IN THE SUPREME COURT OF FLORIDA

CASE NO. 86020

BERNARD BOLENDER,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

FARIBA N. KOMEILY
Assistant Attorney General
Florida Bar No. 0375934
Office of Attorney General
Department of Legal Affairs
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

TABLE OF CITATIONS
(Continued)

TABLE OF CITATIONS
(Continued)

CASES **PAGE**

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

A) Trial and Direct Appeal

Bolender was charged by indictment with four counts of first degree murder, four counts of kidnapping and four counts of armed robbery for the brutal torture slaying of four alleged drug dealers, all of which occurred on January 7-8, 1980. (R1. 1-9).[1] After a trial by jury in April, 1980, Bolender was found guilty as charged. (R1. 387-398). Immediately thereafter, the cause proceeded to the penalty phase where the jury recommended a sentence of life imprisonment. (R1. 399-402). The trial court rejected the jury's recommendation and sentenced Bolender to death. (R1. 403, 406-15).

The direct appeal was taken to the Florida Supreme Court. Bolender v. State, 422 So.2d 833 (Fla. 1982). The Florida Supreme Court affirmed, in all aspects, the judgments and sentences, and, in so doing, established the following historical facts:

> The testimony at trial indicates that on the evening of January 8, 1980 the codefendants were at Macker's residence when two of the victims, John Merino and Rudy Ayan, arrived to participate in a drug deal.

---

[1] The symbol R1. ___ refers to the record on appeal of denial of Bolender's second motion for post conviction relief, Florida Supreme Court Case No. 75,665. Pursuant to Fla. Stat. 90.202(6) and 90.203, the State hereby requests that this Honorable Court take judicial notice of its own records in the instant case.

An argument erupted and Bolender, armed with a gun, ordered the two to strip. A short while later Thompson entered holding Scott Bennett, another subsequent victim, at gunpoint. Thompson said he had surprised Bennett lurking in the bushes outside, armed with two guns. Thompson also discovered a kilogram of cocaine on Bennett which the defendants confiscated. Macker testified that at that point he picked up a gun and went outside to see if anyone else was hiding. He saw a car driving back and forth in front of the house and motioned the driver to come inside. The driver would not. Thompson then ordered Merino to get dressed, and the two of them lured the driver, Nicodemes Hernandez, into the house.

The defendants ordered the additional victims to strip and robbed all four of their jewelry. Thompson left to search the car driven by Hernandez and returned with approximately $3,000 in cash and two more guns. At that point Bolender threatened to kill all four if they did not reveal the location of an additional twenty kilograms of cocaine.

Macker testified that during the ensuing hours the victims were tortured and terrorized in an attempt to obtain their cocaine. He stated that Bolender used a hot knife to burn the back of Hernandez. Bolender also kicked the victims and beat them with a baseball bat and even shot Hernandez in the leg in an attempt to make him talk. The victims insisted, however, that they only had one kilogram of cocaine and not the twenty that Bolender wanted. Macker admitted hitting Merino with the baseball bat but denied any further involvement in the beatings, saying that Bolender dominated him and Thompson. Later they wrapped the victims in sheets, rugs, bedspreads and the material from a beanbag chair. Bolender and Thompson placed them in the blue Monte Carlo Hernandez had been driving. John Merino was still alive at this point; the others were, presumably dead. Bennett's and Ayan's bodies were placed in the trunk, Merino in the back seat, and Hernandez in the front. At approximately

> 4:30 a.m. Bolender and Thompson left with the Monte Carlo and Bolender's car and drove onto the I-95 expressway. They parked the car on the side of the expressway a short distance past the entrance ramp. Intending to burn the car and the victims, they poured gasoline on the vehicle and the surrounding grass and set the grass on fire as they left. Burning the car failed, however, because several motorists saw the fire and put it out.
>
> The defendants thoroughly cleaned the Macker home, removing the bloodied carpeting from the bedroom and living room and scrubbing down the walls. Later, several of the sheets and rugs found wrapped around the bodies were identified as coming from the Macker home. Bolender's fingerprints were found on the Monte Carlo, and on January 13, 1980 he and Macker were arrested for the murders. Five days later Macker gave a statement implicating himself, Bolender, and Thompson. He also told the police where they had disposed of the weapons and other evidence.

Id. at 834-835 (Footnote omitted).

In light of the current claims of "innocence," now advanced in this Court, a brief account of the evidence and testimony of some witnesses, upon which the above findings rest, is in order. Codefendant Macker testified as to the above sequence of events, and the injuries inflicted upon the victims. (TT. 791-868).[2] The account of the injuries to the victims was corroborated by the medical examiner's testimony. (TT. 307-404). All of the victims had been stabbed; victim Hernandez had also been shot.

---

[2] The symbol TT. ___ refers to the trial transcripts.

Motorists saw the burning car, at approximately 4:50 a.m., off of Miami Gardens Drive, and put out the fire. (TT. 717). Carolyn Purdue, who knew Bolender, testified that at approximately 4:30-5:00 a.m., minutes after the car had been set on fire, she received a telephone call from Bolender. Bolender asked her, "Did you hear about the burning car on Miami Garden's Drive?" (TT. 727-8). Later that evening, Bolender, Along with codefendant Thompson, came to her house. Bolender handed her husband the front section of the paper, and told him, "Did you read your horoscope." (TT. 729-30). That section of the paper carried the news about the crimes herein; it did not contain a horoscope. (TT. 729-30).

The burning car, which contained the bodies of the four victims was a blue Monte Carlo, registered to victim Bennett. (TT. 503). When questioned by the police, Bolender denied ever having seen or known Mr. Bennett, and stated that he had never seen the car either. (TT. 510-11). Bolender also denied all knowledge of the homicides, stating he did not know about them until he had read the paper.

Mr. Bolender's finger prints and right palm print were, however, found on the trunk of this car (TT. 629-32); two of the victims' bodies had been placed in the trunk.

Mr. Bolender testified, denying being at Macker's residence at any time during the commission of the crimes. He further denied participating in the clean-up of the Mackers' residence thereafter. As to his finger prints, Mr. Bolender acknowledged that he had told the police that he hand never seen victim Bennett or his blue Monte Carlo. (TT. 1050-51). He stated, however, that he had seen victim Merino earlier on during the night of the crimes. The latter had beeped him and asked to meet at a restaurant parking lot, in order to ask Bolender's assistance in selling a kilo of cocaine. Bolender stated that he had declined the offer, but that it was possible that he had closed the trunk of Merino's car, where the cocaine was. (TT. 1030-34). He stated he could not recall the color or make of Merino's car at that time. (TT. 1049-50).

On rebuttal, the State presented testimony that John Merino had a light yellow new T-Bird rented in that time period. (TT. 1145). Robert McCall testified that in the early morning hours of the day of the crime, Bolender had woken him up and asked him to assist in the clean-up of the Macker residence. (TT. 1115-17). Bolender and Thompson were assisting in the clean-up. Id. McCall also stated that Bolender had thereafter called him, and asked if he could talk to Bolender's attorney and tell him that Bolender was not at the Macker residence. (TT. 1122). Diane Macker testified that Bolender was present at the Macker residence; she did not witness anything done to the victims, as she was staying in the middle bedroom of the house. (TT. 1192-93).

On the above appeal, Bolender had raised the following issues:

I.

WHETHER THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO CALL WITNESSES BY DENYING DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM FOR PAUL THOMPSON WHEN THERE WAS NO SHOWING HE WAS INCOMPETENT TO TESTIFY AND NO EFFECTIVE EXERCISE OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

II.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT PERMITTING THE DEFENDANT TO RECALL CLAUDIA MERINO TO TESTIFY THROUGH AN INTERPRETER.

III.

WHETHER THE TRIAL COURT VIOLATED THE DEFENDANT'S FEDERAL AND FLORIDA CONSTITUTIONAL RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT BY IMPOSING FOUR DEATH SENTENCES WHERE THE JURY'S RECOMMENDATIONS OF LIFE SENTENCES HAD A RATIONAL BASIS.

IV.

WHETHER THE TRIAL COURT VIOLATED THE DEFENDANT'S FEDERAL AND FLORIDA CONSTITUTIONAL RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT WHEN THE COURT BASED ITS DECISION IN PART ON AGGRAVATING CIRCUMSTANCES WHICH HAD NO BASIS IN THE RECORD ON NON-STATUTORY AGGRAVATING CIRCUMSTANCES.

See initial Brief of Appellant in Bernard Bolender v. State, Florida Supreme Court Case No. 59,333.

As to the first issue, the Court found that the trial court did not abuse its discretion in denying the petition for writ of habeas corpus ad testificandum, since Bolender failed to use due diligence to secure Thompson's attendance at trial. Bolender, 422 So. 2d at 835-6. The Court also found no abuse of discretion in denying the motion to have witness Merino testify through an interpreter, since she never requested one and the record reflected she had no difficulty communicating in English. Id. at 837. As to the allegedly improper jury override issue, the Court held:

> . . . In Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), we held that for a trial court to override an advisory sentence of life imprisonment by a jury "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Bolender contends that the jury's recommendation was reasonable because the victims were armed cocaine dealers who may have been planning to rob the defendants, because Macker received a comparatively light sentence, and because only Macker testified as to who shot, stabbed, and killed the victims.
>
> We have examined the record and arguments of counsel and do not agree with these contentions. That the victims were armed cocaine dealers does not justify a night of robbery, torture, kidnapping, and murder. Two of the victims were unarmed and present at the Macker residence because of a previous agreement with Bolender.
>
> The disparity between Bolender's death sentences and Macker's twelve concurrent life sentences is supported by the facts. Bolender acted as the leader and organizer in these crimes and inflicted most of the torture leading to the victims' deaths.

