Moore had actually proved that there was an enforceable plea agreement with Clemmons when he testified at trial that the prosecutor knew about, this alleged Giglio violation would have been harmless beyond a reasonable doubt. However, Moore, proved none of these "if's."

2. Additional Disputes with Moore's Arguments Concerning Clemmons.

The State respectfully submits that the forgoing discussion requires the rejection of Moore's Giglio Clemmons' claim. This claim was untimely, Moore failed to prove that Clemmons testified falsely at trial concerning the plea deal, and any supposed error in Clemmons' trial testimony is inconsequential beyond any reasonable -- indeed, any -- doubt. Thus, the State disputes the Initial Brief's arguments and inferences.

In addition, the State disputes Moore's suggestion that the 30-day limit in Fla.R.Crim.P. 3.851(f)(4) applies to when counsel becomes aware of an alleged factual basis for a claim. Moore notes (IB 61 n.56) that he first became aware of the facts for this claim when he deposed Clemmons; he argues that this was less than 30 days before the evidentiary hearing commenced, thereby perhaps suggesting that he complied with the Rule.

Moore's argument highlights the magnitude of his violation of the rule: He knew about this claim prior to the evidentiary hearing then failed to disclose it to the State until after the evidentiary hearing, when the timing of plea agreement(s) would remain unclarified. Indeed, the Rule limits postconviction amendments to more than 30 days, not less than 30 days (also reqiring a showing of "good cause"). Here, the amendment was not even filed "prior to the evidentiary hearing," Fla.R.Crim.P. 3.851(f)(4), at all, thereby clearly violating the Rule and violating it under prejudicial[9] circumstances.

The State also disputes Moore's suggestion (See IB 59 n.52, 61-62) that the State was trying to hide any "deal" with Clemmons. As a threshold matter, as discussed supra, Moore failed to meet his burden of proving that that there was any deal with Clemmons that was hidden from the defense. Moore could not meet this burden because, at the time of trial, as the trial record shows, there was no such "deal." Instead of proving a deal at the time of trial, Moore **self-servingly infers** that

---

[9] Indeed, if Clemmons had clearly testified at the 2011 hearing that there was a deal in effect when he testified at trial, the State would have called the prosecutor to the witness stand. The trial court could have then made a credibility determination, including relying upon Clemmons' postconviction testimony that he really did not recall much detail about the plea deal (See PCR2012/V 864: "I just know ...," fully quoted infra).

there was one and relies on his inference (See IB 59). Therefore, the only "deal" to which the trial court could have been referring (at PCR2012/V 860) was the "deal" that Clemmons and his attorney, Ms. Watson, presented to the jury at trial. Thus, at the postconviction evidentiary hearing, Clemmons testified that his attorney, Ms. Watson, had negotiated the plea agreement (PCR2012/V 861), which Ms. Watson clearly indicated at trial was voided by the time of trial, as discussed supra.

Contrary to Moore's self-serving inference that Clemmons testified at the postconviction evidentiary hearing that there was a deal "in effect at the time" of Clemmons' trial testimony to plead to Manslaughter (See IB 59-64), Clemmons testified that there was a plea deal and that he did eventually plead to manslaughter. He did **not** indicate that the **plea deal continued** through the trial nor did he indicate that his plea to Manslaughter was **pursuant to any deal in effect at the time of trial**. Here is what Clemmons actually said at the postconviction evidentiary hearing, in context:

> BY MS. COREY [prosecutor]:
>
> Q. Mr. Clemmons, how old were you at the time you were arrested for this murder?
>
> A. 13.
>
> Q. How old?
>
> A. 13.
>
> Q. 13. And how old were you by the time it went through adult court after you got certified?

A. When I got released or...

Q. No, by the time it went to trial, were you still 13 or at most 14?

A. 14.

Q. Now you had a lawyer representing you?

A. Yes, ma'am.

Q. Was that Ms. Watson?

A. Yes, ma'am.

Q. Denise Watson. Can you relate to the Court your memory of the plea agreement between you and Ms. Watson and the State of Florida?

A. That I would go to a juvenile facility, either 5 from -- till I turn 18 or 21. It didn't really speculate.

Q. Okay. What charges did you enter a plea to?

A. Manslaughter.

Q. Okay. And did you violate any terms of your community control after that?

A. No, ma'am.

Q. Okay. You were placed on some sort of probation or community control after that, is that correct?

A. It was during.

Q. During?

A. During it I was on house arrest.

Q. All right.

MS. COREY: Any other details, Your Honor, you want me to bring out?

THE COURT: Has he been convicted of any felonies?

BY MS. COREY:

Q. Mr. Clemmons, have you been convicted of any felonies outside of this case?

A. No, ma'am.

Q. Any crimes of dishonesty that would either be misdemeanors, for example, theft charges, worthless check. I think there's a bunch of them. 6

A. No, ma'am.

THE COURT: He was convicted of a felony in this particular case?

MS. COREY: Yes, sir.

THE COURT: One count? It was just the one count?

MS. COREY: Yes, sir. I have no further questions, Your Honor.

Moore's bolded reference to a plea deal (IB 60) overlooks that Clemmons, on cross-examination, prefaced his answers with his limited memory of the plea deal:

Q. Now, I believe you were asked on direct that you understood that if you didn't testify truthfully you would go to jail.

A. Yes, sir.

Q. Was that pursuant to the plea agreement?

A. No, sir. It was -- they already knew.

Q. You already knew that. Is that what you said?

A. Yes, sir.

Q. But was there an agreement to testify truthfully in the case?

A. Yes, sir.

Q. **And what were the terms of the plea agreement? Do you recall?**

A. **I just know I was going to a juvenile facility and didn't state no time.** It just --

Q. So in exchange for testifying against Mr. Moore you would be able to plead to manslaughter and go to a juvenile facility?

A. Yes, sir.

Q. That was your understanding?

A. Yes, sir.

Q. And do you know whether -- if it were to come out now that you had not testified truthfully, do you know what would happen to you?

A. Go to jail.

MR. McCLAIN: Nothing further, Your Honor.

THE COURT: Now, it depends on when you're talking about. Are you talking about if he didn't testify truthfully now or then? Because there's probably a statute of limitations from back then. I don't know that, but I'm sure there is.

BY MR. McCLAIN:

Q. In terms of the plea agreement -- in terms of the plea agreement, if it came out now that you testified untruthfully at the trial against Mr. Moore in 1993, what would happen?

A. I'm not sure.

Q. Okay. Are you -- if it came out now that you testified untruthfully, do you know whether the plea agreement could be revoked?

A. I'm not -- I'm pretty sure.

Q. Okay. And what -- before you had the plea agreement to testify against Mr. Moore, what was the charge pending against you?

A. Second degree murder.

Q. And what sentence did it carry?

A. Probably life.

Q. Okay. And in this case **after the plea agreement**, what sentence did you get?

A. I went to a juvenile facility.

Q. For how long?

A. Two years.

(PCR2012/V 864-65)

Therefore, as the trial court found -

> ... during the evidentiary hearing, when Mr. Clemmons testified regarding his plea agreement, he was never asked to clarify whether he was referring to the plea agreement entered into before or after the Defendant's trial.

(PCR2012/II 405)

Perhaps Moore did not want to clarify this matter at the postconviction evidentiary hearing so he could make his own self-serving inferences. Moore erroneously failed to consider that he bore the burden of proving, as **his** threshold burden, the existence of an enforceable deal at the time Clemmons testified at trial.

