

IN THE SUPREME COURT OF FLORIDA

DUANE E. OWEN,

Appellant,

vs.

Case No. 01-2476

STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT  
OF THE FIFTEENTH JUDICIAL CIRCUIT,  
IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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vs.

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STATE OF FLORIDA,

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PRELIMINARY STATEMENT

Appellant, DUANE E. OWEN, was the defendant in the proceedings court and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the proceedings below and will be referred to herein as "the State." Reference to any of the transcripts of pleadings from the original record on appeal will be by the symbol "ROA," reference to the pleadings from the proceedings below will be by the symbol "PCR., followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The state accepts appellant's statement of the case and facts with the following additions to the procedural history.

The specific issues raised on appeal of appellant's initial motion were the following:

THE TRIAL COURT DID NOT ERR IN FAILING TO HOLD OWEN'S EVIDENTIARY HEARING IN ABEYANCE PENDING "RESOLUTION" OF HIS RETRIAL FOR ANOTHER CAPITAL OFFENSE

THE TRIAL COURT DID NOT ERR IN FAILING TO HOLD OWEN'S EVIDENTIARY HEARING IN ABEYANCE PENDING "RESOLUTION" OF HIS RETRIAL FOR ANOTHER CAPITAL OFFENSE

OWEN WAS PROPERLY DENIED RELIEF ON HIS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AS HE FAILED TO PRESENT ANY EVIDENCE IN SUPPORT OF HIS CLAIMS.

THE TRIAL COURT PROPERLY DENIED AS PROCEDURALLY BARRED APPELLANT'S CONSTITUTIONAL CHALLENGE TO THE JURY INSTRUCTION ON "HAC"

THE TRIAL COURT PROPERLY FOUND PROCEDURALLY BARRED APPELLANT'S CHALLENGE TO THE JURY INSTRUCTION REGARDING THE FELONY MURDER AGGRAVATOR

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED APPELLANT'S CHALLENGE TO THE CONSTITUTIONALITY OF THE AVOID ARREST JURY INSTRUCTION AND ITS IMPROPER CONSIDERATION BY THE JURY

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED APPELLANT'S CHALLENGE TO THE JURY INSTRUCTION REGARDING THE 'PRIOR VIOLENT FELONY' AGGRAVATOR

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED APPELLANT'S

CONSTITUTIONAL CHALLENGE TO THE JURY INSTRUCTION REGARDING THE "COLD CALCULATED AND PREMEDITATED" AGGRAVATING FACTOR

THE TRIAL COURT PROPERLY DENIED AS PROCEDURALLY BARRED APPELLANT'S CHALLENGE TO THE STATE'S USE OF IRRELEVANT AND PREJUDICIAL EVIDENCE AT THE PENALTY PHASE

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED APPELLANT'S CHALLENGE TO THE ADMISSION OF HIS CONFESSION

THE TRIAL COURT PROPERLY FOUND THAT OWEN'S CHALLENGE TO THE PENALTY PHASE JURY INSTRUCTION WAS PROCEDURALLY BARRED

THE TRIAL COURT PROPERLY FOUND THAT OWEN'S CHALLENGE TO THE PENALTY PHASE JURY INSTRUCTIONS WAS PROCEDURALLY BARRED

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED OWEN'S CHALLENGE TO THE PROSECUTOR'S REMARKS

THE TRIAL COURT PROPERLY DENIED OWEN'S CLAIM REGARDING HIS "RIGHT" TO INTERVIEW JURORS SINCE NO EVIDENCE WAS PRESENTED SUPPORT OF THIS CLAIM

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED OWEN'S CLAIM THAT HE WAS ERRONEOUSLY DENIED A MOTION FOR CHANGE OF VENUE