> Bolender used a hot knife to burn Nicomedes Hernandez on the back and inflicted slash wounds on two of the victims. He also shot Hernandez in the leg in an effort to make him reveal the location of his cocaine and inflicted the stab wounds and gunshot wounds that led to the victims' deaths. Macker's role was less significant, and there is no evidence that he participated in the stabbing and shooting of the victims. [cites omitted] There was sufficient collaborating testimony regarding Bolender's participation in these crimes. Based on the evidence and testimony at trial, we agree with the trial court that virtually no reasonable person could differ on the sentence.
>
> Id. at 837

Finally, as to the remaining issue of improper aggravating circumstances, the Court invalidated two aggravating factors (that the crime was committed by a person under sentence of imprisonment and that the defendant knowingly created a great risk of death to many persons) Bolender, supra, 422 So. 2d at 837-838. However, the Court upheld the remainder of the aggravating circumstances and the sentence of death as follows:

> The court properly applied the remaining factors. The crimes were committed during the perpetration of a robbery and kidnapping and were committed for pecuniary gain. They were committed for the purpose of avoiding or preventing a lawful arrest and to disrupt or hinder the lawful exercise of law enforcement. John Merino was described as a police informant and was still alive when the defendants attempted to burn the vehicle. After committing the robbery, kidnapping, and torture, the defendants murdered the victims partially to prevent their retaliation but also to prevent arrest. Finally, these crimes were especially heinous, atrocious,

> and cruel and were committed in a cold, calculated, and premeditated manner. Bolender presented no testimony showing any mitigating circumstance, statutory or nonstatutory. In the absence of any mitigating circumstance disapproval of two aggravating factors does not require reversal of the death sentence. Demps v. State, 395 So. 2d 501 (Fla.), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981).
>
> Id. at 838.

The defendant then filed a Petition for Writ of Certiorari in the United States Supreme Court. (R1. 2037-2051). Said petition raised the following issues:

> I.
>
> THE IMPOSITION OF DEATH SENTENCES FOLLOWING A UNANIMOUS JURY VERDICT RECOMMENDING LIFE SENTENCES CONSTITUTES A DEPRIVATION OF PETITIONER'S LIFE WITHOUT DUE PROCESS AND DEPRIVATION OF HIS RIGHT TO THE EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT.
>
> II.
>
> THE AGGRAVATING CIRCUMSTANCES SET FORTH IN SECTIONS 921.141(5)(e) and (g) ARE UNCONSTITUTIONALLY VAGUE AND UNCERTAIN WHEN APPLIED TO THE FACTS OF THIS CASE.
>
> III.
>
> THE REFUSAL TO ISSUE COMPULSORY PROCESS TO COMPEL THE ATTENDANCE OF A CO-DEFENDANT TO TESTIFY AS A DEFENSE WITNESS VIOLATED PETITIONER'S RIGHT TO CALL WITNESSES UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(R1. 2038)

The petition was denied on May 16, 1983 (R1. 2062); Bolender v. State, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983). Defendant's petition for rehearing was denied on June 20, 1983. Bolender v. State, 462 U.S. 1146, 103 S.Ct. 3131, 77 L.Ed.2d 1380 (1983).

B) First State COLLATERAL PROCEEDINGS

Bolender's first death warrant was signed on January 31, 1984. (R1. 2075). Bolender had previously filed his first Rule 3.850 motion. Said motion raised two issues:

1. That trial counsel was ineffective for failing to properly subpoena Paul Thompson.

2. That trial counsel was ineffective for failing to present any mitigating evidence.

(R1. 2070-2072)

The trial court ordered an evidentiary hearing and issued a stay of execution. (R1. 2087, 2075). On January 4, 1985, the evidentiary hearing was held on the claim of ineffective assistance of counsel for failure to present mitigating evidence. (R1. 2105-2170). Evidence was presented by Bolender's mother and sister who testified that Bolender was a good son and brother. (R1. 2111-2132). The trial attorney also testified at this evidentiary hearing. (R1. 2138-2147). The trial court then summarily denied the first claim, but vacated the death sentences

on the ground that counsel was ineffective for not presenting the foregoing mitigating evidence. (R1. 2201).

The State appealed the foregoing order vacating the death sentences. The Florida Supreme Court reversed and ordered that the death sentences be reinstated. State v. Bolender, 503 So. 2d 1247 (Fla. 1987). The Court found that mitigating evidence presented at the evidentiary hearing, that Bolender "was a nice person who had helped support his family", was known and available to his trial counsel who at the time of trial, "after checking on the trial judge's reputation, concluded that such nebulous non-statutory mitigating evidence would have had little effect on the judge." State v. Bolender, supra, at 1249. The Court noted that trial counsel had "made the tactical decision that a proportionality argument would be the better strategy." Id. The Court then held that "trial counsel made a reasonable choice [of arguing disparate treatment of codefendants] well within the wide range of professionally competent assistance. Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected." State v. Bolender, supra, at 1250. The Court then stated that the lower court had "erred in declaring trial counsel ineffective" and remanded with directions to reinstate the death sentences vacated by the lower court. Id.

Thereafter, the Office of the Capital Collateral Representative, through current post-conviction counsel, assumed responsibility for the case. (R1. 2294). A Petition for Writ of Certiorari was then filed with the United States Supreme Court, alleging that the Florida Supreme Court erroneously interpreted the ineffective assistance of counsel claim under Strickland v. Washington, 466 U.S. 668 (1984). On October 5, 1987, the petition was denied. Bolender v. State, 484 U.S. 873, 108 S.Ct. 209, 98 L.Ed.2d 161 (1987).

On September 4, 1987, the trial court enforced the Florida Supreme Court's mandate and reinstated the death penalty. Bolender filed an appeal therefrom, but, upon the State's motion, said appeal was dismissed, on the ground that it was not authorized by the mandate which only required the reinstatement of the death sentence, not a resentencing. Bolender v. State, 541 So. 2d 1172 (Fla. 1989), (R1. 2336).

C) Second State Collateral Proceedings

On April 24, 1989, Bolender filed his Second Rule 3.850 Motion. Said Motion raised the following claims:

CLAIM I

MR. BOLENDER'S SENTENCE OF DEATH RESULTED FROM PROCEEDINGS AT WHICH THE TRIAL JUDGE REFUSED TO CONSIDER NONSTATUTORY MITIGATING CIRCUMSTANCES, IN VIOLATION OF HITCHCOCK V. DUGGER, 107 S.CT. 1821 (1987), AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM II

THE JURY OVERRIDE WAS IMPROPER, AND STANDS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM III

BERNARD BOLENDER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH THE GUILT-INNOCENCE AND SENTENCING PHASES OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM IV

MR. BOLENDER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN ALL PROCEEDINGS RESULTING IN HIS DEATH SENTENCE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND WAS DENIED HIS RIGHT TO MEANINGFUL POST-CONVICTION REVIEW BECAUSE OF THE INEFFECTIVENESS OF FORMER COLLATERAL COUNSEL, IN DEROGATION OF DUE PROCESS, EQUAL PROTECTION, AND THE EIGHTH AMENDMENT.

CLAIM V

THE STATE'S INTENTIONAL WITHHOLDING OF MATERIAL AND EXCULPATORY EVIDENCE VIOLATED THE CONSTITUTIONAL RIGHTS OF BERNARD BOLENDER UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM VI

MR. BOLENDER'S SENTENCING JUDGE USED A NON RECORD REPORT TO SENTENCE MR. BOLENDER TO DEATH, IN VIOLATION OF GARDNER V. FLORIDA, AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM VII

THE COURT'S FAILURE TO FULLY AND PROPERLY INSTRUCT THE JURY ON THE STATE'S BURDEN TO PROVE GUILT BEYOND A REASONABLE DOUBT VIOLATED MR. BOLENDER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM VIII

THE PENALTY PHASE JURY INSTRUCTIONS SHIFTING THE BURDEN TO PETITIONER TO PROVE THAT DEATH WAS INAPPROPRIATE VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND ILLUSTRATE THAT PETITIONER'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION WERE DENIED CONTRARY TO MULLANEY V. WILBUR, 421 U.S. 684 (1975), MILLS V. MARYLAND, 108 S.CT. 1860 (1988), AND ADAMSON V. RICKETTS, 865 F.2d 1011, (9TH CIR. 1988) (EN BANC).

CLAIM IX

THE MURDER FOR WHICH MR. BOLENDER WAS CONVICTED WAS NOT COLD, CALCULATED AND PREMEDITATED AS DEFINED BY ROGERS V. STATE, AND VIOLATED MAYNARD V. CARTWRIGHT AND THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE NO LIMITING CONSTRUCTION WAS PROVIDED TO THE JURY OR EMPLOYED BY THE SENTENCING JUDGE.

CLAIM X

THE "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING CIRCUMSTANCE WAS APPLIED TO PETITIONER'S CASE WITHOUT ARTICULATION OR APPLICATION OF A NARROWING PRINCIPLE IN VIOLATION OF MAYNARD V. CARTWRIGHT AND THE EIGHTH AND FOURTEENTH AMENDMENTS

CLAIM XI

MR. BOLENDER'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

(R1. 10-126).

