IN THE SUPREME COURT OF FLORIDA

JOHNNY SHANE KORMONDY

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. SC14-2428
ACTIVE DEATH WARRANT
EXECUTION SET FOR
JANUARY 15, 2015,
AT 6:00 P.M.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT, IN AND
FOR ESCAMBIA COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

References to the appellant will be to "Kormondy" or "Appellant". References to the appellee will be to the "State" or "Appellee".

The record on appeal will be referenced as "TR" followed by the appropriate volume and page number. References to Kormondy's resentencing record on appeal will be designated as "RSTR" followed by the appropriate volume and page number. References to Kormondy's initial post-conviction record on appeal will be designated as "PCR" followed by the appropriate volume and page number. References to Kormondy's successive post-conviction record on appeal will be designated as "SPCR" followed by the appropriate volume and page number.

INTRODUCTION

On November 24, 2014, Governor Scott signed a death warrant setting the warrant week beginning at noon, January 12, 2015, through noon, January 19, 2015, with the execution set for Thursday, January 15, 2015, at 6:00 p.m. At the present time no stays of execution exist.

STATEMENT OF THE CASE

a. PROCEDURAL HISTORY

The Florida Supreme Court, on direct appeal, affirmed Kormondy's convictions including one count of first-degree

murder, three counts of armed sexual battery, one count of burglary of a dwelling with an assault, and one count of armed robbery as charged for the first degree murder of Gary McAdams in *Kormondy v. State*, 703 So.2d 454 (Fla. 1997). The Court affirmed the sentences imposed for the attending crimes charged but reversed the sentence of death and remanded the case for a new penalty phase because the trial court allowed the State to present to the jury, what the Court deemed to be, non-statutory aggravation (threats to kill Ms. McAdams and Mr. Long if released from jail). *Kormondy v. State*, 703 So.2d at 460-464.

On May 3, 1999, with a new judge presiding, the trial court conducted a new penalty phase before a new jury. This new jury recommended Kormondy be sentenced to death by a vote of 8-4. The court found and gave great weight to two aggravating factors: (1) Kormondy had previously been convicted of a felony involving the use or threat of violence, and (2) the murder was committed in the course of a burglary.

The court found no statutory mitigating factors and rejected Kormondy's argument that he was a relatively minor participant and less culpable than his accomplices. The trial court considered but rejected several non-statutory mitigating factors (RSTR Vol. II 202-210). The trial court followed the jury's recommendation and sentenced Kormondy to death on July 7, 1999. (RSTR Vol. II 210).

The Florida Supreme Court rejected each of Kormondy's claims on appeal and affirmed his sentence of death. *Kormondy v. State*, 845 So.2d 41 (Fla. 2003), *cert. denied*, *Kormondy v. Florida*, 540 U.S. 950 (2003).

On August 30, 2004, Kormondy filed his initial motion for post-conviction relief and subsequently was permitted to file an amended motion on April 5, 2005. Kormondy raised a number of claims in his amended motion. (PCR Vol. III 356-516).

On July 7, 2005, after an evidentiary hearing held April 18-19, 2005, the collateral court entered an order denying Kormondy's amended motion for post-conviction relief. (PCR Vol. VI 948-997). Kormondy appealed to the Florida Supreme Court. Thereafter Kormondy also filed a petition for a writ of habeas corpus in the Florida Supreme Court raising three claims of ineffective assistance of appellate counsel.

On October 11, 2007, the Florida Supreme Court affirmed the denial of post-conviction review by the trial court. The Court also denied Kormondy's habeas petition. *Kormondy v. State*, 983 So.2d 418 (Fla. 2007), rehearing denied on May 23, 2008.

On July 24, 2008, Kormondy filed his petition for writ of habeas corpus in the United States District Court for the Northern District of Florida, Pensacola Division. Kormondy raised seven claims in that petition. On September 29, 2011, the district court denied Kormondy's petition (Case No.

3:08cv316-RH [Doc. #12]), but granted a Certificate of Appealability (COA) on two issues. On December 7, 2011, the Eleventh Circuit Court of Appeals granted Kormondy's petition to expand COA to allow Kormondy to raise three additional claims. The Eleventh Circuit, following an extensive review of the issues upon which review was granted, affirmed the district court's denial of federal habeas corpus relief. *Kormondy v. Secretary, DOC*, 688 F.3d 144, 1285 (11th Cir. 2012), *cert. denied, Kormondy v. Tucker,* 133 S.Ct. 764 (2012).

On November 24, 2014, Governor Rick Scott signed a death warrant in Kormondy's case for the murder of Gary McAdams. This action occurred following the Governor's review of Kormondy's clemency application and the Governor's denial of any clemency for Kormondy. The death warrant document reflects that "Whereas, executive clemency for JOHNNY SHANE KORMONDY, as authorized by Article IV, Section 8(a), Florida Constitution, was considered pursuant to the Rules of Executive Clemency and it has been determined that executive clemency is not appropriate," therefore a death warrant was signed "directing the Warden of the Florida State Prison to cause the sentence of death to be executed upon JOHNNY SHANE KORMONDY, in accord with the provisions of the Laws of the State of Florida." **The execution was set for January 15, 2015, at 6:00 P.M., during the**

warrant week commencing at noon, January 12, 2015, until noon, January 19, 2015.

On December 4, 2014, Kormondy filed his successive motion for post-conviction relief in the trial court asserting two claims. He was permitted to amend that motion on December 7, 2014, and December 9, 2014, respectively. The State responded to the motion on December 5, 2014, and December 10, 2014.

On December 15, 2014, the trial court, after hearing argument on the claims raised, denied relief without further evidentiary hearing. The trial court held that as to Kormondy's "newly discovered evidence" Claim I, that Kormondy was not entitled to relief. (Order, December 15, 2014, p. 12) (SPCR Vol. III 193). As to Claim II, regarding ineffectiveness of post-conviction collateral counsel, the trial court found such claims are "not cognizable in a post-conviction motion" and denied relief. (Order, December 15, 2014, p. 15) (SPCR Vol. III 196).

b. FACTS

The Florida Supreme Court specifically set out the facts of the murder, *Kormondy v. State*, 703 So.2d 454, 456-458 (Fla. 1997). Specifically that:

> The record reflects the following. The victim Gary McAdams was murdered, with a single gunshot wound to the back of his head, in the early morning of July 11, 1993. He and his wife, Cecilia McAdams, had returned home from Mrs. McAdams' twenty-year high-school reunion. They heard a knock at the door. When Mr. McAdams opened the door, Curtis Buffkin was there

holding a gun. He forced himself into the house. He ordered the couple to get on the kitchen floor and keep their heads down. James Hazen and Johnny Kormondy then entered the house. They both had socks on their hands. The three intruders took personal valuables from the couple. The blinds were closed and phone cords disconnected.