On a related matter, Moore complains (IB 64) that the trial court failed to find "whether Mr. Clemmons' trial testimony was false," but he erroneously overlooks that it was his burden to prove the point. The trial court accurately characterized the postconviction record as unclarified (PCR2012/V 405), which necessarily means that Moore failed to prove the first two prongs of his Giglio claim.

Moore suggests (IB 63-64) that the prosecutor's closing argument highlighted the lack of a deal with Clemmons to argue that he should be believed over Moore. However, Moore overlooks that --

- the prosecutor also conceded that Clemmons was a "sinner" and no "angel" (See T/XII 1262, 1270, T/X 1277-78);
- other than for this case, Clemmons has not been convicted of a felony (PCR2012/V 861);

- Clemmons appeared for deposition for Moore's postconviction counsel without a subpoena and confirmed that his deposition testimony was truthful (PCR2012/V 859); and,

- Clemmons testified at the postconviction hearing that he testified truthfully at trial, that Moore did ask him to accompany him (Moore) to the victim's house, and that **Moore did kill the victim** (PCR2012/V 176).

Finally, Moore's lengthy argument concerning materiality (IB 64-69) totally misses the mark. Contrary to Moore's position, the trial court did evaluate, arguendo, the alleged false trial testimony that Clemmons had a deal at the time of trial vis-à-vis **the trial record showing** --

- Clemmons prior motive to testify pursuant to a prior plea agreement;

- The very advantageous deal the State was willing to give Clemmons;

- Clemmons enduring hope for leniency from the State;

- The prosecutor's concession to the jury of making deals with "sinners";

- Clemmons early statement to the police incriminating Moore when there was no deal with Clemmons; and,

- The "overwhelming evidence implicating the Defendant."

(PCR2012/V 405-406)

Indeed, the differences between Moore's nebulous postconviction "proof" of a matter already concretely explored at trial and the matters in Guzman v. Secretary, Dept. of Corrections, 663 F.3d 1336 (11th Cir. 2011)(quoted at IB 66-68), are striking:

- Clemmons was not the State's only "key witness" and was significantly corroborated; this was not a swearing match between Moore and only Clemmons; the State's evidence against Moore was "overwhelming";
- Moore failed to prove that Clemmons lied at trial; and,
- Clemmons was impeached at trial, including through questions pertaining to the prior plea deal and his motive to seek the State's leniency.

As such, the record supports the trial court's finding of no Giglio prejudice under any standard, including the one that the trial court used that comports with the reasonable-probability case law. Indeed, Moore (IB 65 n.61) admits to the "reasonable likelihood" standard.

Finally, Moore states (IB 68) that the trial court did not conduct a "cumulative analysis of Mr. Moore's *Giglio* claims," but Moore fails to demonstrate what other meritorious claims should have accumulated with this claim. As such, this argument is unpreserved at the appellate level. See, e.g., Whitfield v. State, 923 So.2d 375, 379 (Fla. 2005)("we summarily affirm because Whitfield presents merely conclusory arguments"); Lawrence v. State, 831 So.2d 121, 133 (Fla. 2002)("Lawrence complains, in a single sentence ... bare claim is unsupported by argument). In any event, the trial court's "accumulation" of the trial evidence vis-à-vis this claim did demonstrate a lack of prejudice.

Perhaps most importantly, this untimely, unproved, and non-meritorious claim does not accumulate with anything. Zero plus zero is still zero. No new trial is "required" (IB 69).

D. VINCENT GAINES. (IB 69-76)

Like the Clemmons-based Giglio claim, this claim is allegedly based upon Gaines' postconviction testimony and therefore untimely. Like the Clemmons' claim and contrary to Moore's position (See IB 73 n.65), the trial court's rejection of the Gaines' claim should be affirmed if correct for any reason; preservation applies to the non-prevailing party below, whereas the prevailing party below may argue anything on appeal that the record supports, and, indeed, the trial court's rejection of this claim is what is on appeal. That rejection should be affirmed on any valid ground. See citations in "OVERARCHING STANDARD OF APPELLATE REVIEW," supra.

If the merits of this Giglio claim are reached, the trial court's ruling and findings merit affirmance for the reasons they state:

> The Defendant argues that a Giglio violation has occurred and is illustrated by the Mr. Gaines' evidentiary hearing testimony.[FN11] Specifically, the Defendant points to Mr. Gaines' evidentiary hearing testimony regarding "Little Terry." At trial, Mr. Gaines denied seeing Little Terry on the day of the murder. (T.T. at 568-9.) However, at the evidentiary hearing, Mr. Gaines testified that he and Mr. Clemmons chased and bullied Little Terry on the day of the murder. (P.C. Vol. I at 234-5.)
>
> The State argues that the Defendant's claim is nonsense, in that it 'essentially contends that every time a witness

> testifies to anything at postconviction that arguably conflicts with that witness' trial testimony, then the State somehow knew that the trial testimony was false.' (State's April 29, 2011 Memorandum and Opposition to Defendant's Amendment at 50.) **As the State argues, the Defendant has failed to allege specific facts that the State had knowledge of any false trial testimony.**
>
> However, even assuming that the State did have knowledge of the purported false trial testimony, the Defendant cannot show that the evidence is material, i.e., that there is no reasonable probability that it could have affected the jury's verdict. See Guzman v. State, 941 So.2d 1045, 1050-51 (Fla. 2006). First, evidence of the 'Little Terry' incident was before the jury. When Mr. Gaines was asked at trial if he saw Little Terry on the day of the murder, his response was: 'Not that I remember.' (T.T. at 568-9.) Mr. Clemmons testified that on the day of the murder, he and Mr. Gaines had a run in with Little Terry and chased him down the street. (T.T. at 827-28.) Little Terry testified that he saw Mr. Clemmons and Mr. Gaines on the day of the murder and ran away from them when he saw Mr. Gaines reach for a gun. (T.T. at 1189-90.) Further, in closing, the State conceded that Mr. Clemons and Mr. Gaines chased Little Terry. (T.T. at 1266, 1270.) Moreover, as discussed supra in Claim Two, there was overwhelming evidence implicating the Defendant, therefore, even if evidence was before the jury that Mr. Gaines now admitted to chasing Little Terry, it would not have affected the jury's verdict.
>
> FN11. The Defendant raised this argument to a certain extent in his Amended Motion. (Defendant's July 31, 2008 Amended Motion at 12-3.)

Moore's contention (IB 73-74) that the trial court did not rule on whether "the State had knowledge of any false trial testimony" is incorrect because Moore overlooks the trial court's agreement with the State's position: "As the State argues . . . " (PCR2012/II 406). In any event, as a matter of law, given the record in this case, Moore failed to prove that the State knew of any false trial testimony that it produced or

did not correct. As the trial court explained, a defendant fails to prove a Giglio claim when he shows that somehow postconviction testimony is somehow inconsistent with trial evidence. **Newly discovered postconviction evidence does not per se demonstrate Giglio falsity or State knowledge of falsity at the time of trial**.

Indeed, as the trial court also explained and as contrary to Moore's argument that the "circuit court did not consider" the matter (See IB 74), this matter was actually explored at the trial. "When Mr. Gaines was asked at trial if he saw Little Terry on the day of the murder, his response was: 'Not that I remember.' (T.T. at 568-9.)" At the 2011 evidentiary hearing, Gaines' testimony, consistent with is postconviction testimony, was that he "can't recall" chasing Little Terry the same day as the murder. (PCR2012/V 877) In the guilt phase of the trial, Moore called Terry Ashley, who testified that about 10:30 or 11:00am the day of the murder, he saw Clemmons and Gaines and "he was reaching for a gun," but Little Terry only saw the handle of the gun and a "chrome piece on the bottom of it" from a block away and ran. (T/XII 1189-90) Thus, the prosecutor even admitted in closing argument that Clemmons "may be out there beating up on kids, but he wasn't in for the ride for murder." (T/XII 1229) The prosecutor's second closing argued:

> If Carlos Clemons was just going to blame somebody why not blame Terry Ashley? ... **They chased Terry Ashley**. Carlos

> and Vincent are the little hoods that **chased Terry Ashley**. So, when they get caught for a crime why not blame it on Terry Ashley. It's the perfect opportunity.