With respect to the Brady v. Maryland, 373 U.S. 83 (1967) claim, issue V above, the defendant requested disclosure of all State Attorney and Metro-Dade Police Department files in the instant case, with respect to Mr. Bolender, stating that there

"was very clearly a credibility contest between Mr. Bolender and one of his co-defendants, Joe Macker". (R1. 78-9). The defendant added that failure to disclose said files made "it impossible for him to adequately set out any other Brady material that may have been withheld by the State in his 1980 trial." Id. The defense thus requested leave to amend his second Rule 3.850 motion, after disclosure of said State files. Id.

On January 31, 1990, the Governor signed Bolender's second death warrant, with execution scheduled for March 7, 1990. The trial Court held a hearing on February 12, 1990.

At the above hearing, the defendant requested a stay and delay of proceedings based upon his Brady claim. (R1. 2538-2542). The defendant's position was that, since the state attorney's office had not disclosed all of its files, due to the pendency of criminal charges against co-defendant Thompson,[3] he could not fully develop his Brady claim. The defense specifically noted: "[i]f we don't plead a Brady claim now, where we may be suspicious, we waive it, we have pled it but there are no facts." (R1. 2542). Mr. Thompson's case was scheduled to be completed with his plea of guilty and a statement

---

[3] Co-defendant Thompson had previously been adjudicated incompetent and insane in the instant case. Said determinations were then vacated as a result of the discovery of Thompson's fraud upon the Court in feigning insanity. Thompson v. Crawford, 479 So. 2d 169 (Fla. 3d DCA, 1985).

of his recollections of the instant crimes, later that week, on February 16, 1990. (R1. 2537-9).

The State agreed that all of its files would be disclosed immediately upon the conclusion of the proceedings against Thompson on February 16, 1990. (R1. 2537). The State's position was that the remainder of the defendant's purely legal claims should be heard at the hearing, but that the defendant was entitled to amend his motion to vacate if the disclosure of the State files requested provided any support for the Brady claim: "and then if at a later time there is a Brady claim as well there may be, they are entitled to raise that as a separate pleading." (R1. 2550).

The trial court temporarily stayed the execution, to allow the defendant an adequate opportunity to inspect all of the State's files. On March 9, 1990, more than three weeks after disclosure of all requested files, the trial court held another hearing. At this latter hearing, post conviction counsel for the defendant conceded that they had in fact inspected and copied all of the state's files, and, that there was no meritorious Brady issue. (R1. 2615). Collateral counsel for defendant specifically stated: "the materials that were looked through in the State Attorney's files in and of themselves were not enough to establish what we believe to be the Brady claims." Id.

The trial Court then found the Defendant's motion to be "a successive Rule 3.850 motion." The trial court denied the motion without an evidentiary hearing, finding issues II, III, IV, V, VI, VII, VIII, IX and X above to be procedurally barred, issue XI legally insufficient, and, issue I to be "conclusively refuted by the record and without merit." (R1. 2493).

The Defendant immediately appealed the above denial of his second motion for post-conviction relief to the Supreme Court of Florida, addressing all issues raised in that motion with the exception of the Brady claim (issue V above), which he abandoned. See, Bolender v. Dugger, 564 So. 2d 1057, 1058 at n. 1 (Fla. 1990)(detailing claims raised on appeal, which did not include any Brady claim).

The Defendant also filed a petition for writ of habeas corpus in the Supreme Court of Florida, raising the following claims:

> I). MR. BOLENDER WAS DENIED HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BECAUSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE ON APPEAL.
>
> II). MR. BOLENDER WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE THE SENTENCING COURT USED IDENTICAL UNDERLYING PREDICATES TO FIND MULTIPLE AGGRAVATING CIRCUMSTANCES.
>
> III). THE APPLICATION OF THE AVOIDING ARREST AND HINDERING LAW ENFORCEMENT AGGRAVATING CIRCUMSTANCES IN THIS CASE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

IV). THE FLORIDA SUPREME COURT'S FAILURE TO REMAND FOR RESENTENCING AFTER STRIKING TWO AGGRAVATING CIRCUMSTANCES ON DIRECT APPEAL IN THIS JURY OVERRIDE CASE DENIED MR. BOLENDER THE PROTECTIONS AFFORDED UNDER FLORIDA'S CAPITAL SENTENCING STATUTE, AND VIOLATED DUE PROCESS, EQUAL PROTECTION, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

V). RECENT DECISIONS FROM THIS COURT MAKE MANIFEST THAT THE JURY OVERRIDE IN MR. BOLENDER'S CASE RESULTED IN AN ARBITRARILY, CAPRICIOUSLY, AND UNRELIABLY IMPOSED SENTENCE OF DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

VI). THE TRIAL COURT'S INSTRUCTIONS AT THE GUILT PHASE DIRECTED A VERDICT FOR THE STATE, IN VIOLATION OF DUE PROCESS AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

VII). THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. BOLENDER'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

VIII). THE "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING CIRCUMSTANCE WAS APPLIED TO PETITIONER'S CASE WITHOUT ARTICULATION OF APPLICATION OF A NARROWING PRINCIPLE, IN VIOLATION OF MAYNARD V. CARTWRIGHT AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

IX). THE SENTENCING PROCEDURE EMPLOYED BY THE TRIAL COURT SHIFTED THE BURDEN TO MR. BOLENDER TO ESTABLISH THAT LIFE WAS THE APPROPRIATE SENTENCE AND RESTRICTED FULL CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE WHICH OUTWEIGHED AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

X). MR. BOLENDER'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Supreme Court of Florida stayed Bolender's execution the day before the warrant expired, and, set both cases for oral

argument. The Court then issued one unanimous dispositive opinion, denying relief as to all claims. See Bolender v. Dugger, 564 So. 2d 1057 (Fla. 1990). In the rule 3.850 appeal portion of its opinion, the Court found all issues except the Hitchcock claim to be procedurally barred. The latter claim was found to be without merit. The ineffective assistance of appellate counsel claims in the habeas petition were, likewise, found to be procedurally barred and without merit. Id. Defendant then filed a motion for rehearing. The Court denied this rehearing on September 4, 1990.

D) Federal habeas corpus proceedings

The Governor then signed a third warrant for execution on September 4, 1990. The warrant period began on October 2, 1990 and expired on October 9, 1990.

On October 1, 1990, Defendant filed his habeas corpus petition in the Federal District Court for the Southern District of Florida. The Defendant raised seventeen (17) issues and subissues,[4] and requested an evidentiary hearing. The Federal

[4] The issues were: 1) Bolender's sentence of death was in violation of Hitchcock v. Dugger, because the sentencer did not properly consider nonstatutory mitigation and defense counsel's presentation of such evidence was inhibited by the law then in effect; 2) Bolender's trial counsel was constitutionally ineffective during the sentencing phase of his trial; 3) Bolender was denied a meaningful post-conviction review and was denied the effective assistance of counsel in said proceedings; 4) Bolender did not receive effective assistance of counsel at the guilt/innocence phase of his trial; 5) the CCP aggravator was unconstitutionally applied; 6) the HAC aggravator was applied in

District Court stayed the execution, but then denied relief without holding an evidentiary hearing. Bolender v. Dugger, 757 F. Supp. 1400 (S.D. Fla. 1991).

The Defendant appealed the above denial of relief to the Eleventh Circuit Court of Appeals. He challenged the District Court's refusal to hold an evidentiary hearing, and also raised five (5) of the (17) issues challenged in the District Court, as follows: (1) Whether Petitioner's claim pursuant to Hitchcock v. Dugger and its progeny was properly denied; (2) Whether Petitioner's claim of ineffective assistance of counsel at the sentencing phase of his capital trial was properly denied; (3) Whether Petitioner's rights to compulsory process were violated; (4) Whether the trial court's instructions at the guilt phase were proper and did not direct a verdict for the State; and, (5) Whether the State Supreme Court's review herein was proper. The federal Court of Appeals affirmed the denial of federal habeas corpus relief, in all respects, on March 11, 1994. Bolender v. Singletary, 16 F.3d 1547 (11th Cir. 1994). Defendant's motion for rehearing was denied on June 27, 1994.

---

violation of Maynard v. Cartwright; 7) the sentencing judge used a non-record report, in violation of Gardner v. Florida, and trial and appellate counsel rendered ineffective assistance in failing to litigate this alleged error; 8) the trial court failed to fully and properly instruct the jury on the State's burden to prove guilt beyond a reasonable doubt; 9) the jury override sentence herein was unconstitutionally arbitrary, capricious and unreliable; and, 10) the trial court unconstitutionally shifted the burden of establishing that life was the appropriate sentence.

The Defendant then filed a petition for writ of certiorari in the United States Supreme Court, challenging: 1) The Federal Court of Appeals' analysis of the Florida Supreme Court's direct appeal review, and 2) the Florida Supreme Court's application of its jury override scheme. The United States Supreme Court denied the petition on November 28, 1994. Defendant's motion for rehearing was denied on January 23, 1995. Bolender v. Singletary, 513 U.S. ___, 130 L.Ed.2d 502, 115 S.Ct. ___ (1994), rehearing denied, 513 U.S. ___, 130 L.Ed.2d 899 (1995).

E) Third State Collateral Proceedings

On May 24, 1995, the Governor of the State of Florida signed the Defendant's fourth warrant for execution, for the period beginning at noon on July 11, 1995 and ending at noon on the 18th day of July, 1995. Execution is currently scheduled for July 12, 1995.