At this point, one of the intruders took Mrs. McAdams to a bedroom in the back. He forced her to remove her dress. He then forced her to perform oral sex on him. She was being held at gun point.

Another of the intruders then entered the room. He was described as having sandy-colored hair that hung down to the collarbone. This intruder proceeded to rape Mrs. McAdams while the first intruder again forced her to perform oral sex on him.

She was taken back to the kitchen, naked, and placed with her husband. Subsequently, one of the intruders took Mrs. McAdams to the bedroom and raped her. While he was raping her, a gunshot was fired in the front of the house. Mrs. McAdams heard someone yell for "Bubba" or "Buff" and the man stopped raping her and ran from the bedroom.FN1 Mrs. McAdams then left the bedroom*457 and was going towards the front of the house when she heard a gunshot come from the bedroom. When she arrived at the kitchen, she found her husband on the floor with blood coming from the back of his head. The medical examiner testified that Mr. McAdams' death was caused by a contact gunshot wound. This means that the barrel of the gun was held to Mr. McAdams' head.

> FN1. Kormondy, in this case, and Hazen, in *Hazen v. State*, 700 So.2d 1207 (Fla.1997), present different factual scenarios. The trial records are inconsistent as to the locations of Hazen and Buffkin at the time of the fatal shot. During Kormondy's trial, Mrs. McAdams testified that Buffkin was with her in the back of the house when she heard a shot fired. Officer Hall testified that Kormondy told him in an unrecorded statement that Buffkin fired the fatal shot and Hazen was

> in the back of the house with Mrs. McAdams. In a tape-recorded confession played for the jury, Kormondy again said that Buffkin shot the victim. During Hazen's trial, Buffkin testified that Kormondy killed the victim and Hazen was in the back room with Mrs. McAdams. Hazen testified that he was not present at the scene when the crimes against the McAdamses were committed.

c. PERTINENT FACTS

The following additional facts were noted by the trial court in its order as to Claim I:

> Strong evidence was presented at trial that showed Defendant was culpable for the killing of Mr. McAdams. Mrs. McAdams testified credibly that Mr. Buffkin was the person with her in the bedroom when her husband, who was in the kitchen, was shot.[13] Mrs. McAdams testified that when Mr. Buffkin, Defendant, and Mr. Hazen first entered the kitchen where she and her husband were, the lights were on and she was able to see Mr. Buftkin's face clearly.[14] Mrs. McAdams testified that she was standing approximately eleven feet away from Mr. Buffkin when he entered the kitchen from the garage.[15] She further gave a credible description of Mr. Buffkin: Mrs. McAdams was able to positively identify both Mr. Buffkin's voice and his face.[16] Mrs. McAdams answered affirmatively when asked if the man who first entered the house with the gun (Mr. Buffkin) was the person who was raping her in the bedroom when she heard the fatal gunshot from the front of the house.[17] After she heard the gunshot, she heard someone yell out either "Bubba" or "Buff," and the person who had been raping her in the bedroom jumped up and ran out of the room.[18] Testimony was also presented that several days after the incident, Wendall Hall and Allen Cotton, both investigators with the Escambia County Sheriff's Office, came to Mrs. McAdams' home to 'update her on developments in the case, namely the arrest of Mr. Buffkin. Both Mr. Hall and Mr. Cotton were with Mrs. McAdams when the local news broadcast began on the television. Mrs. McAdams asked if Mr. Hall and Mr. Cotton would stay with her

during the newscast. During the newscast, a picture of Mr. Buffkin was shown. Mrs. McAdams was visibly upset when she saw the picture of Mr. Buffkin - she informed both Mr. Hall and Mr. Cotton that the picture was of the first man who came to the door with the gun.[19]

Further, William Long, Defendant's cousin by marriage, testified at trial that Defendant confessed to killing Mr. McAdams multiple times in the days that followed the murder.[20] Mr. Long's testimony established that he and Defendant shared a close friendship, making his testimony regarding Defendant's confession of great relevance and strength.[21] Mr. Long testified that there was not a doubt in his mind Defendant was the person who shot and killed Mr. McAdams.[22]

Although Defendant did not testify at his trial, Defendant's recorded statement to law enforcement[23] and the details of his unrecorded statement given to law enforcement[24] were entered into evidence. Even though Defendant claimed that Mr. Buffkin was the person who murdered Mr. McAdams, Defendant's statements were impeached by irrefutable evidence presented at trial. Defendant's rendition of events had Mr. Buffkin shooting and killing Mr. McAdams with the .44-caliber pistol that was brought into the McAdamses' home by Mr. Buffkin the night of the murder.[25] However, the evidence presented at trial showed that Mr. McAdams was not killed with a .44-caliber pistol as Defendant indicated, but with Mr. McAdams' own .38-caliber gun.[26] According to the totality of the evidence submitted at trial, Mr. Buffkin could not have been the person who shot and killed Mr. McAdams.

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[13] See Attachment 4, Trial Transcript, Vol. VI, pp. 1067-80.
[14] See Attachment 4, Trial Transcript, Vol. VI, pp. 1067-69.
[15] See Attachment 4, Trial Transcript, Vol. VI, p. 1068.
[16] See Attachment 4, Trial Transcript, Vol. VI, pp. 1079, 1086, 1088-89, 1091.
[17] See Attachment 4, Trial Transcript, Vol. VI, p. 1080.
[18] See Attachment 4, Trial Transcript, Vol. VI, p. l 082.

[19] See Attachment 4, Trial Transcript, Vol. VI, pp. 1086; 1115.
[20] See Attachment 5, Trial Transcript, Vol. VII, pp. 1184-1201.
[21] See Attachment 5, Trial Transcript, Vol. VII, pp. 1184-1995.
[22] See Attachment 5, Trial Transcript, Vol. VII, p. 1192.
[23] See Attachment 5, Trial Transcript, Vol. VII, pp. 1256-1295.
[24] See Attachment 5, Trial Transcript, Vol. VII, pp. 1238-1242.
[25] See Attachment 5, Trial Transcript, Vol. VII, pp. 1238-1242; 1273-1285; 1310-1311.
[26] See Attachment 5, Trial Transcript, Vol. VII, pp. 1303-1308; 1312-1316.

SUMMARY OF THE ARGUMENT

ISSUE I: Kormondy's death sentence was appropriate. The Florida Supreme Court's opinion in *Kormondy v. State*, 845 So.2d 41 (Fla. 2003), resolved any contention that there was disparate treatment between Kormondy's and his codefendant's sentences. The trial court properly found, in its Order dated December 15, 2014, after denying an evidentiary hearing (on this issue based upon five affidavits presented by Kormondy that Buffkin had admitted murdering Gary McAdams) that, Kormondy's claim was procedurally barred generally and specifically barred regarding the affidavits of Enoch Hall and Christopher Michelson. (December 15, 2014, Order pps. 7-8) (SPCR Vol. III 188-89). The Court noted that the instant claim is merely an attempt to re-litigate Kormondy's prior assertions that Buffkin was the murderer. The new affidavits from Russell Binstead, Roger

Livingston and John Turner shed no new light as to the evidence presented previously and resolved adversely to Kormondy or impact prior judicial decisions concluding that Kormondy's death sentence was proper. This issue has been repeatedly rejected by all the courts that have entertained the claim and every permutation of it. *Kormondy v. State,* 983 So.2d 418 (Fla. 2007), *Kormondy v. Secretary*, DOC, 688 F.3d 1285 (11th Cir. 2012).