(T/XII 1266) Shortly thereafter, the prosecutor conceded that Clemmons and Gaines chased Little Terry, but properly put it in context to show that this is inconsequential:

> ... the defendant asked [Michael Dean] to go robbing with him. Who had robbing on his mind that day? He did. **Who was chasing Little Terry around the neighborhood? Carols and Vincent** But that didn't mean they weren't willing to get some money. And they were wrong, ladies and gentlemen. There is no doubt about it; they were wrong. Nobody says that Carols and Vincent are angels.

(T/XII 1270; see also Clemmons and Gaines as not angels at T/XII 1262 and as "sinners" at T/X 1277)

Accordingly, defense counsel also argued to the jury:

> [Y]ou can rely upon the fact that Carlos Clemmons was armed with a .38 that day or a revolver. Certainly a revolver consistent with those wounds. How do we know that? Thomas Moore saw it. ... Terry Ashley {"Little Terry"] saw it. Because he saw it about to be drawn on him. Other individuals after Mr. Parrish's death had told people that they had seen it, which is Willie Reese told Mr. Dean he had seen the gun. There is proof positive that Carlos Clemons was armed with a gun. And Carols Clemons denied that to you. Direct evidence of that.

(T/XII 1241) Gaines' postconviction testimony continues to deny that he and Clemmons were armed with a chrome-plated .38 when they chased Little Terry. (See PCR2012/V 870-71, 877) There is no actual inconsistency between Gaines' trial testimony and his postconviction testimony. **And most importantly, there is no evidence, even arguendo if there were such an actual**

inconsistency, that Gaines was lying at the time of trial and that the State knew it.

Thus, Moore incorrectly suggests (IB 73) that the trial court found that, at trial, Gaines denied chasing Little Terry on the day of the murder but admitted at the evidentiary hearing that, on the day of the murder, he and Clemmons chased and bullied Little Terry. Instead, in contrast with the trial court adopting the State's position with the preface "[a]s the State argues," the trial court was summarizing Moore's claim, as block-quoted above, and the record indicates that Gaines, at trial and in 2011, could not recall the day of the Little Terry incident.

Accordingly, the trial court found, "the Defendant has failed to allege specific facts that the State had knowledge of any false trial testimony." (PCR2012/II 406) Instead, the untimely Gaines' claim seems to allege that the State's production of Mr. Gaines as a witness in the postconviction hearing per se "acknowledge[s]" that "Gaines trial testimony was false" and that by putting Gaines on the stand in 2011, the State chose Gaines' 2011 testimony as accurate. (PCR2012/II 298-99; see also IB 71-72) Of course, such an argument is absurd: These are more of Moore's self-serving unfounded and insufficient speculations, inferences, and suppositions, which are no substitute for actual competent evidence. However, here there was no material variation. The State has not, and it does not, acknowledge that,

at the time of trial, it knew that Gaines' testimony was false. It had no such knowledge. Indeed, arguendo assuming some discrepancies between trial and postconviction evidence, variations in evidence may often arise after a trial, and to the State's credit here, it assisted in producing Gaines for Moore's postconviction counsel to depose and for the 2011 evidentiary hearing. Gaines testified that prosecutor Corey had not even discussed this case with him prior to Gaines testifying at the evidentiary hearing. (See PCR2012/V 872-73)

In other words, the State assisting in "airing out" a claim does not in any way indicate that the State agrees to the merits of the claim; instead, often, as here, the "airing out" of the claim demonstrates that a defendant is unable to prove the claim.

Moore erroneously makes up a legal theory that is not based upon his attempted amended claim, not based upon fact, and not based upon law. Moore argues (IB 72-73) that the State adopted Moore's investigator's notes as substantive evidence when it cross-examined the investigator concerning those notes. This argument was not timely raised to the trial court (See PCR2012/II 294-99), and therefore it is unpreserved at the trial court level. See, e.g., Hutchinson v. State, 17 So.3d 696, 703 n.5 (Fla. 2009)(innocence claim versus claim of "ineffectiveness due to trial counsel's failure to present evidence of his

innocence to the jury ... not cognizable on this appeal because it is being raised for the first time"; unpreserved; citing Connor v. State, 979 So.2d 852 (Fla. 2007)(because the confrontation issue was not raised in defendant's postconviction motion, the issue could not be heard for the first time on appeal of the postconviction motion); Steinhorst v. State, 412 So.2d 332, 338 (Fla.1982) ("[F]or an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below")); Bryant v. State, 901 So.2d 810, 822 (Fla. 2005)(postconviction "issue [alleging IAC] was not argued in the postconviction motion before the circuit court and was, therefore, not preserved for appeal"); Asay v. State, 769 So.2d 974, 981, 982 (Fla. 2000)("these [postconviction] grounds were not raised by Asay in the trial court in a renewed motion for recusal, so they are not properly before this Court"; "judge was never required to evaluate the proffer under the newly discovered evidence standard"); see also Hitchcock v. State, 991 So.2d 337, 349 (Fla. 2008)("Hitchcock essentially concedes that the evidence does not qualify as newly discovered evidence because he argued in a separate claim, discussed above, that his trial counsel was ineffective for not presenting evidence that Richard sexually and physical abused family members, which was either known by

counsel or could have been discovered by the use of diligence at the time of trial").

Further, the State never agreed to the investigator's notes as substantive evidence and even explicitly disavowed using the notes as substantive evidence, as stated to the trial court by undersigned on behalf of the State: The State is not agreeing to "[t]he truth of the matter asserted in the records." (PCR2012/V 854) Instead of use as substantive evidence, after notes were proffered (PCR2012/V 831-39), the witness also used notes to "refresh" his memory concerning what the witness claimed to be the results of interviews. (See PCR2012/V 838-39) Accordingly, rather than endorsing it, the prosecutor's cross-examination questioned the accuracy of the investigator's testimony:

> Q. So, based on that, Vincent Gaines wouldn't tell Thomas Moore's first investigator anything about this case, but he opened up completely to you? [PCR2012/V 842]
>
> ...
>
> Q Are you instructed not to record these statements or even try to videotape these statements? [Id.]
>
> ...
>
> Q ... My point is how do we ever prove that the people made the statements you're claiming they made? (PCR2012/V 843]

Moore also incorrectly suggests (IB 74-75 n.67 and accompanying text) that he has standing to require the State to enforce plea agreements with other defendants. In addition to Moore having no standing and Moore's argument being outside of the record in this case, the prosecutor's decision whether to

attempt to revoke any defendant's plea agreement may include weighing many factors, such as the defendant's substantial adherence to the agreement, his assistance with other cases, his over-all record, and a myriad factors that cannot be enumerated or anticipated. Thus, this Court has properly recognized the charge decision as an executive function. Moore's request for this Court to violate separation of powers should be rejected. See Art. 5 § 17, Fla. Const. ("state attorney shall be the prosecuting officer of all trial courts in that circuit and shall perform other duties prescribed by general law"); State v. Cotton, 769 So.2d 345 (Fla. 2000) ("Florida Constitution, … traditionally applied a strict separation of powers doctrine"; "State's broad, underlying prosecutorial discretion"); Allen v. Butterworth, 756 So.2d 52, 59 (Fla. 2000) ("Article II, section 3 of the Florida Constitution prohibits the members of one branch of government from exercising 'any powers appertaining to either of the other branches unless expressly provided herein'"); Office of State Attorney v. Parrotino, 628 So.2d 1097, 1099 n.2 (Fla. 1993) ("A judicial attempt to interfere with the decision whether and how to prosecute violates the executive component of the state attorney's office"); State v. J.M., 718 So.2d 316, 317 (Fla. 2d DCA 1998) ("state attorney possesses complete discretion in determining whether to

prosecute, which includes the authority to continue to prosecute"; citing State v. Bloom, 497 So.2d 2, 3 (Fla. 1986)).