THE TRIAL COURT'S SUMMARY DENIAL OF OWEN'S CONSTITUTIONAL CHALLENGE TO FLORIDA'S DEATH PENALTY STATUTE WAS PROPER

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED OWEN'S CHALLENGE TO THE ADMISSIBILITY OF A CRIME SCENE VIDEO

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED OWEN'S CLAIM THAT CUMULATIVE ERROR AMOUNTED TO FUNDAMENTAL ERROR

(PCR 39-232). In rejecting appellant's claim that the trial court erred in accepting appellant's waiver of the evidentiary hearing as it was not knowingly made, this Court found:

As to Owen's Faretta (FN10) claim (i.e., claim 2), the principles underlying Faretta are applicable only when a defendant in a criminal case seeks to waive professional legal representation and proceed unrepresented. These principles are inapplicable here where Owen freely chose to be represented by counsel at the proceeding below and registered no objection to counsel's performance. The record shows that collateral counsel and Owen jointly made the strategic decision to end the evidentiary hearing.

Owen v. State, 773 So. 2d 510, 515 (Fla. 2000).

In rejecting Owen's claims of ineffective assistance of counsel and conflict of interest this Court determined:

Owen's ineffectiveness and conflict claim (i.e., claim 3) is a fact-based issue that requires development at an evidentiary hearing, which Owen-by his actions below-opted to forego. The claim thus is waived.

773 So.2d 515. With respect to the remaining claims this Court found them all to be barred. Id.

## SUMMARY OF ARGUMENT

Issue I - Appellant's attempt to re-litigate the propriety of the waiver of his initial postconviction motion under the guise that collateral counsel was operating under a conflict of interest was properly denied.

Issue II - Appellant's attempt to re-litigate the propriety of the waiver of his initial postconviction motion under the guise that collateral counsel was ineffective was properly denied.

Issue III - Appellant's attempt to re-litigate the propriety of the waiver of his initial postconviction motion under the guise that he is "actually innocent" of the crime was properly denied.

Issue IV - Appellant's attempt to again seek review of his claim that trial counsel was ineffective at both phases of his trial under the guise that the state committed a Brady violation was properly denied.

Issue V - The trial court's order sufficiently detailed its rationale for summarily denying the motion.

ARGUMENT

ISSUE I

THE LOWER COURT PROPERLY DENIED WITHOUT A HEARING APPELLANT'S CLAIM THAT PRIOR POSTCONVICTION COUNSEL WAS INEFFECTIVE DURING LITIGATION OF APPELLANT'S FIRST POSTCONVICTION MOTION AS IT WAS SUCCESSIVE, AND ABUSE OF THE PROCESS

In cases where there has been a summary denial, the standard of review is de novo for pure questions of law. Demps v. State, 761 So.2d 302 (Fla. 2000) (applying de novo review to summary denial). Under this standard, the instant summary denial should be affirmed.

Owen filed his first motion for postconviction relief on October 12, 1994. Owen was represented by the Capital Collateral Regional Counsel in that collateral proceeding before the Honorable Judge Richard Burke.<sup>1</sup> Owen requested and was granted an evidentiary hearing regarding numerous claims raised in his postconviction motion. Two of the issues for which he was granted a hearing were (1) trial counsel was ineffective at both phases of the trial for failing to present mental health defense/mitigation. Owen v. State, 773 So. 2d 510, 513 n. 4 (Fla. 2000). Specifically, had counsel done an adequate

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<sup>1</sup> Simultaneously, Owen's retrial for the murder of Karen Slattery was also proceeding. Owen was represented by private counsel, Carey Haughwout. That retrial occurred on January 3, 1999. Owen was again convicted and sentenced to death for the murder of Karen Slattery. That case is currently pending on direct appeal. Owen v. State, Case no. 95,526.