ISSUE II: Kormondy's second issue is an ineffectiveness of collateral counsel claim premised on *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), and *Martinez v. Ryan*, 142 S.Ct. 1309 (2012). The trial court rejected this claim finding that the Florida Supreme Court has rejected a number of cases raising an ineffectiveness of collateral counsel claim. Citing *Banks v. State*, ___ So.2d ___, 2014 WL 5507970 at *2-3 (Fla. Nov. 3, 2014), the trial court held that Kormondy's argument is not applicable in Florida. The trial court likewise found that challenges to collateral counsel's effectiveness are "not cognizable in a rule 3.851 motion. (December 15, 2014, Order pp. 15) (SPCR Vol. III 196).

ARGUMENT

ISSUE I

KORMONDY'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE IT PERMITS AN ARBITRARY AND CAPRICIOUS IMPOSITION OF A SENTENCE OF DEATH IN LIGHT OF NEWLY DISCOVERED EVIDENCE

The trial court, in denying relief in its December 15, 2014, Order, found that this claim was procedurally barred and without merit. The court observed that the "newly discovered evidence," according to collateral counsel, consisted of statements Curtis Buffkin made in Kormondy's April 2005, post-conviction evidentiary hearing and newly discovered affidavits reflecting Buffkin made statements to five different inmates "confessing" to killing Gary McAdams at various times during their joint incarceration unearthed in August and December 2014. The affidavits reveal:

1. Enoch Hall - Kormondy states that in "1993," Buffkin told a fellow inmate, Enoch Hall, who, at the time was in the Escambia County jail with Buffkin, that he was going to try and escape. Buffkin stated that "he had no problem shooting people in order to escape as he just 'blew McAdams mother f***ing brains out.'" Kormondy asserts he first learned of this information in August 2014, when Kormondy was told by Hall of Buffkin's statement.

2. Christopher Michelson - Kormondy provided the affidavit of Christopher Lee Michelson which indicates that "Buffy" told him about the murder when they were together at Everglades Correctional Institution between 1996 and 1998. "Buffy" admitted the murder and accused Kormondy because he blamed Kormondy for he and Hazen getting caught. Kormondy asserts he first learned of this information on December 3, 2014.

3. Russell Binstead - Kormondy provided the affidavit of Russell Binstead which reflects that in 2001, Buffkin confessed that he murdered the victim in his case. Buffkin said he felt guilty that one of his co-defendants was on death row for the murder he committed. Kormondy asserts he first learned of this information on December 3, 2014.

4. Roger Livingston - Kormondy provided the affidavit of Roger Livingston which reflects that in 2012, he met Buffkin at Union Correction Institution. Buffkin approached him because Livingston was from Pensacola. Livingston's affidavit states that he was aware of the murder in Pensacola and Buffkin told him that Buffkin's co-defendant was on death row but did not kill the victim. Buffkin said he was "going to try to free the man and that one day he would end up on death row himself." Kormondy asserts he first learned of this information on December 3, 2014.

5. John Turner - Kormondy provided the affidavit of John Turner which reflects that in 2012, Buffkin told Turner that he felt bad that he put his co-defendant on death row and that he, Buffkin, was the "ring leader" and was responsible for the murder and Kormondy was wrongfully on death row. Kormondy asserts he first learned of this information on December 5, 2014.

In a successive motion under Rule 3.851(d)(2), each claim must be based on either (1) facts that were unknown to the defendant or his attorney and "could not have been ascertained by the exercise of due diligence," or (2) a "fundamental constitutional right" that was not previously established, and which "has been held to apply retroactively." Fla.R.Crim.P. 3.851 (d)(2).

Claims of newly discovered evidence must be brought within a year of the date the evidence was or could have been discovered through due diligence. See *Glock v. Moore*, 776 So.2d 243, 251 (Fla. 2001). *See also Jiminez v. State*, 997 So.2d 1056, 1064 (Fla. 2008), *Byrd v. State*, 14 So.3d 921 (Fla. 2009). In *Cherry v. State*, 959 So.2d 702 (Fla. 2007), the Florida Supreme Court stated:

> "First, [the defendant] must show that the evidence could not have been discovered with due diligence at the time of trial. *Torres-Arboleda v. Dugger*, 636 So.2d 1321, 1324-25 (Fla. 1994). Moreover, "any claim of newly discovered evidence in a death penalty

> case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence." *Glock v. Moore*, 776 So.2d 273 (Fla. 2001). Second, [the defendant] must show that the evidence would probably produce an acquittal or a lesser sentence on retrial. *Jones v State*, 591 So.2d 911, 915 (Fla. 1991). In considering whether this evidence would affect the outcome at the guilt or penalty phase of a trial, courts consider whether the evidence would have been admissible at trial, the purpose for which the evidence would have been admitted, the materiality and relevance of and any inconsistencies in the evidence, and the reason for any delays in the production of the evidence. *Jones v. State*, 709 So.2d 512, 521-22 (Fla. 1998)."

Claim I is procedurally barred. Kormondy is attempting to relitigate his prior 2005 post-conviction litigation that Buffkin was the murderer. He asserts that he should not be sentenced to death while Buffkin was sentenced to life and points to recently acquired affidavits. He is not entitled to relief because the new affidavits have no probative value. *See*: *Marek v. State*, 14 So.3d 985, 989 (Fla. 2009), and *Marek v. State*, 17 So.3d. 706 (Fla. 2009).[1]

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[1] In an unpublished disposition, the Court held in *Marek*, a similarly circumstanced case, that:

> On August 3, 2009, Marek filed his fifth successive post-conviction motion, in which he alleged that newly discovered evidence of a statement made by his codefendant Raymond Wigley to another inmate demonstrated that Marek's judgment and sentence were constitutionally unreliable. On August 17, 2009, after conducting a case management conference, the circuit court summarily denied Marek's motion. We affirm the denial. We agree that the affidavit attached to Marek's fifth successive motion, when considered cumulatively with the newly discovered evidence

Kormondy previously raised this issue, prior to this instant successive motion, on direct appeal[2] and in his initial post-conviction motion filed in August 8, 2004, and as amended on April 5, 2005. *Kormondy v. State*, 983 So.2d at 431-432. In denying relief, the Florida Supreme Court found, in *Kormondy v. State*, 983 So.2d 418, 438-440 (Fla. 2007), that the statements made by co-defendants James Hazen and Curtis Buffkin identifying

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> presented in support of his third successive post-conviction motion, does not meet the standard for relief set out in *Jones v. State*, 709 So.2d 512, 521 (Fla.1998). Assuming that the affiant accurately recounts statements that Wigley made to him, Wigley's statements suffer from deficiencies in credibility and probative value similar to those we identified in our decision of July 16, 2009. The evidence would not probably result in an acquittal or a life sentence on retrial. Because Marek's claim is legally insufficient, the circuit court did not err in summarily denying the motion.