Moore also may be attempting to raise a confrontation-clause-related claim (See IB 74-75), but he did not timely develop such an argument in the trial court, thereby failing to preserve it. See, e.g., Hutchinson, 17 So.3d at 703 n.5 (citing Connor, 979 So.2d 852 (because the confrontation issue was not raised in defendant's postconviction motion, the issue could not be heard for the first time on appeal of the postconviction motion). Further, instead of attempting to develop a confrontation clause argument in this appeal, Moore merely lists it conclusorily, thereby failing to preserve any such claim at the appellate level. See, e.g., Whitfield, 923 So.2d at 379; Lawrence, 831 So.2d at 133. Moreover, arguendo, even if Gaines had testified at the postconviction hearing substantially differently from his trial testimony, the confrontation clause is not implicated.

Moore next attempts (IB 75) to magnify the significance of Gaines' postconviction testimony beyond what the totality of the record will support, as discussed at greater length supra. The totality of the record includes Gaines' 2011 postconviction testimony that he did not recall whether he and Clemmons chased Little Terry on the same day of the murder (PCR2012/V 197), that "we didn't have a gun" whenever the chase occurred (Id.) At the postconviction hearing, Gaines testified that whenever they

chased Little terry it was to "bully[] him." (Id. at 877) Accordingly, at trial, when asked, "Did you see a young fellow whose nickname is Little Terry that day?," Gaines responded, "Not that I can remember." (T/VIII 568-69) At trial, Gaines was not asked whether he and Clemmons chased Little Terry on any day surrounding the day of the murder. Thus, Moore fails to even show that there was a direct conflict between Gaines trial testimony and his postconviction testimony. The trial court's reliance upon the trial record is well founded.

Finally, like Moore's Clemmons-Giglio claim, Moore erroneously attempts (IB 75-76) to accumulate a groundless claim with another groundless claim. Moore's self-serving inferences, suppositions, and speculations prove no false trial testimony and no prosecutor knowledge of any such falsity. Zero Giglio error plus zero Giglio error sums to zero Giglio error.

E. RANDY JACKSON. (IB 76-82)

Moore argues that the trial court erred in summarily denying his Randy Jackson claim.

The trial court correctly ruled as follows:

> In Claim One, the Defendant alleges that the State violated Giglio v. United States, 405 U.S. 150 (1972), when it presented false evidence and argument during the Defendant's trial. Specifically, the Defendant asserts that during the cross-examination of State witness Randy Jackson, defense counsel elicited testimony to demonstrate animosity between the Defendant and Mr. Jackson. This testimony regarded an incident in which Mr. Jackson claimed that the Defendant hit him with hammer. The Defendant claims that the State downplayed this animosity by showing

> that the Defendant and Mr. Jackson were consorting and arrested together for a battery of Timothy Brinkley after the 'hammer' incident. The Defendant argues that the State knowingly misled the jury, as the Defendant and Mr. Jackson were not arrested together, but were arrested at different times for actions that occurred in advance of the 'hammer' incident.
>
> This claim is untimely. Florida Rule of Criminal Procedure 3.851(d)(l) provides that any motion to vacate the judgment of conviction and sentence of death shall be filed within one year after the judgment becomes final. Rule 3.851 provides an exception to this time limit where the facts that give rise to the claim were unknown at the time of trial and could not have been ascertained through the use of due diligence. Fla.R.Crim.P. 3.85l(d)(2)(A). The facts that give rise to Claim One were readily available to trial counsel at the time of trial, as they were contained in police reports which existed in 1991. Further, there is no reason why this claim could not have been raised in the Defendant's first post-conviction motion. Consequently, Claim One is procedurally barred.

(PCR2012/II 393-94)

On appeal, Moore attempts to morph his Giglio claim into an IAC claim. To the contrary, as the trial court found, Moore raised this matter as a Giglio claim. (See, e.g., PCR2012/I 6-12), and the State responded as such (See, e.g., PCR2012/I 61-67). Even in his belated and compound successive 2006 postconviction motion, for this claim, Moore failed to allege the elements of Strickland v. Washington, 466 U.S. 668 (1984), and failed to allege specific facts that arguably prima facie supported each of the Strickland elements. As such, it is clear that no prima facie sufficient IAC claim was presented to the trial court. Indeed, here, an insufficient conclusory IAC claim was not even presented to the trial court in Moore's 2006

motion. See, e.g., Franqui v. State, 59 So.3d 82, 95-96 (Fla. 2011)("defendant bears the burden to establish a prima facie case based on a legally valid claim; mere conclusory allegations are insufficient"); Geralds v. State, 2010 WL 3582955, *15 September 16, 2010 (Fla. 2010)(affirmed summary denial of claims alleged under Brady v. Maryland, 373 U.S. 83 (1963), and IAC; "Geralds merely provided facts and failed to allege any of the proper elements of a Brady or ineffective assistance of counsel claim"; "Geralds bears the burden of establishing a prima facie case based upon a legally valid claim"); Spera v. State, 971 So.2d 754, 758 (Fla. 2007)(process for evaluating 3.850 motions: determine facial sufficiency, "i.e., whether it sets out a cognizable claim for relief based upon the legal and factual grounds asserted'," and then, if facially sufficient, "review the record for evidence refuting the claim"; "Failure to sufficiently allege both prongs [of IAC claim] results in a summary denial of the claim"); Freeman v. State, 761 So.2d 1055, 1061 (Fla. 2000)("defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden"). And, as such, the trial court did not rule on an IAC claim, so there is no pertinent ruling to appeal.

In sum, "[i]n order to preserve an issue for appeal, the issue 'must be presented to the lower court and the specific

legal argument or grounds to be argued on appeal must be part of that presentation.'" Bryant v. State, 901 So.2d 810, 822 (Fla. 2005)(quoting Archer v. State, 613 So.2d 446, 448 (Fla. 1993) (quoting Tillman v. State, 471 So.2d 32, 35 (Fla.1985))). An IAC issue was not argued or developed with any requisite specificity in the postconviction motion before the circuit court and was, therefore, not preserved for appeal.

Contrary to the foregoing authorities, Moore contends (IB 79-80) that his Giglio claim is automatically converted into an IAC claim. For this argument, Moore cites to State v. Gunsby, 670 So.2d 920, 921 (Fla. 1996), but Moore overlooks that there, an IAC claim was actually raised, See Gunsby, 670 So.2d at 921. Moreover, there, unlike here, the defendant was the prevailing party below, which entitled the defendant to argue any theory on appeal that, based upon the record in that case, supported the trial court's ruling. Yet further, here, if a viable IAC claim had been properly alleged with specificity, a record concerning that IAC claim could have been developed, including, for example, inquiring of trial defense counsel why he did not pursue the matter further; it is axiomatic that reasonable strategy belies Strickland's deficiency prong. Fairness also applies to trial counsel, the trial court, and the State. Like the other ISSUE I claims, this claim, in effect, was a version of "hide the ball" until after the evidentiary hearing.