investigation, he would have discovered that Owen suffers from a variety of mental disorders, including organic brain damage, psychosis, gender identity disorder, and insanity. (PCR 90-102, 112-126). Judge Burke set the evidentiary hearing for the week of December 8, 1998. On that morning, Owen advised the judge that he could not to go forward because he was unable to waive the attorney-client privilege in the Slattery case. Judge Burke assured Owen that the attorney-client privilege associated with that case was not waived and that the Court would not require any witness to disclose any privileged information relating to Slattery. The Court further stated the focus of the evidentiary hearing was to be on this case only. The Court then directed Owen to go forward. Owen, 773 So. 2d at 513. Ultimately Owen refused to go forward irrespective of the judge's determination. After explaining the ramifications of such a decision, Judge Burke dismissed Owen's postconviction motion **with prejudice**. Owen appealed that decision to this Court. Therein Owen argued that Judge Burke's refusal to continue the postconviction hearing indefinitely and require Owen to proceed with litigation of his claims created an unconstitutional condition under Simmons v. United State, 390 U.S. 377 (1968), as it forced Owen to chose between going forward with the postconviction litigation in this case or violate the attorney/client privilege

in the Slattery case. (PCR 63-77). In rejecting Owen's appeal, this Court determined as follows:

In the present proceeding, by filing ineffectiveness and conflict of interest claims against trial counsel in the Worden case, Owen waived the attorney-client privilege in that case. Although he subsequently invoked the privilege in the Slattery case, he still was obligated to proceed in good faith in the present case to the extent that the privilege permitted. He did not do so. In fact, at the hearing below, he made no effort to introduce substantive evidence concerning the Worden trial. Instead, he called as his only witness Barry Krischer, i.e., his former trial counsel in the Slattery case. Krischer knew virtually nothing about the Worden trial and his testimony was guaranteed to implicate the privilege, which expressly applied only to the Slattery case. Further, although the court below agreed to bar disclosure of privileged information, Owen made no effort to proffer any substantive evidence that would have been excluded by the privilege. In short, Owen made no showing of prejudice. We find no abuse of discretion in the manner in which the court conducted the hearing.

Owen, 773 So. 2d at 514-515.

In a successive motion Owen, *pro se*, attempted to re-litigate the propriety of his prior waiver. Therein he complained that postconviction counsel was laboring under a

conflict of interest during litigation of his first collateral proceeding. Owen alleged that mental health evidence garnered over the years in preparation for his retrial in the "Slattery case" and postconviction litigation in this case, was shared between Owen's trial attorney and collateral counsel.<sup>2</sup> Owen claimed that because of the existing attorney-client privilege in the Slattery case, this "shared information" somehow created a "conflict of interest" for collateral counsel. (PCR 4-7). Owen further alleged that he was entitled to an evidentiary hearing on this claim. The relief sought was the appointment of new conflict-free postconviction counsel for the purpose of fairly and properly proceeding with the evidentiary hearing he had previously waived. The state responded that the issue was procedurally barred because it had previously been litigated. (PCR 29-37). The trial court summarily denied the motion finding it to be successive, untimely, and an abuse of the process. (PCR 248).

The state asserts that the trial court correctly denied relief. The motion was nothing more than a second appeal from the denial of his first motion for postconviction relief. Although appellant claims that the issue raised below was separate and distinct from that litigated in the first motion,

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<sup>2</sup> Both collateral counsel and re-trial counsel retained the same mental health experts in preparation for their respective cases.

he fails to demonstrate how that is so. Whether appellant focused his complaint on the existence of an attorney-client privilege, or on the theory that asserting the attorney-client privilege was responsible for creating a conflict of interest for postconviction counsel, the issue is identical, i.e., appellant was forced to abandon the evidentiary hearing because of the existing attorney-client privilege. Consequently, appellant's attempt to re-litigate the propriety of his prior waiver was precluded and summary denial was proper. See Marek v. Singletary, 626 So. 2d 160 (Fla. 1993)(precluding review of issue raised in a successive collateral motion as same was previously raised and reject in fist motion for postconviction relief); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995)(finding it inappropriate to use different argument to relitigate issue previously raised and rejected on appeal); Zeigler v. State, 632 So. 2d 48, 51 (Fla. 1993)(same); Preston v. State, 564 So. 2d 120, 123 (Fla. 1990)(same).