On June 6, 1995, the defendant served a motion requesting that the trial court provide him with: 1) copies of his fingerprint and hand print, introduced at trial, and 2) "an original note pack, as well as pre and post test documents", "a wealth of material" underlying a report of 1980 pretrial polygraph exam of co-defendant Macker, conducted by Slattery Associates, Inc. See motion to provide access, at pp. 1-2.[5]

---

[5] Said motion, although filed in the court below, is not included in the record on appeal.

A copy of the 1980 polygraph report, attached to the motion, reflected that the underlying polygraph materials requested by the defendant were in the possession of Slattery Associates, Inc. (R. 226; T. 2-3).[6] The motion also stated that, "the polygrapher will not release the complete set of materials without a waiver from Macker." Motion to provide access, at p. 2. The purpose of the motion, according to the defendant, was to test Bolender's culpability and evaluate Brady claims. Id.

As the motion had, inter alia, been served upon the State Attorney's Office, the State filed a response.[7] In its response the State noted, as detailed herein at pp. 14-17, that it had previously disclosed all of its files in their entirety, in 1990. Response at pp. 1-3. The State noted that the polygraph report itself had been obviously disclosed as of at least 1990, as apparent from its attachment to the motions. Id. at 4-5. The State, in reliance upon Lopez v. Singletary, 634 So. 2d 1054, 1058 and n. 11, (Fla. 1994) alleged that it had no additional duty to obtain unspecified records with respect to the polygraph report from a private entity. Id. at 5-6. Moreover, the State noted that in light of the defense's prior claims based upon culpability and Brady, raised in direct appeal and a prior motion

---

6 The symbol "R. ___" refers to the record on appeal herein; the symbol "T. ___" refers to the transcripts of hearings.

7 Said response, although filed in the circuit court is not included in the record on appeal.

for post conviction relief, any such claims at this juncture were successive and untimely. Id. at 4.

The defendant then also served a notice of hearing upon the State Attorney's Office and Slattery Associates, Inc., for June 8, 1995, with respect to the above motion. The latter entity which had never been a party in the instant case, and which was not subpoenaed, or otherwise served with any written request or suit pursuant to Fla. Stat. 119, did not appear at the hearing. (T. 19). The trial court and the State noted that Mr. Slattery had contacted the Court and the state, and inquired as to the necessity of his presence, given his busy schedule and lack of adequate notice. (T. 17-18). At the hearing, the defense also conceded that the polygraph report, which as noted previously clearly reflects that the material requested by the defense (test charts, test questions, notes of polygrapher, etc.) has always been in the possession of Slattery, was additionally provided to trial counsel, at trial in 1980. (T. 2-3). The State in addition to the arguments in its written pleadings, also noted that it was not in a position to waive Mr. Macker's rights as to any privilege against disclosure of the requested materials. See defendant's motion for rehearing at p. 3.[8]

---

[8] Said motion for rehearing has not been included in the record on appeal either.

The trial court agreed to provide assistance in locating the original fingerprints/handprint. The court denied the request for production of the underlying test materials for the polygraph report, in light of the fact that the appropriate party had not been properly brought before the court. (T. 20, 26). The next day, June 9, 1995, the defendant was provided with copies of the requested fingerprints/handprints which were in the original court file.

On June 16, 1995, the defendant served a motion for rehearing of the trial court's above denial with respect to polygraph materials. In said motion, the defendant conceded that it had first contacted Slattery Associates, Inc., telephonically, on June 1, 1995. The motion for rehearing, unlike the original motion, did not contain any allegations with respect to requirement of a waiver by co-defendant Macker. Instead, on rehearing, the defendant alleged that Slattery Associates, Inc. would release the requested materials to the defendant upon authorization from the State Attorney's Office. See motion for rehearing at p. 2. Upon receipt of this motion, the State Attorney's Office immediately gave its authorization. See agreed order of the parties. On June 21, 1995, the defendant received all the requested polygraph material from Slattery. (R. 115 et/seq.).

On or about 12 p.m., July 7, 1995, the defendant delivered his third motion for post-conviction relief. He raised nine (9) issues. Said motion was accompanied with another one, requesting the disqualification of the State Attorney's Office. The latter motion was based upon alleged misconduct of the prosecutor handling the case, and the possibility that he would be called as a witness. (R. 1121-30).

The State had previously, on June 12, 1995, filed a "Procedural History," and stated its position that any motion for post-conviction relief should be dismissed without an evidentiary hearing, due to untimeliness and under the successive motion doctrine.[9] See, Procedural History, at pp. 15-16. The State also filed a response to the individual claims raised in the Third Motion for Post-Conviction Relief, still maintaining its position that all claims were procedurally barred as they were untimely and successive. (R. 1137-55). A separate response in opposition to the motion for disqualification, was also filed. (R. 1156-59).

The trial court conducted a hearing on the defendant's claims on July 8, 1995. The defendant wished to address his post-conviction claims first, before argument on his motion to disqualify. (T. 31-2). The trial court, however, initially heard arguments or disqualification of the State Attorney's

---

[9] Said pleading was lodged with this Court, and filed in the Circuit Court, but has not been included in the record on appeal.

Office, as same would be dispositive. Id. Based upon the State's response and reliance upon State v. Clausell, 474 So. 2d 1189 (Fla. 1989), the trial court denied the defense motion to disqualify. (T. 37-41).

The defendant then presented argument as to his first three (3) claims, and rested on his motion to vacate with respect to the remaining six (6) claims. (T. 42, 71). At the outset, the trial court noted that this was a successive and untimely motion to vacate, and that the defendant had procedural hurdles to overcome. (T. 42-3). The trial court stated that, although the defendant had couched his claims in terms of "newly discovered" evidence, he still had to show why he did not uncover this evidence previously, and present the claims based thereon in his prior motions for post conviction. Id. The defendant thus initially addressed the issue of timeliness.

The first claim was that two new polygraphers had opined , based upon an examination of Slattery's charts and test questions, that the pretrial polygraph reports on co-defendant Macker were erroneous and invalid. (T. 47). There was no allegation that the original polygraphers had changed their opinions. The defense stated, "we don't know the opinion of the original examiner. The reason the State has, is in 1980 he passed although it was not expressed. What is on the record is, if you find or show deception this plea is abrogated, he did not

fail the polygraph. We have an affidavit that [defense counsel] was told he passed the polygraph, that is submitted as a part of the Appendix." (T. 47-8); see also affidavit of defense counsel stating that he understood that Macker had passed the polygraph. (R. 323).

Upon questioning by the trial court, the defense conceded, "what was known is that he passed a polygraph and it was not discoverable in '85". (T. 50). The State then pointed out: "we can't stress enough is that in '90 once Mr. Thompson's case was over and they had access to the State Attorney's files and they saw the report of the polygraph examiner, and they could have at that time made a public record's request and said to the State further, do you have any files? ....they could have gone to Mr. Slattery, made the same public records request to Mr. Slattery that they did in ['95](sic) and we could have litigated that and taken the position the State took. If they were wrong they could have appealed and would have gotten it, but they never asked Slattery for the record or the State for Slattery's records. They had the opportunity to do it, they didn't. They clearly did not use due diligence any way you want to look at it. (T. 60).

The second claim was that newly uncovered evidence from the Organized Crime Bureau (OCB) files on Mr. Macker, from the mid-1970's and entirely unrelated to the instant case, demonstrated that, at trial, the prosecution portrayed Mr. Macker in a false

light. Apart from the OCB files, this claim was also based upon a PSI on Diane Macker, again in an unrelated 1976 case, which contained bad character hearsay on Joseph Macker. Neither of these files were in possession of the State Attorney's Office. With respect to this issue, the defendant stated that, in 1990, pursuant to Fla. Stat. 119, he had requested all files for all defendants from the police department. (T. 64). A copy of the 1990 written request, however, reflected that the defense had only asked for Bernard Bolender's files (not all defendants) in the instant case (not any and all cases). (T. 65, 66-7, 68). As to Diane Macker's files and PSI, the defense conceded that it had not made any requests to anyone in 1990 or any time prior thereto. (T. 69). The third claim, which was also based on Diane Macker's PSI, was also in the same posture.

As noted previously, with respect to the remainder of the claims, the defense rested on its written pleadings without any further proffer of timeliness. (T. 72).

The trial court concluded, "the burden of proof in newly discovered evidence is very stringent. The facts underlying the motion must have been unknown at the time of the trial and not discoverable despite the exercise of due diligence. In addition to being truly new, the movant must show that the evidence is material. I don't think the defendant has met that burden in any of these claims. The State has been able to refute the claims

made in the motion without the necessity of an evidentiary hearing and the motion to vacate judgments of convictions and sentences is therefore denied." (T. 74).

POINTS ON APPEAL

I.

WHETHER BOLENDER'S CLAIM BASED UPON NEWLY FOUND OPINIONS OF POLYGRAPHERS IS PROCEDURALLY BARRED AS IT IS UNTIMELY AND SUCCESSIVE, AND WITHOUT MERIT.

II.

WHETHER BOLENDER'S BRADY CLAIM ARISING FROM UNRELATED 1970'S FILES IS PROCEDURALLY BARRED AS IT WAS UNTIMELY AND SUCCESSIVE.

III.

WHETHER THE CLAIM OF BRADY VIOLATION WITH RESPECT TO INFORMATION AS TO DIANE MACKER IS PROCEDURALLY BARRED AS IT WAS UNTIMELY AND SUCCESSIVE.