Moore argues (IB 81) that Martinez v. Ryan, __U.S.__, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), entitles him to raise IAC of trial counsel concerning Randy Jackson. To the contrary, Gore v. State, 91 So.3d 769, 771 (Fla. 2012), properly held that "the recent decision from the United States Supreme Court in Martinez v. Ryan, ..., does not provide Gore with any basis for relief in this Court." Gore, 91 So.3d at 778, reasoned that "the Supreme Court specifically declined to address the issue of whether a constitutional right to effective assistance of collateral counsel exists." Therefore, the extensive case law rejecting a constitutional right to effective postconviction counsel disposes of Moore's argument. See, e.g., State v. Kilgore, 976 So.2d 1066, 1068 (Fla. 2007)("Because Kilgore has no constitutional right to postconviction counsel, ..."); Zack v. State, 911 So. 2d 1190, 1203 (Fla. 2005)("no constitutional right to effective collateral counsel"); Murray v. Giarratano, 492 U.S. 1 (1989); Pennsylvania v. Finley, 481 U.S. 551 (1987).

Accordingly, the body of case law rejecting attacks on postconviction counsel also remains viable and dispositive. See, e.g., Tompkins v. State, 994 So.2d 1072, 1088 (Fla. 2008)("claims of ineffective assistance of postconviction counsel are not cognizable"); Gonzalez v. State, 990 So. 2d 1017, 1034 (Fla. 2008)("To the extent that Gonzalez is making an ineffective assistance of postconviction counsel claim, this

Court has repeatedly rejected such a claim"); Hartley v. State, 990 So.2d 1008, 1016 (Fla. 2008)(rejected claim that "should remand the case for new postconviction proceedings because postconviction counsel (Morrow and Malnick) failed to adequately investigate the case and to obtain a mental health expert"; "Sixth Amendment does not guarantee a right to the effective assistance of postconviction counsel"); Kokal v. State, 901 So. 2d 766, 777 (Fla. 2005)("Kokal's claim regarding the ineffectiveness of counsel's representation of Kokal during his first postconviction litigation was properly summarily denied"); Waterhouse v. State, 792 So. 2d 1176, 1193 (Fla. 2001)(postconviction "counsel ... failed to seek Judge Beach's recusal at that time. Even assuming that defense counsel was ineffective in failing to move for recusal, this Court has repeatedly held that ineffective assistance of postconviction counsel is not a cognizable claim"); Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996)("claims of ineffective assistance of postconviction counsel do not present a valid basis for relief"; citing Murray v. Giarratano; Pennsylvania v. Finley). Accordingly, Section 27.711(10), Fla. Stat., excludes ineffective assistance of postconviction counsel as a postconviction claim.

Yet further, here, registry counsel is especially not authorized to even raise this claim, where the 2006-onward

successive motions are compound and far in excess of the one-year limit of Fla.R.Crim.P. 3.851. Assuming arguendo that IAC/postconviction counsel is a viable claim, it should have been made about a decade or so ago.

Moreover, any allegation that postconviction counsel was ineffective for not raising IAC concerning Randy Jackson was not raised in the trial court, thereby rendering this argument unpreserved.

Moore (IB 81-82) also may be suggesting that the State, because it provides postconviction counsel, is accountable for Moore's postconviction counsel's lack of due diligence. This is incorrect. Instead, Moore's postconviction attorneys are his agents, making Moore accountable for their actions and inactions. Analogously, in federal court, for purposes of equitable tolling, a defendant is bound by his lawyer's negligence. See Maples v. Thomas, __U.S.__, __S.Ct.__, 2012 WL 125438 (January 18, 2012)(comparing abandonment with principle that "when a petitioner's postconviction attorney misses a filing deadline, the petitioner is bound by the oversight and cannot rely on it to establish cause"); Holland v. Florida, 560 U.S.__, 130 S.Ct. 2549 (2010); Lawrence v. Florida, 549 U.S. 327, 336, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007); Hutchinson v. State of Fla., 677 F.3d 1097 (11th Cir. 2012); Chavez v. Sec'y Florida Dept. of Corr., 647 F.3d 1057 (11th Cir. 2011). Of

course, here, Moore is now in state court, where he clearly remains accountable for his lawyer's actions and inactions during postconviction proceedings.

Moore also incorrectly argues (IB 81) that any prejudice arising from a Giglio violation accumulates with any prejudice from any other violation under any theory. See, e.g., Ponticelli, 2012 WL 3517146, *21-22 (11th Cir. 2012)(the only way to evaluate the cumulative effect is to first examine each piece standing alone). Thus, analogously, Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984), explained the test for IAC prejudice focuses on the effect of counsel's deficiency, that is prejudice due to IAC:

> [T]he defendant must show that **the deficient performance** prejudiced the defense. This requires showing that **counsel's errors** were so serious....

Strickland, 466 U.S. at 691-92, continued:

> **An error by counsel**, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. ... **any deficiencies in counsel's performance** must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

In contrast, any Giglio violation would be, by its very nature, not a "deficienc[y] in counsel's performance." Giglio focuses on the prosecutor violating a duty, whereas Strickland IAC focuses on trial defense counsel violating a duty of a certain level of performance. They are "apples and oranges" and should not be mixed.

Similarly, Brady v. Maryland, 373 U.S. at 87, explained that the prejudice for Brady material focuses on the effect of the particular **Brady** material:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where **the evidence** is material either to guilt or to punishment ....

Brady's discussion, Id., continued by making it clear that the analysis of Brady-prejudice is tied to the prosecutor's duty, not to any trial defense counsel's IAC: Withholding exculpatory or penalty-reducing evidence "casts **the prosecutor** in the role of an architect of a proceeding that does not comport with standards of justice."

Accordingly, Smith v. Cain, 132 S.Ct. 627, 630 (2012), recently explained:

> We have explained that 'evidence is "material" within the meaning of *Brady* when there is a reasonable probability that, had **the evidence** been disclosed, the result of the proceeding would have been different.' *Cone v. Bell*, 556 U.S. 449, 469–470, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009). A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with **the evidence**,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.' *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (internal quotation marks omitted).

While Kyles v. Whitley did discuss the cumulative effect of Brady material with other Brady material, its rationale limited cumulative analysis to Brady evidence:

> The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item.

...

> But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached.

Kyles v. Whitley, 514 U.S. 419, 436-37, 115 S.Ct. 1555, 1567 (1995).

In sum, it is clear that any supposed prejudice arising from a Giglio theory cannot accumulate with any supposed prejudice from a non-Giglio violation.

Moreover, the predicate for Moore's prejudice argument is that there was prejudice from a Clemmons-Gaines Giglio violation to accumulate with Moore's allegation of a Jackson-based Giglio violation. Here, as discussed at length supra, Moore has failed to demonstrate that he proved any Clemmons or Gaines violation that he alleged in his postconviction motion. There is nothing viable to accumulate with any Jackson-based claim.

Indeed, especially given the record in this case, the State disputes that Moore alleged a viable basis for a Jackson-based Giglio claim. The basis for this claim is the timing of a hammer incident compared with the timing of an incident in which Moore and Randy Jackson cooperated with each other. (See PCR2012/I 7-12) However, as the State pointed out in its responses (See, e.g., PCR2012/I 37 n.9), defense counsel possessed the underlying information during the trial (See T/XI 1121-25). On supplemental discovery response in this case, the State had even

listed its file concerning the Jackson case. (See R/II 371). Moreover, Defendant Moore, himself, reviewed the underlying police report while he was on the witness stand and explicitly agreed with the prosecutor's statement of the timing of the incidents. After Moore denied being with Jackson after the hammer incident (T/XI 1139), Moore testified:

> Q. Isn't it true, sir, that approximately two weeks after you hit Randy Jackson on the head [,] you and Randy Jackson got arrested for committing a crime together?
>
> A. I don't know how long it was. **It was about that time frame**.
>
> Q. if I showed you **the police report** would that help?
>
> A. Yes.
>
> Q. Does that sound about right to you (tendering)?
>
> A. Yes. I just mentioned that, you know, it sounds about that, **that sounds about the right time frame**.