Additionally, the state would note that appellant's allegation that a "conflict of counsel" existed has not been properly pled. As noted above, appellant just simply asserts that shared information between his lawyers resulted in a conflict. Appellant alleges, "Mr. Owen argued that the conflict of interest at his original postconviction motion resulted from the sharing of experts and other privileged information between

his Worden postconviction counsel and his Slattery retrial counsel. This conflict could have initially been avoided by postconviction counsel keeping the experts and information of the Worden case separate from that of the Slattery retrial."

**Initial Brief at 22.** Appellant, without further explanation concludes that, "The conflict of interest prevented counsel from going forward on Mr. Owen's postconviction issues and from the lower court granting any relief that may have been appropriate."

**Initial brief at 25.** Appellant's claim is legally insufficient as pled.

A defendant's burden in establishing the existence of an actual conflict is as follows:

To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were impaired or compromised for the benefit of the lawyer or another party. See Buenoano v. Singletary, 74 F.3d 1078, 1086 n. 6 (11th Cir.1996); Porter v. Singletary, 14 F.3d 554, 560 (11th Cir.1994); Oliver v. Wainwright, 782 F.2d 1521, 1524-25 (11th Cir.1986). Without this factual showing of inconsistent interests, the conflict is merely possible or speculative, and, under Cuyler, 446 U.S. at 350, 100 S.Ct. 1708, such a conflict is "insufficient to impugn a criminal conviction."

Herring v. State, 730 So.2d 1264, 1267 (Fla. 1998); Thompson v. State, 759 So. 2d 650, 661 (Fla. 2000)(explaining that a defendant must prove that his counsel actively presented conflicting interests that affected counsel's performance in a

negative way). Owen has not met his burden. Summary denial was warranted as Owen did not present sufficient facts which would entitle him to an evidentiary hearing on this claim.

Additionally the trial court found litigation of this claim to be untimely. Clearly, any claim that counsel was hampered by a conflict of interest at the time of the hearing could have and should have been raised at the hearing. In response to this argument, Owen states, "Mr. Owen could not have raised this claim at the time of his original postconviction litigation because this claim was not apparent until after the actual hearing on the original motion." **Initial brief at 20.** Owen does not explain why this claim was "not apparent" at that time.<sup>3</sup> His cursory conclusion is insufficient and does not overcome the procedural bar. See Thompson, 759 So. 2d at 661 (finding claim of "conflict of interest" to be procedurally barred since factual basis for same was known at time of direct appeal); Jackson v. Dugger, 633 So. 2d 1051, 1055 (Fla. 1993)(same); Koon v. Dugger, 619 So. 2d 246, 247 (Fla. 1993)(same). claim that Cf. Foster v. State, 614 So. 2d 455, 459 (Fla. 1992)(finding successive motion to be abuse of the process warranting summary

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<sup>3</sup> The fallacy and illogical nature of this argument is underscored by the following. If this alleged conflict was not known to the parties at the critical time, i.e., during the evidentiary hearing, then how could its existence impede or interfere with the actions and decisions of counsel at the hearing?

denial where alleged new facts could have been discovered at time of initial motion).

Owen advances one final argument in an attempt to overcome the procedural bar. He claims the alleged "conflict of interest" hampered postconviction counsel's representation and deprived him of meaningful access to the courts in violation of Bounds v. Smith, 430 U.S. 817 (1977). Owen complains that since he was precluded from going forward because counsel was operating under a conflict of interest, meaningful access to the court was never realized. However, again Owen does not explicitly set out the underpinnings of his claim regarding this alleged conflict. Nor does he set out factually what affirmative action by the state barred him from access to the court. To the contrary the facts demonstrate otherwise.