IV.

WHETHER BOLENDER'S ALLEGED DUE PROCESS VIOLATION IS PROCEDURALLY BARRED.

V.

WHETHER BOLENDER'S CLAIM OF NEWLY DISCOVERED EVIDENCE OF MACKER'S CONFESSION TO OTHER INMATES IS UNTIMELY AND PROCEDURALLY BARRED.

VI.

WHETHER NEWLY DISCOVERED EVIDENCE ALLEGATIONS REGARDING MACKER AS AN INFORMANT, AND GOVERNMENT INVOLVEMENT IN THE DRUG DEAL, ARE BOTH UNTIMELY AND UNSUBSTANTIATED.

VII.

WHETHER AN EVIDENTIARY HEARING IS REQUIRED ON PROCEDURAL DEFENSES ASSERTED BY THE STATE.

VIII.

WHETHER BOLENDER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS SUCCESSIVE AND UNTIMELY.

IX.

WHETHER BOLENDER'S CLAIM OF STATE INTERFERENCE IS UNTIMELY AND PROCEDURALLY BARRED.

X.

WHETHER BOLENDER'S CLAIM OF IMPROPER JURY OVERRIDE IS UNTIMELY AND PROCEDURALLY BARRED.

ARGUMENT

I.

BOLENDER'S CLAIM BASED UPON NEWLY FOUND OPINIONS OF POLYGRAPHERS IS PROCEDURALLY BARRED AS IT IS UNTIMELY AND SUCCESSIVE.

In the court below, defendant alleged that newly discovered evidence revealed that "Macker's trial testimony was a lie, that the State knew or should have known that the testimony was a lie, and that the State went to great lengths deceitfully to misrepresent the veracity of their main witness against Mr. Bolender." (R. 43).

At the outset the State would note that there is no support for the defendant's bald assertion that Macker's trial testimony was a lie. The claim herein is based upon two newly found polygraph experts who disagree with each other, and with the original examiners at Slattery Associates, who administered polygraph exams to Macker 15 years ago.

A brief factual background with respect to the instant claim reflects that it is entirely without merit and untimely. On January 18, 1980, some five (5) days after his arrest, co-defendant Macker gave a statement to the police. (R. 129-150). He later agreed to go through a polygraph examination, the written report of which was prepared on January 30, 1980. (R. 224-233). The Slattery Associates, Inc. examiner concluded that

Macker was truthful in his lack of involvement in stabbing any of the murder victims and lack of involvement in shooting. (R. 231, 233).

Macker was concluded to be deceptive as to his knowledge of whether anyone would be robbed or killed prior to the entry of the second victim to the house, and his beating of any victims. (R. 233). When he was advised of this opinion, Macker admitted that he kicked some of the victims. He also admitted that when Bolender spoke to the first victim and spoke of Macker having money, he was fairly certain that something was going to happen. (R. 233). After the above statements, Macker was again examined as to his knowledge and beating. Id. As these latter exam questions had been asked twice, the result was inconclusive. Id. The examiner thus recommended re-examination at a later date, to see whether Macker was holding back any pertinent information as to the said questions. Id.

Collateral counsel for defendant have expressly admitted that trial counsel received a copy of the above written report with the aforestated conclusions, at trial in 1980. (T. 2-3). Indeed, a copy of said report was also attached to collateral counsel's motion for access to records. The above 1980 written report, on its face, clearly states that various subject information, pre- and post-test documents, etc., were retained in Slattery's possession. (R. 226).

On April 14, 1980, Macker then entered a formal plea agreement with the State. (R. 269, et seq.). The terms of the plea agreement, contained in the original record on appeal, stated that the agreement was between Assistant State Attorney (Bob Kaye and Abraham Laeser) and Macker and his attorney. Record on direct appeal, FSC No. 59,333 at pp. 78, 81. Condition 11 of said agreement provided:

> Prior to this agreement being finalized and ratified by the Court, the defendant, Joseph T. Macker must take and 'pass' a polygraph examination with a polygraph examiner of the State's choice. By the use of the work 'pass', it is understood that the defendant will testify fully and truthfully about the acts performed and the degree of culpability of all persons who participated in the acts which resulted in the four deaths listed in the indictment. The determination of whether the defendant 'passed' will be exclusively within the province of the selected examiner.

Id. at pp. 79-80 (emphasis added).

The plea colloquy further reflects that the prosecutor, Mr. Kaye, also informed the court, that if the polygraph exam was unacceptable, the plea would be abrogated and Macker's statements to the state would not be used "against Mr. Macker at any subsequent trial." (R. 277).

On April 17, 1980, another polygraph test by Slattery was scheduled, but not given. (R. 116). On April 21, 1980, Macker was again polygraphed by Slattery and a verbal report was given to Assistant State Attorney, Robert Kaye. (R. 117). The defendant's appendix in the court below, reflects an affidavit by trial counsel that at the time of trial it was his understanding that Macker had passed the polygraph examination.

The defendant has thus, for the past fifteen years, had full knowledge of a verbal report of pass[10] and a written report which concluded Macker was not involved in stabbing any victims or shooting, and which reflected that underlying charts, test questions, etc., were in possession of Slattery Associates, Inc. As noted on pp. 14-17, the defendant, since 1990, has also had full access to, and has inspected, the state's files in the instant case; he obviously knew that the state was not in possession of any charts, test questions, etc. Years thereafter, during the instant warrant period, the defendant finally asked for and obtained the underlying charts, questions, etc., from Slattery Associates. The charts, etc., were given to two newly found experts, who have never examined Macker and who have never consulted with the Slattery examiners. One of the new experts has now opined that the results of the written and verbal reports reflect deception by Macker; the other new expert has stated that

---

[10] In addition to the trial counsel's knowledge, collateral counsel, at the hearing in the lower court, also stated that they knew Macker had passed. (T. 50).

the tests were unreliable and invalid. There are no affidavits, statements or other representations by the defendant that the original examiners have either changed their mind or are of the opinion that Macker did not pass.

The state fails to see how the new experts' polygraph opinions are in any way material. "Polygraph testing has not passed the reliability threshold." Delap v. State, 440 So. 2d 1242, 1247 (Fla. 1983). "The use of a polygraph examination as evidence is premised on the waiver by both parties of evidentiary objections as to lack of scientific reliability. The evidence fails to show that the polygraph examination has gained such reliability and scientific recognition in Florida as to warrant its admissibility." Id. For this precise reason, as noted above, the State and Macker agreed that the latter would be examined by an expert of the State's choosing, and that whether Macker passed would be within the sole province of such examiner; not examiners of Mr. Bolender's choosing, produced fifteen years after the fact, and second guessing the agreed upon expert, without any examination of Macker or even consultation with the original examiner. The newly found experts' opinions thus in no way abrogates Macker's plea condition. In light of the lack of admissibility of polygraph results in general, and the irrelevancy of the opinion of Bolender's newly found experts under the terms of the instant plea agreement, the State fails to see how the outcome of the instant trial was in any way affected.

The State submits that this claim is not only without merit but that it is procedurally barred as it is untimely. The opinions by the new polygraphers are not newly discovered evidence as contemplated by Fla.R.Crim.P. 3.850 as well as Jones v. State, 591 So. 2d 911, 915 (Fla. 1991). First, for evidence to be newly discovered, the facts must have been unknown to the defendant or his attorney and could not have been ascertained by the exercise of due diligence. Clearly, the defendant, through his attorneys, has been aware of the polygraphs taken by Macker since trial. Indeed, collateral counsel conceded that both the written and verbal reports from the polygraph examiners were disclosed to trial counsel. (T. 2-3, 50; R. 323). The polygraph report, on its face, clearly states that all the information, upon which the newly found experts based their opinions, was in the possession of Slattery Associates, Inc. In light of the defense's knowledge of said reports, the State submits that collateral counsel could have made the request for underlying charts, tests, questions, etc., in, at the latest, their second motion to vacate in 1990, to Slattery Associates, Inc., under the Public Records Laws, Ch. 119, as they were the entity that had possession of the records. See Lopez v. Singletary, 634 So. 2d 1054, 1058 (Fla. 1994)(the State Attorney is not responsible for giving access to polygraph examiners' files; requests must be made directly to the entity in possession of such records). The fact that they did not do so until June of 1995 does not make the

records newly discovered. See Porter v. State, 20 Fla. L. Weekly S152, 153 (Fla. March 28, 1995)(claims, including allegation that exculpatory impeachment evidence was not disclosed at trial, which are included in a successive post conviction motion or filed after the expiration of the time limits set forth in Rule 3.850, are procedurally barred where the newly discovered evidence has been available and subject to discovery through due diligence); Agan v. State, 560 So. 2d 222 (Fla. 1986)(where the Public Records Act was equally available prior to the date for a timely post-conviction relief motion, no due diligence is shown for bringing an untimely newly discovered evidence claim); Adams v. State, 543 So. 2d 1244 (Fla. 1989)(all post-conviction relief motions filed after June 30, 1989, and based on new facts or significant changes in the law must be made within two years from date facts should have been reasonably known or change was announced).