(T/XI 1140) Therefore, the Defendant personally confirmed the accuracy of the fact that he now claims was false. The Defendant's own testimony provided a good faith basis for the prosecutor's argument.[10]

Yet further, the overwhelming additional evidence renders any supposed violation non-prejudicial. (See facts bulleted at PCR2012/II 321-22, 325-28, 348) This overwhelming evidence, for example, includes Clemmons detailed pre-plea-deal statement to

[10] Indeed, Moore's claim does not preclude the plausible scenario that there were more than two events in which Jackson and Moore cooperated with each other after the hammer incident.

the police that incriminated Moore as the triggerman (See, e.g., PCR2012/II 321-22, 359-61) and Moore's detailed confession to Shorter (See T/XI 998-1004; see also PCR2012/I 66-67).

In conclusion, this claim remains untimely, and it is rebutted by the record in multiple ways. The State "obfuscated" (IB 82) nothing.

ISSUE II: IAC AND OTHER ALLEGATIONS (IB 83-100, RESTATED)

A. MOORE'S "INTRODUCTION."

Moore's "Introduction" summarily lumps various claims together. (See IB 83-86) and may be assuming that they were all timely and sufficiently pled. Rather than address Moore's assumption in this Introduction, the State will address each of Moore's ISSUE II sub-claims as he makes them in the other sub-parts of the issue and dispute Moore's assumptions, as appropriate for each ISSUE II sub-claim.

At this juncture, the State does note its adherence to objecting to expanding the scope of the evidentiary hearing beyond Clemmons' and Gaines' alleged self-incriminating statements:

> The State has adhered, and adheres now, to its position that aspects of CLAIM II, outside of the allegation that C.C. [Clemmons] and V.G. (Gaines] have made extra-judicial statements conflicting with their trial testimony, should be summarily denied.

(PCR2012/II 309 n.10; see also, e.g., PCR2012/II 249-65; PCR2012/IV 646-53, 661-62, 668-69, 671-72)

B. DAVID HALLBACK. (IB 86-93)

Concerning Mr. Hallback, it appears that on appeal, Moore has now morphed his allegation to IAC of trial counsel. The trial court's order correctly ruled as follows concerning CLAIM II:

> A. Ineffective Assistance of Counsel
>
> With regard to the claim of ineffective assistance of counsel, such claim is **untimely** and **procedurally barred**.[FN4] Fla. R. Crim. P. 3.851 (d)(1).
>
> > FN4. Further, the Defendant's claim in this regard is **wholly insufficient and conclusory**, as the Defendant does not indicate which facts counsel failed to discover or why the failure to discover such facts was unreasonable.

(PCR2012/II 394)

A claim specifying Hallback was not asserted until 2009, in Moore's amendment to amendment to his 2006 second successive postconviction motion, in essence, the eighth version of Moore's postconviction motions. (See PCR2012/I 196-97; Timeline supra) In contrast, and supporting the trial court's ruling that a Hallback claim was untimely, investigator Aston testified that he began working on Moore's case in 2005 (See PCR2012/ V 815), and there was already documentation in Moore's postconviction counsel's file concerning Hallback (PCR2012/V 825). The investigator was able to speak with Hallback by phone and testified to no difficulty or unsuccessful diligent efforts locating Hallback. (See Id. at 824-26) Moore's prior postconviction counsel, John Jackson, recalled the name "Hallback," but he was unable to testify concerning any efforts

to locate Hallback. (See PCR2012/V 807) Instead, he merely testified that he "would" have "tried to track down" Hallback. (Id. at 812)

Perhaps most importantly, Moore's motion alleged that Ashton spoke with Hallback in 2005 (PCR2012/I 196), **FOUR YEARS prior to alleging a claim specifying Hallback**.

Therefore, supporting the trial court's ruling that the IAC claim was "untimely," Moore failed to allege and failed to prove any timely due diligence in pursuing and alleging any IAC claim specifically based upon Hallback when John Jackson represented him or when current counsel represented him.

Moore contests (IB 88) the trial court's reliance upon Fla.R.Crim.P. 3.851(d)(1), but Moore overlooks that Fla.R.Crim.P. 8.851(d)(2) references (d)(1) by providing three exceptions to (d)(1)'s one-year time limitation:

> (2) No motion shall be filed or considered pursuant to this rule if filed beyond the t**ime limitation provided in subdivision (d)(1)** unless it alleges:
>
> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and **could not have been ascertained by the exercise of due diligence**, or
>
> (B) the fundamental constitutional right asserted was not established within the [one-year] period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

Accordingly, Jimenez v. State, 997 So.2d 1056, 1064 (Fla. 2008), explained:

> This successive rule 3.851 motion was filed on April 28, 2005, which is well beyond the one-year time period limitation after the judgment and sentence were finalized-on October 30, 1997, when this Court affirmed the convictions and sentence on direct appeal. Thus, to be reviewed on the merits, each of Jimenez's subclaims must either be based on (A) new evidence that would have been unknowable through the exercise of due diligence or (B) a fundamental constitutional right that should receive retroactive application and that was not established before October 30, 1998. See Fla. R.Crim. P. 3.851(d)(2)(A)-(B). 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**. *Cf. Mills v. State*, 684 So.2d 801, 804-05 (Fla.1996) (establishing such an interpretation for rule 3.850(b)(1), which has language identical to rule 3.851(d)(2)(A)).

Accord, e.g., Shere v. State, 2012 WL 1970264, *1 (Fla. 2012); Gordon v. State, 2012 WL 2684516, *1 (Fla.) (Fla. 2012)(unpublished; table).

Here, Moore not only failed to allege specific facts demonstrating that he filed his successive motion "within one year of the date upon which the claim became discoverable through due diligence," he affirmatively alleged facts that show that his counsel knew of Hallback years earlier, and he put on evidence that his counsel was on notice concerning Hallback even years prior to that.

In conclusion, the trial court's ruling that the IAC claim was "untimely" merits affirmance.

Moore may be attempting (IB 89 n.76) to use Martinez excuse his untimeliness, but this argument fails, as the State discussed in section "E. Randy Jackson" of ISSUE I supra.

Moreover, here, current postconviction counsel expressly disavowed that the representation of prior postconviction counsel was being attacked. (See PCR2012/V 810-11) Moore should be bound by his counsel-agent's disavowal.

Further, as the trial court also ruled, "the Defendant's claim in this regard is **wholly insufficient and conclusory**, as the Defendant does not indicate which facts counsel failed to discover or why the failure to discover such facts was unreasonable." (PCR2012/II 394) Even after a decade, Moore's untimely 2009 postconviction motion failed to specify how Hallback supported the elements of Strickland's IAC. (See Id. at 247) See, e.g., Franqui v. State, 59 So.3d at 95-96; Geralds v. State, 2010 WL 3582955, *15; Spera v. State, 971 So.2d 754, 758; Freeman v. State, 761 So.2d 1055, 1061.

Under his Hallback section, Moore (IB 91 n.78) in 2012 may be attempting to add yet another claim, "inherent conflict." This over-a-decade-late, conclusory footnote is much too late and much too little.