Access to the courts was afforded to appellant when the trial court granted an evidentiary hearing. Irrespective of the court's efforts to alleviate Owen's concerns regarding the attorney-client privilege, Owen refused to go forward. The state in no way affirmatively denied appellant access to the court. As noted by this Court, appellant made no effort to present his case. Owen, 773 So. 2d at 514. Therefore appellant's argument is completely unavailing and cannot form the basis for overcoming the procedural bar. The trial court correctly concluded that appellant's motion was successive,

untimely and an abuse of the process. Owen's argument is improper and summary denial was warranted and must be affirmed on appeal. Marek, 626 So. 2d at 162; Harvey, 656 So. 2d at 1256.

## ISSUE II

SUMMARY DENIAL OF HIS CLAIM THAT COLLATERAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WAS PROPER GIVEN THAT THE CLAIM IS PROCEDURALLY BARRED AND THE ISSUE IS NOT COGNIZABLE IN POSTCONVICTION LITIGATION.

Owen claims that he is entitled to file a successive motion for postconviction relief because he received ineffective assistance of counsel during litigation of his initial motion. This claim is predicated on the fact that collateral counsel erroneously advised appellant not to proceed with the evidentiary hearing. In his initial motion, appellant argued to the trial court and later on appeal to this Court, that by requiring appellant to proceed with the evidentiary hearing he was being forced to surrender one constitutional right in order to protect a second constitutional right. This unfair predicament was a violation of his due process rights under Simmons v. Unites States, 390 U.S. 377, 394 (1968). (PCR 174-190). This Court rejected appellant's argument on appeal. Owen v. State, 773 So. 2d 510 (Fla. 2000).

Now Owen comes back before this Court claiming that since his first argument was rejected, he should be entitled to a second opportunity to convince this Court to reverse its earlier ruling. His attempt to obtain a second appeal of this Court's earlier decision is predicated on his claim that because this Court rejected his initial legal theory under Simmons, that

somehow translates into a viable claim of ineffective assistance of collateral counsel. Owen simply states,

The performance of prior postconviction counsel was deficient in advising Mr. Owen to abandon the original postconviction proceedings as evidenced by this Court's denial of Mr. Owen's claim on appeal. See Owen, 774 So. 2d at 514. No reasonable counsel would have advised Mr. Owen to gamble his entire postconviction litigation on their theory without clear precedent supporting the position.

**See Initial brief at 33.** Owen's claim is legally flawed and therefore summary denial was proper.

Based on the procedural history of this issue, it is obvious that Owen is simply trying to relitigate an issue that has already been denied on the merits. In his appeal of the first motion for postconviction relief, appellant challenged the propriety of his waiver under two separate theories; (1) appellant was unfairly forced to waive his postconviction motion in violation of Simmons supra; (2) the trial court failed to conduct a proper inquiry of appellant regarding the ramifications of waiving his postconviction motion. (PCR 174-192). This Court explicitly rejected his arguments. Owen, 773 So. 2d at, 513-515. Owen's attempt to again seek review of this same issue now under the guise of ineffective assistance of counsel. He is not permitted to do so, therefore summary denial is warranted See Marek v. Singletary, 626 So. 2d 160 (Fla. 1993)(precluding review of issue raised in a successive

collateral motion as same was previously raised and reject in first motion for postconviction relief); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995)(finding it inappropriate to use different argument to relitigate issue previously raised and rejected on appeal); Zeigler v. State, 632 So. 2d 48, 51 (Fla. 1993)(same); Preston v. State, 564 So. 2d 120, 123 (Fla. 1990)(same).