[2] Following remand for resentencing, Kormondy asserted, in *Kormondy v. State*, 845 So.2d 41, 47-48 (Fla. 2003), that his death sentence was disproportionate because his co-defendants received life sentences. The Court found that the evidence at trial and resentencing demonstrated that Kormondy committed the homicide and was more culpable.

> The testimony presented at trial tends to prove that Kormondy was the triggerman, and therefore his sentence of death is not disproportionate to the life sentences received by his codefendants. See *Jennings v. State*, 718 So.2d 144 (Fla.1998).

Kormondy finally raised his "newly discovered evidence" claim, that statements of both James Hazen and Curtis Buffkin that Buffkin shot Gary McAdams constituted newly discovered evidence, in his initial post-conviction motion. The Florida Supreme Court rejected his claims and affirmed the trial court's findings following an evidentiary hearing denying his claims. *Kormondy v. State*, 983 So.2d 418, 437-438 (Fla. 2007).

Buffkin as the person who shot Gary McAdams, were not credible and "it would not have led to an acquittal of Kormondy." Moreover, in reviewing Buffkin's "personal recanted admission," the Court found, based upon the evidence, it would not have changed the outcome of "Kormondy's trial or penalty phase." *Kormondy*, 983 So.2d at 440.

> Kormondy contends that the trial court erred by determining that the newly discovered evidence of recanted testimony was not credible and that this recanted testimony would not have changed the outcome of the trial. Kormondy argues that Hazen's recent statement, that Hazen was present at the McAdams' house when the crime occurred and that Buffkin was the one who shot Mr. McAdams, would have resulted in a life sentence based on a proportionality assessment. Kormondy further argues that Buffkin's recent affidavit claiming that it was Buffkin who shot Mr. McAdams and not Kormondy is also newly discovered evidence. This evidence, he argues, also proves that Kormondy was not the shooter and that Kormondy should be given a life sentence on resentencing.
>
> To obtain a new trial or new sentencing based on newly discovered evidence, a defendant must meet two requirements. First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the exercise of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. See *Jones v. State*, 709 So.2d 512, 521 (Fla.1998)(*Jones II*). Newly discovered evidence satisfies the second prong of the *Jones II* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones II*, 709 So.2d at 526 (quoting *Jones v. State*, 678 So.2d 309, 315 (Fla.1996)). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe

*438 sentence. See *Jones v. State*, 591 So.2d 911, 915 (Fla.1991) (*Jones I*).

In making its decision concerning whether the newly discovered evidence compels a new trial, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Id.* at 916. This determination includes a decision on:

> [W]hether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether this evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.
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> *Jones II*, 709 So.2d at 521 (citations omitted).

The analysis is similar when the newly discovered evidence is based on the recantation of a witness's prior testimony. In such situations, the trial court is cautioned that recanted testimony is exceedingly unreliable, so a trial judge should deny a new trial if it is not satisfied that the new testimony is true. Special attention should be given to this testimony where the recantation involves a confession of perjury. See *Consalvo v. State*, 937 So.2d 555 (Fla.2006), *cert. denied*, 549 U.S. 1285, 127 S.Ct. 1821, 167 L.Ed.2d 330 (2007); *Henderson v. State*, 135 Fla. 548, 185 So. 625 (1938). A trial court's ruling on a motion based on newly discovered evidence, including a witness's recanted testimony, will not be reversed on appeal unless there is shown to be an abuse of discretion. See *Mills v. State*, 786 So.2d 547, 549 (Fla.2001).

The trial court found that Hazen's recent statement met the first prong of the *Jones* standard, that is, the statement was not known at the time of trial. Hazen did not testify at Kormondy's trial, and Hazen was tried after Kormondy. At his own trial Hazen

said he was not at the scene when Mr. McAdams was killed and Mrs. McAdams was raped. Hazen only recently made the statement that is at issue here. Thus, this testimony was not available prior to Kormondy's trial. However, the trial judge questioned the credibility of the statement after comparing the statement with other testimony produced at the evidentiary hearing and after examining all the circumstances of the case. As a result, the trial court found that a new trial was not warranted. We find that the trial court did not abuse its discretion in denying a new trial and that its findings are supported by competent substantial evidence.

At his own trial, Hazen testified that he was not present when the crimes were committed. He said, under oath, that he did not sexually assault Mrs. McAdams and that he did not rob anyone. He testified that after the incident, Buffkin told him that he shot Mr. McAdams by accident, but that he would have had to shoot him anyway. In his more recent statement, however, Hazen says that he was present during the crimes and that he lied at his own trial. At the evidentiary hearing, Hazen testified that he saw Buffkin standing behind Mr. McAdams with a gun. He further testified that he did not see Buffkin shoot Mr. McAdams because he was at the back of the house at that time. He said Buffkin made a comment to him that implied that it was Buffkin who shot Mr. McAdams. Hazen also testified that he does not have a problem lying under oath.

The trial court compared these recent statements by Hazen with other trial testimonies, specifically those of Mrs. McAdams and William Long. Mrs. McAdams testified that Buffkin was in the room with her when Mr. McAdams was shot. William Long testified that Kormondy told him that he, Kormondy, shot Mr. McAdams. As stated in the order denying post-conviction relief, the judge reviewed the trial testimony of both Mrs. McAdams and Long. The trial court then examined the circumstances of the case to assess the reliability of Hazen's recent statement. Through other testimony presented, the trial court found that Hazen and Kormondy were loosely related to one another—Hazen was the foster child of Kormondy's aunt, his mother's sister. Testimony also revealed that Hazen and

Kormondy were reared as cousins. Taking all this evidence into consideration, the trial court found that Hazen's recent statement was not credible and it would not have led to an acquittal of Kormondy. Additionally, this evidence would not have resulted in a different sentence. The evidence supports the trial court's denial of relief on this claim.

The trial court similarly found that Buffkin's statement met the first prong of the *Jones* standard. However, the trial court also found the statement was not credible. After comparing the statement with other testimony produced at the evidentiary hearing and after examining all the circumstances of the case, the court found a new trial was not warranted. We find that the trial court did not abuse its discretion in denying a new trial and that the trial court's findings are supported by competent substantial evidence.