Yet further, the trial court's credibility determination that rejected Hallback's testimony merits deference on appeal. See, e.g., Valle v. State, 70 So.3d 530, 541 (Fla. 2011)("'the trial court is in the best position to evaluate the credibility of witnesses, and appellate courts are obligated to give great deference to the findings of the trial court'"; quoting

Durousseau v. State, 55 So.3d 543, 562 (Fla. 2010); Jones v. State, 998 So.2d 573, 580 (Fla. 2008)("Giving deference to the trial courts rulings on questions of fact, especially when such factual findings are based on an evaluation of credibility and demeanor, we deny each of Jones's *Brady* and *Giglio* claims"; citing Jones v. State, 709 So.2d 512, 514-15 (Fla.1998)([W]e are mindful that this Court, as an appellate body, has no authority to substitute its view of the facts for that of the trial judge when competent evidence exists to support the trial judges conclusion.)(quoting State v. Spaziano, 692 So.2d 174, 175 (Fla. 1997))).

Here, the trial court's finding, in discussing alleged statements by Clemmons, disbelieved Hallback. The finding meriting deference is as follows:

> Mr. Hallback testified that in 1993, when he was about fourteen years old, he was incarcerated with Mr. Clemmons. (P.C. Vol. I at 23.) Mr. Hallback testified that Mr. Clemmons told him that the Defendant did not have anything to do with the crime. (P.C. Vol. I at 30-1, 38.) Mr. Hallback testified that he told this information to a defense investigator, Dan Ashton, a few years ago. (P.C. Vol. I at 33.) On cross-examination, Mr. Hallback stated that he had been convicted of three armed robbery charges. (P.C. Vol. I at 34.) Mr. Hallback is the Defendant's first cousin. (P.C. Vol. I at .) Mr. Hallback testified that, at the time the Defendant was facing these charges, he told a representative of the Public Defender's Office that the Defendant was innocent, but that they never got back in touch with him. (P.C. Vol. I at 40-2, 56-7.) Mr. Hallback waited all these years for the Public Defender's Office to get back in touch with him. (P.C. Vol. I at 51-2.) Mr. Hallback testified that the next time he told this infonnation to anyone was when Mr. Ashton contacted him a few years ago. (P.C. Vol. I at 47-50.) **With regard to Mr.**

> **Hallback's testimony, this Court finds it completely incredible** that he would wait from 1993 to 2005 to inform anyone that his cousin, who was on death row, was an innocent man. As such, this Court affords **no weight to Mr. Hallback's testimony**.

(PCR2012/II 395-96)

The State disputes Moore's untimely argument (IB 92-93) that he demonstrated prejudice. Not only was Hallback's postconviction testimony worth nothing, thereby negating both of Strickland's prongs, its nothingness pales in contrast with the overlapping corroborating evidence amassed against Moore at trial, as discussed at multiple points supra and as bulleted at PCR2012/II 321 et seq.)

For the reasons that the trial court discussed, as well as the foregoing discussion, ISSUE II's IAC claim based upon Hallback should be rejected, and the trial court should be affirmed.

C. Juvenile Pod: HOGAN, RHODES, AND SIMPSON. (IB 93-96)

This sub-claim should be rejected for the same reasons that the Hallback claim should be rejected.

As the trial court found, the IAC claim was is untimely and, at best, conclusory -- indeed it does not even "rise" to the level of conclusory. Moore's postconviction motion that raised these names merely alleged that they overheard conversations that allegedly would undermine Clemmons' and/or Gaines' trial testimony. Nothing was alleged that demonstrated how these

juvenile pod witnesses would prove either of Strickland's prongs, (See PCR2012/I 194-97) making the postconviction motion dispositively deficient. In addition, Moore sat on these claims from 2005 (See Id.) to 2009, making them patently untimely.

Yet further, the trial court did not believe Moore's witnesses vis-à-vis Clemmons. (Id. at 399) The trial court pointed out Rhodes' "quite a few" convictions and Rhodes' using a false name, and Rhodes' admitting that he really did not know when he had the supposed conversation with Clemmons. (Id. at 396-97) The trial court pointed to Hogan's 12 armed robbery convictions and failure to report his supposed knowledge of an "innocent man" on death row (Id. at 397). The trial court summarized aspects of Simpson's testimony that led to the conclusion that it gave "absolutely no weight to Simpson's testimony." (Id. at 397-98) Then, after summarizing Clemmons' postconviction testimony, including his denial of confiding in Simpson et at, (Id. at 398-99) the trial court reasoned:

> Mr. Clemmons had not been convicted of any felonies outside of this case, nor had he been convicted of any crimes of dishonesty. (P .C. Vol. I at 215-16.) Further, Mr. Clemmons appeared for his post-conviction deposition without having to be subpoenaed. (P.C. Vol. I at 212.)

(PCR2012/II 399) The trial court then accepted Clemmons' testimony over Rhodes' and Hogans' testimony:

> This Court, having already afforded no weight to Mr. Hallback's or Mr. Simpson's testimony, is left with the testimony of Mr. Rhodes and Mr. Hogan, which contradicts the testimony of Mr. Clemmons. This Court finds Mr. Clemmons['] testimony to be more credible and persuasive

> than that of Mr. Rhodes or Mr. Hogan. Mr. Clemmon's testimony was clear, concise, and in accord with his original trial testimony. Mr. Clemmon's testimony was also consistent with the statement he gave to police on January 19, 1993, before the State Attorney's Office was even involved with the case.
>
> In contrast, Mr. Rhodes testimony was anything but concise. Mr. Rhodes characterized Mr. Clemmons' statements as 'just something to do, just something to say.' (P.C. Vol. I at 83.) Mr. Rhodes could not even remember when he had his conversation with Mr. Clemmons. He first testified that it occurred in 1993 and then testified that it occurred in 1994. Then Mr. Rhodes stated that he could not remember when it happened. If the conversation occurred in 1994, then it would have occurred after this case had been tried and the Defendant had been sentenced to death. Finally, this Court finds it implausible that one would have information regarding the guilt of someone on death row and then wait for over a decade to disclose this information (and, at that, only disclose it when questioned by an investigator). This Court finds it equally implausible that Mr. Hogan, a fourteen-time convicted felon, would have had information regarding the guilt of someone on death row and not tell anyone, including his own attorney, because it was not his 'business,' yet, it became his 'business' over a decade later when questioned by the Defendant's investigator.

(PCR2012/II 399-400)

The trial court also indicated that, concerning Gaines, it rejected Hogan's testimony and found that Gaines' character was already "before the jury," and in any event, "there was overwhelming evidence against the Defendant." (Id. at 401-402)

In sum, there is no accredited evidence of any substance on which to support this sub-claim.

This sub-claim remains untimely, less than conclusory, and unsupported by the evidence. There remains nothing to accumulate

with anything. Nothing but Moore's claims is "undermined" (IB 95-96). The trial court should be affirmed.

D. CLEMMONS AND GAINES, AGAIN. (IB 96-97)

In this sub-claim, Moore repackages his ISSUE I Giglio arguments as Brady allegations. However, Moore does not show where he averred any developed Brady claim for the trial court to consider, and even his 2009 postconviction motion appears to be devoid of any such development.[11] (See PCR2012/I 186 et seq.) Therefore, any Brady claim, was unpreserved. Moreover, as the State discussed under ISSUE I supra, there is no competent evidence that proved that the State withheld anything significant, and, the State denies any such accusation. Further, the overwhelming evidence against Moore easily satisfies Brady's standard for prejudice and rebuts any suggestion that Moore met his burden to prove Brady prejudice.