Furthermore summary denial is warranted as a claim of ineffective assistance of collateral counsel is not a cognizable issue for review. Lambrix v. State, 698 So. 2d 247 (Fla. 1996); State v. Riechmann, 777 So. 2d 342, 364 n.22 (Fla. 2000); State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998); King v. State, 808 So. 2d 1237 (Fla. 2002); Pennsylvania v. Finley, 107 S.Ct. 1990 (U.S. 1987); Murray v. Giarranto, 492 U.S. 1 (1989); Medrano v. State, 795 So. 3d 1009 (Fla. 4<sup>th</sup> DCA 2001).

Owen acknowledges that this Court has clearly and consistently found that this allegation does not form a proper basis for relief. **See Initial brief at 34.** However, appellant alleges that this well settled principle should not apply to him. Rather this case should be governed by the principle of Steele v. Kehoe, 747 So. 2d 931 (Fla. 1999) and Williams v. State, 777 So. 2d 947 (Fla. 2000). Owen alleges that the uniqueness of his situation warrants special relief. In Steele this Court held that due process considerations would entitle a

defendant to a belated motion for postconviction relief if counsel had affirmatively assured the client that a motion would in fact be filed yet counsel fails to do so in a timely manner. Steele, 747 So. 2d at 934.

Similarly in Williams, after extending affirmative assurances that a notice of appeal would be filed upon conclusion of the postconviction proceedings, counsel simply did not do so. Consequently under that limited circumstance, a defendant would be allowed to file a belated appeal. Id., 949.

As noted above, in both Williams and Steele, the defendant was given assurances by counsel that a particular course of action would be undertaken i.e., pursuit of a law suit. Counsels' failure to follow through on those assurances could not be attributed to the defendants as they were done without the clients' knowledge/wishes. No such due process concerns are implicated in the instant case. The record is crystal clear that Owen knowingly waived the opportunity to proceed with the evidentiary hearing. In upholding the propriety of his waiver, this Court observed that appellant was fully advised of the consequences of his actions and he affirmatively made the decision not to proceed with the hearing.

Owen freely chose to be represented by counsel at the proceeding below and registered no objection to counsel's performance. The record shows that collateral counsel and Owen *jointly* made the

strategic decision to end the evidentiary hearing.

Owen, 773 at 515(emphasis in the original). Consequently, Owen's claim that he was denied meaningful access to the courts under Bounds is without merit.

The state would also point out that appellant's conclusory claim that counsel was ineffective is legally insufficient as pled. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. See Kennedy v. State, 547 So. 2d 912 (Fla. 1989). In other words, "[a] hearing is warranted on an ineffective assistance of counsel claim only where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrate a deficiency in the performance that prejudiced the defendant. A summary or conclusory allegation is insufficient to allow the trial court to examine the specific allegations against the record." Ragsdale v. State, 720 So.2d 203, 207.(Fla. 1998). Consequently even if appellant's claim was a cognizable issue, summary denial was still proper given the bare conclusory allegations made. Simply alleging that the trial strategy employed was ultimately unsuccessful does not state a claim for relief. Bush v. Dugger, 505 So. 2d 409, 411 (Fla. 1987)(explaining that unsuccessful trial strategy does not

establish that counsel was ineffective). The trial court's denial of relief was proper and must be affirmed on appeal.

### ISSUE III

THE TRIAL COURT PROPERLY FOUND APPELLANT'S CLAIM OF ACTUAL INNOCENCE TO HAVE BEEN PROCEDURALLY BARRED

Appellant alleges that the trial court erred in summarily denying his claims of ineffective assistance of collateral counsel. Relying on Schulp v. DeLeo, 513 U.S. 851 (1995) appellant claims that he is able to overcome the procedural bar attached to his claim because he can establish that he is "actual innocent" of the murder of Georgiann Worden. Specifically, appellant explains that had counsel done an adequate investigation, he would have discovered that Owen suffers from a variety of disorders, including organic brain damage, psychosis, gender identity disorder. These maladies would have formed the basis for an insanity defense. Because the insanity defense would have resulted in his acquittal, appellant claims that he is therefore "actually innocent" and entitled to have his claim heard under Schulp. The trial court correctly rejected this argument as Schulp does not apply as an exception to a state procedural bar, and secondly the facts of Schulp are distinguishable.