On three occasions Buffkin said Kormondy shot Mr. McAdams—in his statement to law enforcement officers, at his deposition, and at Hazen's trial. However, in his recent affidavit, Buffkin states that he was the one who shot Mr. McAdams. FN7 At the evidentiary hearing, Buffkin testified that he pointed to Kormondy as the shooter because he was hoping to receive a plea bargain in his own case. He further testified that on the night of the crime, Kormondy was in the kitchen with him searching Mrs. McAdams' purse while Buffkin held the gun at Mr. McAdams' head. Buffkin said that he bumped Mr. McAdams in the head with the gun and the gun fired. Buffkin also admitted to lying to the jury, the state attorney's office, his lawyer, investigators, to essentially everybody, but claimed that he was now telling the truth.

> **FN7. Buffkin has already been tried and sentenced for his participation in the crimes against the McAdamses. He has nothing more to lose except a possible prosecution for perjury.**

The trial court also compared the post-conviction statements by Buffkin with other trial testimonies, specifically those of Mrs. McAdams and William Long. The trial court also examined the circumstances of the

case to assess the reliability of Buffkin's recent statement. The court concluded that Buffkin's sole purpose for testifying at the evidentiary hearing was to attempt an escape.FN8

> **FN8. Testimony and evidence presented revealed that Buffkin apparently had a plan to escape after his evidentiary hearing testimony. Shane Lewis, a detention deputy at the Escambia County Sheriff's Office, testified at the evidentiary hearing that when he was transporting Buffkin back to the correctional institute after Buffkin testified, he could not remove the iron restraints placed on Buffkin's legs. He testified that he had to use a pair of bolt cutters to cut them off and when he did, he discovered a piece of metal stuck in the hole. The metal piece would not allow him to use the handcuff key on the hole. Officer Hobby, the lock and key officer at the correctional institute, testified that the piece of metal found in the hole was a makeshift key. In addition to these circumstances, there was evidence that Buffkin had escaped from custody in the past.**

Based on the evidence presented at the hearing, the evidence presented at trial, and the circumstances presented, the trial court properly found that Buffkin's recent statement was not credible and it would not have changed the outcome of Kormondy's trial or penalty phase. Accordingly, the trial court properly denied relief on this claim.

Kormondy v. State, 983 So.2d at 438-440 (emphasis added).

The Court found that Mrs. McAdams' testimony that "Buffkin was in the room with her when Mr. McAdams was shot," and William Long's testimony "that Kormondy told him that he, Kormondy, shot Mr. McAdams" were intact and what occurred. While the Court found that Buffkin's statement was not known previously, the

Court "also found the statement was not credible." Moreover at the 2005 evidentiary hearing, "Buffkin testified that he pointed to Kormondy as the shooter because he was hoping to receive a plea bargain in his own case. He further testified that on the night of the crime, Kormondy was in the kitchen with him searching Mrs. McAdams' purse while Buffkin held the gun at Mr. McAdams' head. Buffkin said that he bumped Mr. McAdams in the head with the gun and the gun fired. Buffkin also admitted to lying to the jury, the state attorney's office, his lawyer, investigators, to essentially everybody, but claimed that he was now telling the truth." *Kormondy v. State*, 983 So.2d at 438-440.

William Long told law enforcement, stated in a deposition and testified that Kormondy shot Gary McAdams. At the time he testified in 2005, he had nothing to lose, he had already gone to trial and, before a verdict was returned at his trial on June 24, 1994, made a deal to testify against his co-defendants, if necessary, in exchange for a life sentence with the possibility of parole after 25 years.

The fact that over the years Buffkin "made" statements to fellow inmates that he "blew McAdams f***ing brains out" in regard to his willingness to shoot anyone in "order to escape.," (1993 statement by Enoch Hall); that "Buffy" stated he "put the shooting on Kormondy because he knew if he didn't put it on one

of his co-defendants he was going to be sentenced to death. He chose to put it on Kormondy because he blamed Kormondy for the threesome getting caught." (1996-1998, affidavit of Christopher Michelson); Buffkin told Russell Binstead that he "felt guilty that one of his co-defendants had a death sentence for a murder he committed." (2011, affidavit of Russell Binstead); Buffkin told Roger Livingston that "his co-defendant who was on death row was not the one that killed the victim. He told me that he was going to try to free the man and that one day he would end up on death row himself." (2012, affidavit of Roger Livingston); or that he told John Turner that he felt bad because he was the "ring leader" and the killer and his co-defendant was on death row, is of no particular probative value. No matter the correctness of the affidavits, the only thing each reveals is that Buffkin talked to other inmates. The statements shed no light or credibility to the truth, rather they only confirm what Buffkin testified to in Kormondy's 2005 post-conviction evidentiary hearing.[3]

[3] Curtis Buffkin testified, as well as Kormondy's other co-defendant James Hazen, at that post-conviction evidentiary hearing, that he was the shooter, that he lied at trial when he testified that Kormondy shot Mr. McAdams, and that Buffkin did so in his June 30, 1993, statement because he wanted to make a deal since he was facing the death penalty. From being present and testifying at Hazen's trial in 1993, Buffkin told the court he knew how to "word his statement to accommodate the testimony." He testified that he was now telling the truth in

Contrary to Kormondy's collateral counsel's representations, the Florida Supreme Court decisions in *Marek v. State*, 14 So.3d 985 (Fla. 2009), and the subsequent unpublished decision in *Marek v. State*, 17 So.3d 706 (Fla. 2009), control. The Florida Supreme Court found, in *Marek v. State*, 17 So.3d at 706, the affidavits in the fifth successive motion suffered "from deficiencies in credibility and probative value" similar to those the court had identified in the third successive motions and affirmed the trial court's summary denial.

In fact the Florida Supreme Court, in affirming the imposition of the death sentence at resentencing in *Kormondy v. State*, 845 So.2d 41, 48 (Fla. 2003), found that the evidence "tends to prove that Kormondy was the triggerman."

> Although Kormondy, in a taped statement recorded by Investigator Allen Cotton, contended that Buffkin was the trigger man, the evidence in this case demonstrates otherwise. Mrs. McAdams, decedent's wife, who was sexually assaulted during the robbery, testified that the second person who raped her had shoulder-length hair. She also stated that while the first person who entered the home, Buffkin, was assaulting her, the shortest person (Hazen) and the long-haired one, Kormondy, were in the kitchen with her husband Gary when he was shot.
>
> Mrs. McAdams' description of Kormondy was supported by the testimony of several other witnesses as well as inconsistencies in Kormondy's taped statement. Allen Cotton also testified that Kormondy had longer hair than the others on the day he was arrested and that Hazen was shorter than Kormondy.

2005, because he wanted to let the families know the truth. (PCR Vol. I 70-105).