Allegations, that the State initially, in 1995, opposed the public records request as to the underlying polygraph materials does not change the fact that the defendant had a duty to request such records in 1990 and during the pendency of his prior post conviction motions. Moreover, contrary to the defendant's allegations, the State was not opposing the release of any records in its possession, rather, the defendant was seeking to have the State waive Macker's rights and obtain said records from the possession of a non-state entity. When, on rehearing, the

defendant indicated that Macker's consent was not necessary, but only the State's, the State immediately agreed to the release of those records. Thus, the polygraph records do not present a basis for this claim of newly discovered evidence.

Finally, the defendant alleges a violation of Brady v. Maryland, 373 U.S. 83 (1963), in that the State allegedly failed to turn over one inconsistent statement by Macker, i.e. that he told the polygrapher that Paul Thompson killed Hernandez after shooting and torturing him with a heated knife, while he stated at trial that the defendant had tortured Hernandez with the heated knife, and shot him in the leg, while Thompson hit Hernandez with the bat. (TT. 820-21, 826, 830). The State submits again that this is an untimely claim as the polygrapher's notes were available through a public record request at the prior post conviction motion. Thus, it does not present a ground that is cognizable in this post conviction motion. Moreover, as noted in the statement of case and facts, at pp. 14-17, the defendant previously raised and abandoned a Brady claim in his 1990 post-conviction proceedings. This claim is thus also procedurally barred as it is successive. Porter, supra, (additional evidentiary assertions in support of a previously raised R. 3.850 are procedurally barred).

Lastly, the State would note that this claim is also without merit. The defendant has conveniently taken the alleged

inconsistent statement out of context, as is obvious when the notes are reviewed as a whole. In the notes, Macker states that the defendant burnt Hernandez with the hot knife and then shot him in the leg. (R. 168-9). In the notes quoted by the defendant when read in context, it is clear that Macker stated that Paul Thompson killed Hernandez after the defendant shot and tortured him with the heated knife. Thus, there was no Brady violation, or certainly at most one inconsistent statement out of testimony lasting approximately 150 pages. In that testimony, Macker was extensively cross-examined by defense counsel as to his prior statements, plea and motive to lie. (TT. 868-923). Thus, in light of the evidence against the defendant, detailed at pp. 1-5 herein, and the cross-examination conducted, there is no reasonable probability that the results of the trial would have been different. The one alleged inconsistency did not prevent the defendant from receiving a fair trial, one whose verdict is worthy of confidence. Kyles v. Whitley, 115 S.Ct. 1555 (1995).

II.

BOLENDER'S BRADY CLAIM ARISING FROM UNRELATED 1970'S FILES IS PROCEDURALLY BARRED AS IT WAS UNTIMELY AND SUCCESSIVE.

In his second claim, defendant first alleges that "newly discovered evidence of police and other state maintained files" reflects that the prosecutor's arguments at trial, with regard to Macker, were false. (R. 65). The first portion of the evidence is apparently surveillance tapes of Macker taken by the organized

Crime Bureau in Miami in the mid-1970's. (R. 66). Defendant stated that said tapes reflect that Macker, at that time, was involved in numerous criminal enterprises. Id. The defendant, however, also added that there was never any arrest or convictions for this alleged criminal conduct, (R. 69), which is not surprising, given that the portions of the tapes quoted by the defendant consist entirely of nonsensical conversations with often unidentified persons. The OCB files were entirely unrelated to the instant case, and were not contained in the State Attorney's files.

The State submits that the instant claim is also procedurally barred because it was untimely and successive. There were no written allegations whatsoever as to why this claim was not raised and litigated previously. At the hearing below, as noted on p. 28 herein, it was clear that the defense's prior 1990 F.S. 119 demands to the police agencies, did not include any request for disclosure of Mr. Macker's unrelated files; the prior public records requests solely related to information as to Mr. Bolender in the instant case. This claim is thus procedurally barred as a result of being untimely. Jones v. State, supra, 591 So. 2d at 916 (definition of newly discovered evidence is that asserted facts must have been unknown by the party, and it must appear that defendant or his counsel could not have known them by use of due diligence), Demps v. State, 515 So. 2d 196, 198 (Fla. 1987)("Rule 3.850 bars an untimely petition based upon

information previously ascertainable through the exercise of due diligence"); Porter, supra; Agan, supra. Moreover, as noted in the previous argument, the defense had previously raised and abandoned a Brady claim, based upon the State's files, during his second post-conviction proceedings in 1990. As such the instant claim is also procedurally barred for being successive.

The State would also note that the premise of the instant claim - i.e., the defendant's allegations that the trial prosecutor portrayed Mr. Macker as a non-violent person without a substantial criminal background - is without any record support. Macker pled guilty to four counts of murder, four counts of robbery, four counts of kidnapping, and possession of cocaine. At trial, he testified that: 1) he participated in the murders herein, by assisting in bringing in one of the victims from the front of the house; 2) at some point in time he held a gun on the victims; 3) he hit one of the victims with a baseball bat and kicked them; 4) he fetched whatever weapons Bolender asked him to; and 5) he assisted the other codefendants in placing the bodies of the victims in a car which was later to be burnt. (TT. 808-42).[11] The state fails to see how Macker's convictions and testimony at trial portray him as a "non-violent" individual. Moreover, Macker also testified that, 1) he had been previously convicted of cocaine charges (T. 789); and 2) prior to the

---

[11] The symbol "TT. ___" refers to the trial transcripts included in the direct appeal record in this Court, FSC Case No. 59,333.

offenses herein he and the defendant were partners in the cocaine sale business, wherein they had participated in other violent drug rip-offs. (TT. 901-2, 920, 927). In light of Macker's admissions, at trial, of his substantial criminal background and violent acts, the bald assertions by the defendant that the state falsely portrayed Macker at trial is entirely without merit.

Finally, the State would also note that Macker was never arrested, charged or convicted for the criminal activities which are allegedly reflected on the surveillance tapes. Nor is there any allegation by the defendant that the alleged criminal activity by Macker, from the 1970's, was in any way connected to the instant crimes. The State fails to see how unintelligible transcripts of surveillance tapes, which do not reflect the commission of any violent crimes, which were made years before the instant crimes, and which never led to any convictions, were competent evidence which could have been utilized at trial, let alone probably affected the outcome, especially where Macker testified and admitted to violent criminal acts, both in conjunction with the instant case and prior crimes. Whether the instant claim is viewed as a newly discovered evidence claim, or as a Brady claim, alleging that the State failed to produce allegedly favorable evidence, the conclusion remains the same. Either variation of the claim, in addition to timeliness, requires a demonstration, by the defendant, that the information in question would probably have affected the outcome of the

trial. Thus, in Breedlove v. State, 580 So. 2d 605, 606-607 (Fla. 1991), the Florida Supreme Court addressed the defendant's Brady claim, in which the defendant, subsequent to his conviction, received various confidential police internal affairs files, regarding an investigation of officers who testified at the defendant's trial. Those previously confidential files contained information regarding those officers' involvement in various criminal offenses. The Court concluded that the information in question would not have been material, as there was no reasonable probability that it would have affected the outcome of the trial. 580 So. 2d at 607. This conclusion was reached, in part, because the evidence would not have been admissible at the defendant's trial.

The defendant asserts, in reliance on Breedlove, that he could have used this additional evidence of Macker's alleged prior involvement in criminal activities as a form of impeachment of Macker on cross-examination. The defendant relies on that portion of Breedlove which notes that "[w]hile defense witnesses may be impeached only by proof of convictions, the rule regarding prosecution witnesses has been expanded." 580 So. 2d at 607. The defendant misreads Breedlove; that case would not furnish the defense with any possible use of the matters alleged in the motion. The broader examination of prosecution witnesses applies when the prosecution witness has been charged with a crime. 580 So. 2d at 608. "This is so because pending felony charges are a

matter of public record and questions as to the existence of such charges 'do not necessarily tend to incriminate the witness,'. . . ." Id. In the instant case, Macker was fully questioned about the felony charges which were pending against him and for which he made his bargain with the prosecution.

The defendant's effort to apply the same principle to uncharged crimes fails, however:

> If a state witness is merely under investigation, however, the ability to cross-examine on such investigation is not absolute. Instead, any criminal investigation must not be too remote in time and must be related to the case at hand to be relevant.

Id. The defendant's trial took place in 1980. The OCB recordings were from the mid-1970's and are therefore quite remote in time from the defendant's 1980 trial. Furthermore, none of the recordings referred to in the defendant's motion, nor any of the other allegations in the motion, demonstrate or suggest that any OCB investigation of Macker in the mid-1970's was in any way related to the defendant's case. In view of the foregoing, there is no reasonable basis for believing that the matters referred to in the recordings could have been used in any manner in the defendant's 1980 trial.

So, too, in the instant case, evidence of surveillance tapes and suspicions of Macker's involvement in other criminal activities, which matters did not result in any convictions, would not have been admissible at the defendant's trial. Accordingly, there is no basis for concluding that this information could have affected the outcome of the defendant's trial. See also Williamson v. Dugger, 651 So. 2d 84, 88-89 (Fla. 1994)(Allegedly cumulative impeachment evidence did not satisfy requirements of newly discovered evidence). Thus, the instant claim is procedurally barred and without merit.