Under this sub-claim, Moore also contends (IB 96 n.82) that Clemmons' and Gaines' statements could be used as "impeachment" or perhaps "substantive[]" evidence. Moore overlooks that at postconviction, Clemmons and Gaines did not recant their trial testimony and actually denied making inconsistent statements. (See PCR2012/V 855 et seq.). Moreover, the trial court's

[11] Thus, the trial court only found a Brady claim concerning Gaines, and it essentially ruled that it was undeveloped. (See PCR2012/II 403)

accrediting Clemmons is especially noteworthy, as Clemmons had no other felony criminal history and he told the police early-on that Moore was the triggerman. Clemmons' early-on statement to Detective Conn (found at PCR2012/II 359-61) is among the overwhelming evidence that devastates this (and other) claims. Further, contrary to Moore's unsupported conclusion, there has been no predicate established for a statement-against-penal-interest exception to hearsay. See, e.g., §90.804, Fla. Stat. (unavailability required for exception).

E. RANDY JACKSON, REGARDING PAYMENTS. (IB 97-98)

The Initial Brief argues that Moore proved a claim that "they" paid Jackson when he testified. This appellate sub-claim should be rejected for each of several reasons. It was not added to Moore's postconviction motion until 2009, (See PCR2012/I 196) when it was untimely, unsupported by "good cause," and not authorized by the trial court. (See, e.g., PCR2012/III 591-602; PCR2012/II 212; PCR2012/II 223-24, 227-28) Moreover, even after over a decade of multitudinous postconviction motions, the payments-to-Jackson "claim" failed to allege any specificity whatsoever concerning what theory of law it was filed under and how it proved that theory. (See PCR2012/I 196) It was less than conclusory, requiring the denial of the "claim."

Yet further, Moore did not produce Randy Jackson as a witness at the postconviction evidentiary hearing, making the "claim"

devoid of support with competent non-hearsay evidence. (See PCR2012/IV-V) His investigator's statements at the evidentiary hearing were, in fact and law, a proffer of what the investigator said that Jackson told him in 2005. Thus, the trial court indicated it was hearsay, and the State agreed to a proffer. (See PCR2012/V 831-32) The trial court confirmed that the investigator was testifying based on a proffer. (Id. at 834)

Concerning the supposed "content" of the investigator's testimony, he only testified that Jackson told him that "they" paid him. He did not say who "they" were. (Id. at 833-34) Therefore, even if the investigator's hearsay were erroneously accepted as substantive, it did not prove that the State knew anything or did anything that required disclosure. Indeed, its vagueness did not even qualify as impeachment, rendering it inadmissible hearsay.

The "they," for example, may have indicated routine payment as a statutory witness fee, See §92.142, Fla. Stat. (1993).

Moore bore the burden, and he failed to meet it, and ambiguous testimony does not meet it. Cf. e.g., Phillips v. State, 608 So.2d 778, 781 (Fla. 1992)("Scott's statement that he was not a police agent is attributable to the ambiguity of the term 'agent'"; "Ambiguous testimony does not constitute false testimony for the purposes of *Giglio*"). Indeed, the ambiguous testimony was also incompetent hearsay on a proffer.

A vague reference to being paid by an undetermined person in some undetermined way is insufficient to support any relief, especially when compared with the evidence of Moore's guilt, as discussed above, and impeachment of Jackson at trial (See T/XI 973-76, 78-79). See Pagan v. State, 29 So.3d 938, 953 (Fla. 2009)("Any additional information ... would only be more impeachment and our confidence in the outcome of the trial is not undermined")(citing Guzman v. State, 868 So.2d 498, 508 (Fla. 2003)).

F. WILHELMENIA MOORE. (IB 98-99)

The trial court's rejection of this claim merits affirmance:

> The Defendant also presented the testimony of Wilhelmenia Moore, the Defendant's mother. (P.C. Vol. I at 69.) Ms. Moore testified that after her son's conviction for murder, a State witness, Chris Shorter, approached her and told her that he had to do what he had to do because he had to think about his children. (P.C. Vol. I at 69.) Ms. Moore clearly has an interest in this case, as the Defendant is her son. Further, the testimony of Mr. Shorter was not presented, and his original trial testimony remains uncontroverted.

(PCR2012/II 402-403) Indeed, even Ms. Moore's hearsay postconviction testimony does not indicate that Shorter recanted or admitted that his trial testimony was false.

In addition, like the Randy-Jackson-payment allegation, this allegation was untimely added to Moore's postconviction motion in 2009, when the investigator was aware of it in 2005, and it developed no legal theory whatsoever, making it less than deficiently conclusory. (See PCR2012/I 195)

G. AUDRA MCCRAY. (IB 99-100)

The trial court's ruling merits affirmance:

> The Defendant also claims that there is Brady evidence with regard to State witness Audrey McCray. The Defendant claims that the State did not disclose that it had threatened Ms. McCray with incarceration and the loss of the custody of her son. The Defendant claims that Ms. McCray stated that the State made her say things that were not true. As the State points out, there has been no justification for the delay in filing this claim, nor has the Defendant specified what things in Ms. McCray's testimony were not true, thereby failing to make out a prima facie allegation under Brady. (State's August 26, 2008 Response at 4, 21-2, 24, 27, 32-4; State's October 6, 2009 Response to Moore's Amendment at 15, 18.) Thus, the Defendant's Brady claims are denied.

(See also PCR2012/II 226-27, 229-30) Moreover, after Moore unjustifiably allowed several years to pass prior to presenting this claim, the claim's lack of specificity concerning what supposedly was not true, and when juxtaposed the overwhelming other evidence of Moore's guilt, render it especially insufficient as a matter of law. Indeed, the claim fails to allege the law-enforcement source of the alleged threat, and, depending on the timing and source of the alleged threats, the prosecution may not to accountable for them under Brady. See, e.g., Jones v. State, 998 So.2d 573, 581 (Fla. 2008)("unreasonable to expect the prosecutor in this case, having no knowledge of Prim's illegal activity, to become informed of and disclose such information in the less than twenty-four-hour period between Prim's arrest and Jones's sentencing hearing"; citing Breedlove v. State, 580 So.2d 605,

607 (Fla. 1991) (detectives' knowledge of the witnesses' criminal activities not readily available to the prosecution)).

Moore's discussion of Smith v. Secretary, Dept. of Corrections, 572 F.3d 1327, 1343 (11th Cir. 2009), also overlooks that it concerned a "key prosecution witnesses" who "was the only eyewitness to the crime who was not involved in the robbery and murder. Both sides recognized that his credibility was important." In contrast, Ms. McCray was not an eyewitness to the shooting. She testified to facts that were more peripheral. Her general credibility was not "important." Any supposed impeachment that the "State made me testify" would have made no difference in the trial. Moore has failed to prima facie demonstrate Brady prejudice.

CONCLUSION

Based on the foregoing discussions and the reasoning in the trial court's order (attached as Appendix), the State respectfully requests this Honorable Court affirm the trial court's denial of postconviction relief. Moore has failed to demonstrate a valid basis for relief from his conviction or sentence, and he failed to present any developed claim attacking his sentence, and, indeed, he personally affirmatively disavowed any attack on his sentence.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on October 11th, 2012: Martin J. McClain, Esq., at martymcclain@earthlink.net.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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IN THE SUPREME COURT OF FLORIDA

THOMAS JAMES MOORE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-459

APPENDIX

Order Denying Defendant's Motion to Vacate Judgment of Conviction and sentence (PCR2012/II 391-412); the Order from which this appeal was taken.

AG#: L12-2-1074