> Terri Kilgore, the officer who pursued Kormondy on foot, also described Kormondy as having long hair at the time of his arrest. This testimony tends to place Kormondy, not Buffkin, in the kitchen with the victim and Hazen when the fatal shot was fired.
>
> Kormondy's confession to Will Long also belies Kormondy's version of events. According to Long, he and Kormondy went to a convenience store the day after the murders and Kormondy commented, upon seeing a reward poster related to the murders, that the only way the police would find the killer would be if they were walking behind him and Long at that moment. Later that day, Kormondy admitted killing the victim and tearfully explained that it was an accident. **The testimony presented at trial tends to prove that Kormondy was the triggerman, and therefore his sentence of death is not disproportionate to the life sentences received by his codefendants.** See *Jennings v. State*, 718 So.2d 144 (Fla.1998).

Kormondy v. State, 845 So.2d 41, 48 (emphasis added). *See*: *Henyard v. State*, 992 So.2d 120, 127-128 (Fla. 2008) (". . . we address the second prong requiring a showing of a probability of a different outcome, i.e., in this case a life sentence rather than death. Initially, we note this claim faces a number of hurdles including a potential procedural bar and a serious question of admissibility of the new evidence. Regardless, even if those hurdles could be overcome, we agree with the trial court that Henyard is not able to demonstrate prejudice. At trial, the State did not rely on Henyard being the triggerman, but rather relied on his dominant role in the entire criminal episode and unrefuted evidence of his close proximity to the child victims at the time of their deaths. The record affirmatively supports the State's position that regardless of

whether Smalls or Henyard pulled the trigger, Henyard's substantial culpability as outlined by the trial court in great detail and as reflected in our opinion affirming his death sentence establishes the death penalty as a proportionate sentence for his actions.").

Most importantly, nothing asserted in this most recent litigation has undercut the trial testimony of Mrs. McAdams or William Long. And, in addition to ignoring the evidence of Kormondy's culpability, he continues to misrepresent the circumstance under which he was sentenced to death. The trial court, as well as the Florida Supreme Court, has determined Kormondy was not sentenced to death "because he was the shooter," rather his sentence has been repeatedly vetted as appropriate because he was the most culpable.[4]

Here, as in *Marek*, 17 So.3d at 706, the issue of the co-perpetrator's admission to being the "triggerman" was already explored during the initial post-conviction motion. Indeed, here, unlike *Marek*, Buffkin himself testified at the evidentiary hearing. The trial court heard the admission directly from "the murderer," yet rejected the claim. Here, as in *Marek*, this

[4] In *Kormondy v. State*, 983 So.2d at 431 (Fla. 2008) (Kormondy continually maintained that he fully participated in the burglary and robbery. There could be no question as to his participation in this crime. *Stein v. State*, 995 So.2d 329, 341 (Fla. 2008) ("However, the triggerman has not been found to be the more culpable where the non-triggerman codefendant is 'the dominating force' behind the murder.")

newly surfaced information suffers from the same "deficiencies in credibility and probative value" as in the initial proceedings. The affidavit adds little to an issue that was already explored.[5]

Here, there is no basis demonstrating any "additional inmates" testimony can do more - any testimony would be hearsay and clearly cumulative to Buffkin's - simply because Buffkin "told other inmates" what he did. Nothing would change the findings by the Florida Supreme Court in *Kormondy v. State*, 983 So.2d 418 (Fla. 2008), regarding Kormondy's previous newly discovered evidence claims as to Buffkin being the shooter.

While the claim should be procedurally barred, the State has likewise argued that the "newly discovered evidence" is not newly discovered evidence as defined or, in fact, because: (1) due diligence would have unearthed the evidence; (2) these

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[5] Kormondy argues that the statement of Enoch Hall was made in 1993, presumably suggesting that there is more credibility to the accuracy of Buffkin's remarks. The comments made by Hall were that Buffkin, after telling Hall that he was going to escape from the Escambia County Jail, stated further "he had no problem shooting people in order to escape as he had just 'blew McAdams mother f***ing brains out.'" (Successive Motion p. 10) (SPCR Vol. I 52).

The record reflects shortly after the murder Kormondy confessed to Long that he had been involved in the robbery of the McAdamses and that he killed Gary McAdams. However, the record reflects that Kormondy went to trial for the murder in late June and early July of 1994, and at that time changed his story, stating that Buffkin was the shooter, just days after Buffkin received his deal and agreed to be a witness against his co-defendants Hazen and Kormondy.

statements are merely hearsay, without any justifiable exception for admission, and (3) could not have been admitted.[6]

The trial court, in reviewing Kormondy's successive motion as amended, denied all relief including this issue, finding it procedurally barred.

The record reflects at trial, and in previous post-conviction litigation, the reviewing courts have found that Kormondy was the dominant character in the murder of Gary McAdams. *See Turner v. Dugger*, 614 So.2d 1075, 1078 (Fla. 1993) (barring claims for post-conviction relief "because they, or variations thereof, were raised on direct appeal"); *Waterhouse v. State*, 792 So.2d 1176 (Fla. 2001) (Although Waterhouse now frames the issue as one of ineffective assistance of counsel, the appellant is merely trying to re-litigate the same issue using different words.); *Sireci v. State*, 773 So.2d 34 (Fla. 2000) (To the extent that Sireci uses a different argument to re-litigate the same issue, the claims remain procedurally barred, *citing e.g.*, *Harvey v. Dugger*, 656 So.2d 1253, 1256 (Fla. 1995). *See Stein v. State*, 995 So.2d 329, 341 (Fla. 2008), wherein the Court held:

> "When a codefendant . . . is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's

[6] Buffkin never testified in Kormondy's trial. Buffkin only testified in James Hazen's trial, however, Hazen was never considered the shooter.

> punishment disproportionate." *Larzelere v. State*, 676 So.2d 394, 406 (Fla. 1996). "However, '[w]here the circumstances indicate that the defendant is more culpable than a codefendant, disparate treatment is not impermissible despite the fact that the codefendant received a lighter sentence for his participation in the same crime.'" *Marquard v. State*, 850 So.2d 417, 423 (Fla. 2002) (quoting *Brown v. State*, 721 So.2d 274, 282 (Fla. 1998)).

See: Van Poyck v. State, 564 So.2d 1066, 1070-1071 (Fla. 1990) (while not the killer, Van Poyck was the instigator and prime participant in the crime).

In Kormondy's case, Buffkin's recantation was known at the time of his first post-conviction motion. The additional affidavits are "merely composed of hearsay statements that would not have fallen under any hearsay exception or become admissible as substantive evidence or for impeachment purposes." (Order, December 15, 2014, pp. 9) (SPCR Vol. III 190).

The trial court further noted, "even if Buffkin's statements to the five inmates satisfy the first prong of *Jones*, as newly discovered evidence, and even if the Court ignores the fact that the proposed newly discovered evidence would not have been admissible, and further treats as true the fact that Mr. Buffkin told the five inmates that he killed Mr. McAdams (cite omitted), a review of the record demonstrates that Mr. Buffkin's confessions told through the five inmates would not have produced an acquittal or yielded a less severe sentence for Defendant."