In the second portion of this claim, the defendant asserted that Diane Macker's confidential PSI, again prepared years prior to the murders herein (1976), and containing hearsay statements of rumored criminal activity by Joe Macker, was also newly discovered evidence. The defendant had stated that said PSI is normally exempt from disclosure, but that he was able to obtain a copy of it recently, as Ms. Macker died two years ago. The State submits that once again there is no showing of timeliness and due diligence with respect to uncovering this evidence either. At the hearing below, the defendant conceded that he had not previously requested said records. Diane Macker's conviction and sentencing on the 1976 burglary and robbery charges, which gave rise to the PSI, were made known to the defense and were a matter of court record since at least the time of trial, in 1980. See testimony of Diane Macker at trial, admitting she was on

probation for said charges, at TT. 1191. A review of the trial court's files with respect to the above charges, which the defendant could have done for the past 15 years, would have easily revealed the PSI now claimed to have been "recently" discovered. The arguments as to the untimeliness successive procedural bar and lack of merit of the claim with respect to the surveillance tapes, are thus equally applicable to the PSI evidence.

III.

THE CLAIM OF BRADY VIOLATION WITH RESPECT TO INFORMATION AS TO DIANE MACKER IS PROCEDURALLY BARRED AS IT WAS UNTIMELY AND SUCCESSIVE.

The defendant's third claim is essentially the same as the second claim, alleging that Diane Macker's PSI report is either newly discovered evidence or Brady material, as it contained references to rumors of Diane Macker's knowledge of other homicides, her abilities to survive by conning others in order to get what she wants; her prior criminal activities, and her relationship with Joseph Macker, who allegedly manipulated her.

The same arguments asserted in the preceding issues are equally applicable here. The motion contains no showing of due diligence with respect to the defense efforts to obtain this evidence. There were no allegations or showing that any timely prior requests for this report had been denied. The underlying convictions which resulted in Diane Macker's PSI report were

fully known to the defense, and were a matter of court record, since the 1980 trial of the defendant. (TT. 1191). As previously noted, a review of Diane Macker's court files, which could have been done at any time over the past 15 years, would have disclosed the existence of the PSI report. Thus, this claim, like the preceding ones, is barred as being untimely and successive. Jones, supra, 591 So. 2d at 916; Demps, supra, 515 So. 2d at 198; Porter, supra.

Lastly, whether the claim is viewed as a newly discovered evidence claim, or a Brady claim, as the hearsay nature of the report would render its information inadmissible at the defendant's trial, and as it involves nothing more than inadmissible forms of character evidence, neither the report nor its contents would have affected the outcome of the defendant's trial proceedings. Breedlove, supra. Moreover, with respect to the PSI information as to Ms. Macker's prior heroin addiction, subsequent use of cocaine, prior criminal history, and motivation to testify in order to protect herself and her husband, the trial transcripts again reflect that trial counsel was well aware of all said information as he questioned Ms. Macker regarding same. (TT. 1172, 1190-92). Thus, the allegations of the motion are also without merit as they do not assert either a valid Brady claim or a valid newly discovered evidence claim.

The principal thrust of the defendant's current argument is the passing reference to Diane Macker as a police informant in the mid-1970's. The defendant attempts to connect that passing reference to this Court's decision in Gorham v. State, 597 So. 2d 782 (Fla. 1992). While this Court did treat evidence that a prosecution witness had been a paid police informant as Brady evidence in Gorham, the facts of Gorham were unique and have no applicability to the instant case. The witness who was the informant in Gorham was the prosecution's key witness, upon whom the state's entire case hinged. Thus, any matters which could potentially impeach such a witness were of the utmost importance. By contrast, even if Diane Macker had been an informant, Diane Macker was a tangential witness in the instant case; not the key witness. Establishing that she had been an informant is not the type of evidence which would probably have affected the outcome of the proceedings. The State's case-in-chief consisted of physical evidence linking the defendant to the crimes, the testimony of Joe Macker, and Bolender's statements to other witnesses immediately after the crimes. Diane Macker was called as a rebuttal witness only after the defendant denied having been in the residence on the day of the offenses. While Diane Macker's rebuttal testimony placed the defendant at the residence, she specifically stated that she never personally, saw him harm any of the victims. Moreover, Bolender was also placed at the residence, ordering and assisting the clean up of the premises, by another rebuttal witness, Robert McCall as well.

Diane Macker was thus a far cry from the key witness who had been the informant in Gorham.[12]

IV.

BOLENDER'S ALLEGED DUE PROCESS VIOLATION IS PROCEDURALLY BARRED.

The defendant alleged that a condition of Macker's plea to make a good faith effort to produce certain persons whose testimony would be useful to the State of Florida, was in and of itself "unconscionable" and in light of allegedly new facts, "truly evil". (R. 74). The State submits as it has throughout this brief that this claim is not one involving newly discovered evidence, as the condition of the plea has been known to counsel since prior to trial. The plea agreement, containing the complained of conditions and listing all the witnesses now referred to by collateral counsel, was part of the original record on direct appeal, and in fact utilized by trial counsel. See record on direct appeal, FSC Cast No. 59,333, at pp. 78-80; 76-7. The same plea agreement was also attached to the defense pleadings, and relied upon by them, in the 1990 prior post-conviction proceedings. (R1. 111-113). The claim that the conditions of the plea violate due process, at this late juncture, is clearly untimely and procedurally barred. Said

---

[12] The State would note in passing that in the lower court, while the defendant's motion quoted Detective Kuhn's reference to Diane Macker as an informant in the 1970's, the defendant did not, in any way, rely on the Gorham argument which is being advanced in this Court. As such, the current argument shold be treated as one which has never been presented to the trial court and one which is not properly presented herein.

claim should have been raised, if at all, during the direct appeal and/or defendant's two prior post-conviction proceedings.

The defendant's reliance upon allegations of "newly discovered evidence", in the form of Deborah Novello's affidavit is entirely unwarranted. As with the rest of the claims herein, there was no allegation or proffer as to when Miss Novello was contacted by collateral counsel, and why the alleged statements from her father and her own beliefs could not have been ascertained at the prior proceedings herein. As to Novello's affidavit, the State further notes that it entirely consists of double hearsay statements from her now deceased father.[13] For evidence to be newly discovered, it must be admissible and competent evidence, which this affiant clearly is not. State v. Nussdorf, 575 So. 2d 1320 (Fla. 4th DCA 1991). See also Williamson v. State, 651 So. 2d 84, 88-9 (Fla. 1995). Thus, this

---

[13] The affidavit of Deborah Novello, upon which the defendant now relies, clearly demonstrates itself to be of little value, as it is so internally contradictory as to be of no consequence. After Ms. Novello states how her father told her that Macker admitted his involvement in the murders, Ms. Novello asserts that her father "never mentioned Bolender's name in connection with the murders, though I know that he knew him." Ms. Novello then goes on to assert that, "According to everything my father told me, Bolender wasn't even there when the murders took place; he had nothing to do with killing those four men." One might reasonably ask, if her father never mentioned Bolender's name in connection with the murders, how could her father have told her that Bolender was not there when the murders took place? The obvious answer is that her father could not possibly have told her any such thing.

claim must be denied as untimely and an abuse of the post-conviction process.

V.

BOLENDER'S CLAIM OF NEWLY DISCOVERED EVIDENCE OF MACKER'S CONFESSION TO OTHER INMATES IS UNTIMELY AND PROCEDURALLY BARRED.

The defendant alleges that through the affidavit of an alleged fellow inmate of Macker's, who allegedly "knew" Macker and his wife to be informants, Macker confessed that he and Thompson were the ones who had killed the victims. The State again submits that this is not newly discovered evidence. There has been no showing by the defendant that he could not have, through due diligence, discovered this inmate's alleged testimony previously. The inmate, never states that if someone had come to him prior to 1995, for example in 1990 at the time of the defendant's second motion for post conviction relief, he would not have provided the same information in order to save the defendant's life. Moreover, the affidavit, contrary to the defendant's description does not contain a confession by Macker; rather, it is only an alleged statement made by Macker that the defendant had to die and that at the time of the crimes, Macker was on Quaaludes (which was testified to at trial (TT. 886-87)). The statement "That was because Bo knew the truth about what Macker had done," is not a quote of what Macker said, but, is clearly the inmate's impression of why Macker said that he wanted the defendant to get the chair. The statement attributed to

another inmate, Mike Devito, by the affiant Terri Novello, that Macker had told Devito that he and Thompson had killed the victims, is also, in addition to being untimely,[14] inadmissible double hearsay and not competent evidence. As stated previously, such evidence cannot be the basis for granting a new trial on the grounds of newly discovered evidence. See, Williamson v. State, 612 So. 2d 84, 89 (Fla. 1995); Jones, supra. Thus, the State submits that this claim must be denied as untimely, an abuse of the post-conviction process, and legally insufficient.

VI.

NEWLY DISCOVERED EVIDENCE ALLEGATIONS REGARDING MACKER AS AN INFORMANT, AND GOVERNMENT INVOLVEMENT IN THE DRUG DEAL, ARE BOTH UNTIMELY AND UNSUBSTANTIATED.

The defendant claims that alleged newly discovered evidence in OCB files (See issue II, herein at pp. 40-7) reflects that Macker was an informant working for OCB. As noted in the argument on Claim II, however, the OCB files could have been requested, but were not, in the defendant's prior collateral proceeding. Moreover, the State respectfully submits that the OCB files reproduced in the petitioner's Appendix do not reflect that Macker was an informant, but that rather he was being investigated by OCB. (R. 504-58).

---

[14] Indeed, Novello's affidavit refers to an alleged 1987 conversation with Devito, reflecting that this alleged information has been known and discoverable for eight years.