The trial court concluded:

> The "newly discovered" evidence, when weighed with the evidence adduced at trial, and the previously submitted newly discovered evidence considered at the 2005 evidentiary hearing,[27] would not have produced an acquittal or yielded a less severe sentence for Defendant.[28] Consequently, Defendant has failed to meet the *Jones* requirements to establish newly discovered evidence and he is not entitled to relief as to this claim.
>
> _____
>
> [27] See Attachment 3, Transcript, Postconviction Evidentiary Hearing, Vol. I, pp. 49-124. As noted previously, Mr. Buffkin's 2005 direct testimony confessing to killing Mr. McAdams was deemed not credible by the Court. Additionally, Mr. Hazen's 2005 testimony implicating Mr. Buffkin as Mr. McAdams' killer was also found to be incredible. Both of these determinations of credibility were affirmed by the Supreme Court of Florida. *Kormondy v. State*, 983 So.2d 418, 438-440 (Fla. 2007).
>
> [28] Defendant argues that Defendant should be granted relief based on the case of *State v. Mills*, 788 So.2d 249 (Fla. 2001). In *Mills*, the trial court granted a new sentencing hearing based on the newly discovered evidence that Mill's co-defendant had confessed to a fellow inmate that it was the co-defendant and not Mills who had shot the victim. In *Mills*, the trial court found that the newly discovered evidence would have been admissible at trial and would have probably produced a different result at sentencing. The case at bar is distinguishable from *Mills* in that the instant claim appears to be procedurally barred, the proposed newly discovered evidence would not have been admissible at trial, and the proposed newly discovered evidence would not have made a difference in either the guilt or penalty phase of Defendant's trial.

See Ventura v. State, 794 So.2d 553, 570-71 (Fla. 2000) (co-defendant's sentence of life affirmed one year after Ventura's sentence was affirmed where not equally culpable co-defendants no error - not entitled to further review - Ventura failed to

meet second prong of *Jones*); *Groover v. State*, 703 So.2d 1035, 1037 (Fla. 1997); *Johnson v. State*, 696 So.2d 317, 326 (Fla. 1997), *Van Poyck v. State*, 961 So.2d 220, 224-229 (Fla. 2007).

Kormondy's claim is insufficiently pled and he is entitled to no relief.[7]

ISSUE II

KORMONDY IS NOT ENTITLED TO EQUITABLE RELIEF AND CONSIDERATION OF THE MERITS REGARDING HIS CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COLLATERAL COUNSEL AND/OR THE STATE VIOLATED *BRADY V. MARYLAND* AND *GIGLIO V. UNITED STATES*

Kormondy filed in his initial post-conviction motion a claim that trial counsel Stitt was ineffective in not fully impeaching William Long as to any benefits he received from the State. A full evidentiary hearing was held by the trial court in 2005, at which point collateral counsel Mike Reiter

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[7] The trial court distinguished *State v. Mills*, 788 So.2d 249 (Fla. 2001), relied on by Kormondy as follows in footnote 28:

[28] Defendant argues that Defendant should be granted relief based on the case of *State v. Mills*, 788 So.2d 249 (Fla. 2001). In *Mills*, the trial court granted a new sentencing hearing based on the newly discovered evidence that Mill's co-defendant had confessed to a fellow inmate that it was the co-defendant and not Mills who had shot the victim. In *Mills*, the trial court found that the newly discovered evidence would have been admissible at trial and would have probably produced a different result at sentencing. The case at bar is distinguishable from Mills in that the instant claim appears to be procedurally barred, the proposed newly discovered evidence would not have been admissible at trial, and the proposed newly discovered evidence would not have made a difference in either the guilt or penalty phase of Defendant's trial.

questioned Long as to his prior felony convictions, the benefits received as a result of his testimony and the inconsistency between Long's deposition and his trial testimony. Today, in 2014, he is arguing that this information is both new and *Brady* materials. The allegation and any permutations therefrom are time-barred because he did not bring this issue before the court within the one year time requirement of Fla.R.Crim.P. 3.851(d)(1). *Moore v. State*, 132 So.3d 718 (Fla. 2013), and *Byrd v. State*, 14 So.3d 921, 926 (Fla. 2009) ("Appellant first claims that the State failed to correct testimony at trial regarding when Sullivan first offered to provide information against Byrd. We agree with the circuit court that the claim is barred. In fact, Byrd admits that he raised this claim under *Brady* and *Giglio* in his prior post-conviction motion and that this Court affirmed the denial of relief. Further, the claim is based on a December 1981 police report that the circuit court found, in ruling on Byrd's prior post-conviction motion, was provided to Byrd's trial counsel. Finally, because he previously raised a claim of ineffective assistance of counsel regarding use of the document, any such claim here is barred as well.).

While Kormondy attempts to reassert that trial counsel rendered ineffective representation for failing to explore impeachment of William Long, he is now doing so by arguing that he "present post-conviction counsel Michael Reiter," was

ineffective for failing to fully explore this issue. Specifically citing *Martinez v. Ryan*, 132 S.Ct 1309 (2012), and *Trevino v. Thaler*, 133 S.Ct. 1911, 1918 2013), he argues that "there exists equitable right to effective collateral counsel in initial collateral proceedings as to constitutional claims that are not subject to adequate review on direct appeal." (Successive Motion p. 22) (SPCR Vol. I 64). He states if collateral counsel is deficient then he can overcome a procedural bar that arose based upon his failure to bring the claim fully. He is not entitled to relief.

In *Banks v. State*, ___ So.3d ___, 2014 WL5507970 *2 (Fla. 2014), the Florida Supreme Court once again has explained why *Martinez* and *Trevino* are not applicable in Florida courts:

> **A. Ineffective Assistance of Postconviction Counsel**
>
> In his first claim on appeal, Banks asserts that he was entitled to raise procedurally barred claims of ineffective assistance of trial counsel in his post-warrant second successive postconviction motion because he received ineffective assistance of postconviction counsel in his initial collateral review proceeding. In support of his claim, Banks relies on the decisions of the United States Supreme Court in *Martinez v. Ryan*, --- U.S. ----, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler*, --- U.S. ----, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013). His reliance is misplaced.
>
> *Martinez* held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 132 S.Ct. at 1320. *Trevino* simply

> applied the *Martinez* holding in a federal habeas case arising out of a Texas state court and involving Texas state law. *Trevino*, 133 S.Ct. at 1921 ("[W]e conclude that where, as here, state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in *Martinez* applies[.]"). In essence, both *Trevino* and *Martinez* addressed circumstances in which a defendant can raise a claim in a federal habeas petition that he did not raise in state proceedings.
>
> We have held that *Martinez* applies only to federal habeas proceedings and "does not provide an independent basis for relief in state court proceedings." *Howell v. State*, 109 So.3d 763, 774 (Fla.2013); see also *Chavez v. State*, 129 So.3d 1067, 2013 WL 5629607, at *1 (Fla.2013) (table); *Gore v. State*, 91 So.3d 769, 778 (Fla.), *cert. denied*, --- U.S. ----, 132 S.Ct. 1904, 182 L.Ed.2d 661 (2012). Nor does *Trevino*. *Zakrzewski v. State*, No. SC13-1825, 2014 WL 2810560, at *1 (Fla. June 20, 2014) (citing *Gore* and *Howell*). Moreover, we have "repeatedly held that claims of ineffective assistance of postconviction counsel are not cognizable." *Howell*, 109 So.3d at 774; *Chavez*, 129 So.3d at 1067, 2013 WL 5629607, at *9; *Moore v. State*, 132 So.3d 718, 724 (Fla.2013); *Atwater v. State*, 118 So.3d 219, 2013 WL 3198744, at *1 (Fla.2013) (table); *Mann v. State*, 112 So.3d 1158, 1164 (Fla.2013); *Gore*, 91 So.3d at 778. Because claims of ineffective assistance of postconviction counsel do not present a valid basis for relief, we deny relief on Banks' claim that postconviction counsel rendered ineffective assistance.

The record shows that at trial Long was cross-examined on any benefit or deals he might have received from the State. The Florida Supreme Court, on direct appeal, found that "Long, was subjected to extensive cross-examination by the defense. The jury was given ample opportunity to assess Long's credibility."

Kormondy v. State, 703 So.2d 454, 459 (Fla. 1997). While the Court ultimately reversed for resentencing as to the issue of premeditation, the finding that remains intact is that Long was extensively crossed and the jury as to guilt was able to assess his credibility.

The litigation history however does show that present collateral counsel did challenge the credibility of Long's testimony that Kormondy told Long that he killed Gary McAdams. What collateral counsel is unsettled about is that collateral counsel did not fully argue "all" aspects of why trial counsel was "ineffective" in his initial post-conviction motion and state habeas corpus petition. Specifically he contends the jury was not informed of "undisclosed benefits" which Long received, that could have cast doubts upon the veracity of Long's testimony.

Kormondy now claims that had trial counsel Ms. Stitt discovered this other information, she would have learned about the benefits Long received from law enforcement regarding Long's probation proceedings. And, if that information had been told the jury, the jury would have rejected Long's testimony as to what Kormondy told Long. However, collateral counsel did not argue or present this claim below. The only claim that Kormondy brought as an ineffective assistance of counsel claim was trial

counsel's failure to impeach Long on his one felony conviction. (PCR Vol. III 371).

The Florida Supreme Court held in *Kormondy,* 983 So.2d at 431-432:

> The only claim that is properly before this Court is the claim that trial counsel failed to impeach Long regarding his prior felony conviction.FN4 Trial counsel conceded at the evidentiary hearing that she did not remember whether she asked Long about his prior felony conviction even though she did have his criminal record. However, trial counsel did question Long about his use of drugs, about the fact that he failed a urinalysis five times, about his violation of probation, about the fact that he was on the run from the law, and about his use of crack cocaine and alcohol the night Kormondy allegedly confessed his involvement in the crime to Long. While trial counsel did not ask Long the specific question regarding his prior felony conviction, the other questions relate to Long's criminal record and were valid methods of attempting to impeach Long's trial testimony. The one specific question regarding Long's felony conviction would not have changed the effect of Long's testimony on the jury. Thus, Kormondy fails to show how he was prejudiced by trial counsel failing to ask this one question. Because prejudice has not been demonstrated, we affirm the denial of relief on this claim.
>
> FN4. With regard to the benefits Long received from the State and the inconsistency between Long's deposition statements and trial testimony, these arguments are not properly brought under this claim because they were not raised as ineffective assistance of trial counsel claims in the postconviction motion. As a result, the trial court did not address either of these issues. This Court has held that "an appellate court will not consider an issue unless it was presented to the lower court."

Kormondy has not demonstrated prejudice.[8] In fact Long's evidentiary hearing testimony reaffirmed that after he was fully questioned about what benefits he received, Long reaffirmed what Kormondy said to him about murdering Gary McAdams. More importantly, the records show that Long spoke to Chris Roberts after Kormondy told him about the murderer. Long asked Roberts

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[8] Collateral counsel attempted to raise this factual claim in Kormondy's federal habeas corpus pleadings in 2008. The federal district court reviewed the Florida Supreme Court's holding on the issue and concurred that it's holding was correct. The District Court held that in *Kormondy v Tucker*, 2011 WL 9933762 *16-17 (Fla. N.D. 2011), that:

> The Florida Supreme Court rejected the felony-conviction claim for lack of prejudice and rejected the other claims because they had not been asserted below as ineffective-assistance claims. *Kormondy v. State*, 983 So.2d 418, 432 & n. 4 (Fla.2007) (Emphasis added).
>
> The ruling on the felony-conviction claim was plainly correct. That Mr. Long was under a sentence for a crime of some sort was obvious from the fact that he was on the run for a probation violation. And the fact that he had a felony conviction would have added little to the substantial circumstances already shown: he was on the run, had used cocaine and drunk six pitchers of beer, and now expected a $25,000 reward.
>
> The ruling that Mr. Kormondy failed to raise the other claims about Mr. Long's impeachment was also correct. Mr. Kormondy thus procedurally defaulted those claims in state court and could obtain relief here only by showing "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrat[ing] that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). **Mr. Kormondy has not demonstrated cause and prejudice or a fundamental miscarriage of justice. Indeed, Mr. Kormondy has shown no prejudice at all from the failure to impeach Mr. Long on the additional grounds now proposed.**

to contact the police. When the police came he told them the same thing he told Roberts and testified to the same. Long observed on redirect examination by Mr. Reiter in 2005, that Kormondy's statements to Long were made long before trial and when Long did testify, he had already satisfied his community control and was no longer in trouble with the State. (PCR Vol. I 64-68).

As the federal district court observed in denying any relief on this claim in 2011, "Kormondy has not demonstrated cause and prejudice or a fundamental miscarriage of justice. Indeed, Mr. Kormondy has shown no prejudice at all from the failure to impeach Mr. Long on the additional grounds now proposed." *Kormondy v Tucker*, 2011 WL 9933762 *16-17 (Fla. N.D. 2011). So, too, should this Court find that not only is Kormondy time-barred and procedurally barred, but he has failed to show that the evidence known to him since 2005 was prejudicial.

Kormondy is entitled to no relief as to this claim.

CONCLUSION

The denial of Kormondy's successive motion for post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via e-mail to Mike Reiter, Esquire, Counsel for Defendant, at mreiter37@comcast.net, this 23rd day of December, 2014.

/s/Carolyn M. Snurkowski
Carolyn M. Snurkowski
Counsel for the State