The defendant's reliance upon various affidavits is also unwarranted. The first affidavit was that of an inmate, who states that he knew Macker was an OCB informant, but whose "first hand" knowledge was as a result of his personally taking Macker to "DEA". This is the same inmate mentioned in Claim V, and the arguments as to the untimeliness are equally applicable herein. Moreover, as seen above, from the affidavit itself, there are no particulars, details or corroboration with respect to Macker being an OCB informant. Likewise, the other affidavit relied upon, by Ms. Novello, merely states that her now deceased father indicated to another party, Mary Mele, that "something led Anthony to realize that Joe Macker was actually "working for the police". (R. 1042). The State respectfully submits that the trial court properly summarily denied the above double hearsay and untimely allegations. Williamson v. State, supra.

The defendant's allegations concerning Macker's use as an informant by the DEA, are likewise untimely. Moreover, such information would not have been admissible impeachment evidence in that the DEA, being a federal agency, was not the same party involved in the prosecution of the defendant in this case, i.e., the State. Thus, it would not have shown bias or interest on the part of Macker to testify for the State. Compare Gorham v. State, 597 So. 2d 784 (Fla. 1992).

Furthermore, the defense allegations that the victims were involved in drug related activities were clearly known at the time of trial, see Bolender v. State, supra, 422 So. 2d 833 (Fla. 1982). The allegations that various files reflect that the murders herein took place in the middle of a law enforcement operation have no support in the petitioner's voluminous Appendix. Finally, the remaining argument that Detective McElveen and other law enforcement officers were being investigated for unrelated criminal activities, is not Brady evidence. See Breedlove v. State, 580 So. 2d 605 (Fla. 1991). As the defendant does not allege any competent evidence that has been newly discovered, this claim must be denied as untimely, successive, an abuse of the post-conviction process, and as legally insufficient.

CLAIM VII.

AN EVIDENTIARY HEARING IS NOT REQUIRED ON PROCEDURAL DEFENSES ASSERTED BY THE STATE.

In this claim, Bolender's counsel contend that he is entitled to an evidentiary hearing on any procedural defenses which the State may assert, as well as upon his substantive claims of newly discovered evidence and Brady, relying primarily upon such decisions as Scott v. State, 20 Fla. L. Weekly S133 (Fla. March 16, 1995), Card v. State, 652 So. 2d 344 (Fla. 1995), Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994) and Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Bolender's reliance is misplaced and precedent clearly demonstrates that not every

defendant filing a successive post-conviction motion receives an evidentiary hearing on the issue of due diligence. See e.g., Porter v. Singletary, 653 So. 2d 374 (Fla. 1995) (denial of successive 3.850 motion affirmed, in the absence of any hearing on due diligence or "cause" to excuse the procedural bar): Zeigler v. State, 632 So. 2d 48 (Fla. 1993) (same); Foster v. State, 614 So.2d 453 (Fla. 1992) (same). Additionally, the cases relied upon by Bolender are distinguishable.

Thus, in Lightbourne, the defendant came forward with an affidavit of recantation from one of the state's primary witnesses, whereas here Bolender only proffers hearsay and inference; interestingly, although Lightbourne was afforded an evidentiary hearing on his claim, he was unable to substantiate the allegations in the affidavit. See Lightbourne v. State, 643 So. 2d 54 (Fla. 1994). In Johnson, the defendant came forward with evidence suggesting that another individual, recently deceased, had committed the murder and alleged that the evidence could not have been obtained earlier because the witnesses, who had contacted Johnson's counsel, had been afraid for their lives. While cautioning that its holding was not be read as meaning that an evidentiary hearing would be afforded to every convicted felon who secured an affidavit that another person admitted to committing his crime, this court deemed that Johnson was entitled to such hearing because only the testimony of one witness had linked him to the crime. Here, Bolender has not secured any

affidavit from a witness who heard Macker (who is still alive) confess to the crime, and Macker's testimony was not the only thing linking Bolender to these murders, i.e., given the presence of Bolender's fingerprints and handprints on the burnt car containing the victim's bodies; further all of the materials now proffered by collateral counsel were always available.

In Card, the defendant was afforded an evidentiary hearing on his claim that the judge had allowed the prosecutor to draft his sentencing order, and such claim had been evidenced by affidavits directly from the judge himself and trial counsel; again, Bolender has no affidavit from Macker, or any other party, which offers direct evidence in support of his Brady claim or which constitutes truly newly discovered evidence. Finally, in Scott, the defendant presented affidavits from two witnesses who had obtained exculpatory evidence, in the form of admissions from Scott's co-defendant, in very close proximity to the crime itself, and in their affidavits the witnesses averred that they had apprised the authorities of these matters at the time. Bolender has come forward with nothing comparable sub judice, and as this court held in Porter, a Brady claim cannot be constructed by the "stacking of inferences." Id at 379. Further, because he has not come forward with anything concrete to suggest that Bolender's participation was less than the trial record would suggest, or that Macker's was more so, his argument as to disproportionality of sentence is meritless, as well as procedurally barred.

When this court affirmed the summary denial of Foster's 3.850, and found his Brady claim procedurally barred, it noted that Foster had been represented by collateral counsel for over 10 years, and found that no justification had been shown for the failure to assert the claim earlier. Here, Bolender has been represented by counsel at least since 1984 when his first post-conviction motion was filed. At some point, there has to be finality. Witt v. State, 387 So. 2d 922 (Fla. 1980). All that the instant proceeding demonstrates is that with unlimited time and unlimited state funds, collateral counsel can generate a virtually unlimited number of documents, none of which raise a colorable suggestion of Bolender's actual innocence or any actual state suppression of material evidence. Most importantly, Bolender has failed to demonstrate any good cause for this untimely, successive motion and this court should affirm the circuit court's denial of all relief on the grounds of procedural bar.

VIII.

BOLENDER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS SUCCESSIVE AND UNTIMELY.

The defendant alleges that he was provided ineffective assistance of counsel in that his attorney was only out of law school for three years, and was addicted to cocaine and selling drugs. The defendant, in his two prior motions for post conviction relief, alleged that counsel was ineffective for

various reasons. Successive claims of ineffective assistance of counsel are considered procedurally barred, even if they allege new grounds. See Card v. State, 512 So. 2d 829, 830 (Fla. 1987), Tafero v. State, 524 So. 2d 987 (Fla. 1987); Christopher v. State, 489 So. 2d 22 (Fla. 1986). Furthermore, the alleged evidence of counsel's drug habits were known by the defendant in 1990, as it was made part of the allegations in the defendant's federal habeas corpus petition, wherein the defendant stated "defense counsel's deficient performance also resulted from personal problems involving drugs. Evidence has been recently uncovered reflecting that during Mr. Bolender's trial, defense counsel was smoking marijuana almost every morning of the trial and was also using cocaine in the evening." (R. 1155). Thus, the defendant's failure to bring this evidence to the court's attention within two years of learning of its existence, is another ground for procedurally barring this claim. Adams v. State, 543 So. 2d 1244 (Fla. 1989).

IX.

BOLENDER'S CLAIM OF STATE INTERFERENCE IS UNTIMELY AND PROCEDURALLY BARRED.

The defendant alleges that the State has interfered with their ability to contact Macker and Thompson. First, as to Thompson, his allegedly favorable testimony was available in 1990 when he pled guilty and gave his deposition. In that deposition, Thompson stated that he was not present at all times (R. 1082), and that many of the events of that night were a complete daze to

him. (R. 1089). The defendant could have filed whatever motions were appropriate back then to have forced Thompson's testimony. His failure to raise this issue within the next two years, procedurally bars any claim concerning Thompson's testimony. See Adams v. State, supra. Furthermore, any allegations about the State's interference with the defendant's ability to secure a perjurious affidavit from Thompson are nothing but pure speculation on the defendant's part without any proof.

Secondly, as to Macker, the State submits that this allegation is also untimely because the affidavits relied upon reflect that Macker was not approached by collateral counsel/investigators, until July 1, 1995. (R. 1055) Collateral counsel could have contacted Macker years prior to the instant motion. If they had done so, and the State had interfered with their access to Macker as now alleged (which the State unequivocally denies), then he could have brought this interference to the court's attention in a timely manner. The defendant has not alleged any reason why this claim could not have been presented to the court within the last five years. As such, it is untimely and an abuse of the post-conviction process.

X.

BOLENDER'S CLAIM OF IMPROPER JURY OVERRIDE IS UNTIMELY AND PROCEDURALLY BARRED.

The defendant alleges that the judge who overrode the life recommendation in this case was predisposed to sentence the

defendant to death. In support of this allegation, the defendant cites to trial counsel's statements in the evidentiary hearing at the first motion to vacate. Clearly, the basis for this claim was long known to the defendant and as such is procedurally barred. Porter v. State, supra, 20 Fla. L. Weekly at S153.

CONCLUSION

The State submits that the claims raised by the defendant in his Third Motion to Vacate Judgments and Sentence were all properly denied as they were untimely, legally insufficient, procedurally barred and an abuse of the post-conviction process.

WHEREFORE, the State respectfully submits that this Court must affirm the lower court's denial of the defendant's Third Motion to Vacate Judgments and Sentence and Motion to Stay Execution.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

FARIBA N. KOMEILY
Assistant Attorney General
Florida Bar No. 0375934
Office of Attorney General
Department of Legal Affairs
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **MARK EVAN OLIVE, ESQUIRE,** 805 North Gadsden Street, Tallahassee, Florida 32303, on this 11 day of July, 1995.

FARIBA N. KOMEILY
Assistant Attorney General

/blm