Schulp was designed to allow for federal review of a claim where a defendant had no other adequate remedy in state court. See Herrera v. Collins, 506 U.S. 390, 404-05 (1993)(noting "History shows that the traditional remedy for claims of

innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency" and reasoning that only "a truly persuasive demonstration of 'actual innocence'" where the defendant was facing execution would "warrant federal habeas relief" but only "**if there were no state avenue open** to process such a claim." (emphasis supplied); Royal v. Taylor, 188 F.3d 239, 243 (4th Cir. 1999) (opining "when available, state clemency proceedings provide the proper forum to pursue claims of actual innocence based on new facts"); Lucas v. Johnson, 132 F.3d 1069, 1075 (5th Cir. 1998) (recognizing state clemency proceedings are proper vehicle for those claiming actual innocence); Cherrix v. Braxton, 131 F.Supp.2d 756, 767-69 (E. Dist. Va. 2000) (permitting petitioner to obtain new DNA tests to assist clemency or federal habeas litigation, however, noting that before the federal litigation continued, the court "may have to address whether Cherrix's failure to seek clemency presents a bar to his quest for federal habeas relief"). Cf. Hill v. Lockhart, 992 F.2d 801, 803 (8th Cir. 1003) (recognizing that petitioner entitled to seek federal remedy where state law provides no avenue to obtain relief).

Generally speaking under Florida law, a defendant will normally be able to present new evidence in a successive collateral proceeding Florida Rule of Criminal Procedure 3.850(b) provides:

Time Limitations. ... No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case ... unless it alleges that

(1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence.

Consequently the application of a Schulp under Florida law is not warranted.

Even if appellant could establish that Schulp or its rationale is applicable in Florida collateral proceedings, appellant has not met his burden. In Schulp, the United States Supreme Court fashioned and applied an extremely narrow exception to the well defined rules of procedural bar and abuse of the writ in the context of federal habeas jurisprudence. A federal habeas petitioner's burden is as follows: "[t]o be credible, [an actual innocence claim] requires petitioner to support his allegations of constitutional error with new reliable evidence... that was not presented at trial." Schulp, 513 U.S. at 324 (3maphaiss added). "The fundamental miscarriage of justice exception is available 'only where the petitioner **supplements** his constitutional claim with a colorable showing of factual.'" Herrea v. Collins, 506 U.S. 390, (emphasis in original) (quoting Kuhlmann v. Wilson, 477 U.S. 436 (1986)).

The defendant Schulp had previously presented a claim of ineffective assistance of counsel based on counsel's failure to investigate three other inmates who were eye-witnesses to the

murder. Schulp, 513 U.S. at 306. The petition was found to be barred for failing to raise it in state court. Schulp subsequently filed a second federal habeas petition, alleging that he has newly discovered evidence of actual innocence that will supplement his earlier barred claim of ineffective assistance of counsel. In addition to the eye witnesses presented in the first petition, Schulp uncovered a fourth individual. This individual provided evidence to establish that it was not physically possible for Schulp to have been the killer given the timing of the murder and when guards were notified. In other words, this new witness provided Schulp with an alibi. The United States Supreme Court determined that this newly discovered evidence augmented his earlier procedurally barred claim and provided evidence that Schulp may actually be innocent. Consequently, Schulp's previously barred claim should be therefore be reviewed on the merits. Schulp, 513 U.S. at 332.

The facts of the instant case are significantly different and do not provide any relief to appellant. Fatal to his argument is the fact that Schulp requires that a defendant produce **new** evidence of factual innocence that will bolster an already existing barred claim. Appellant does not present any **new** evidence of factual innocence. He merely has taken the existing, and identical claim of ineffective assistance of

counsel and reasserted it under a different argument. There is no **new** evidence that supports a previously barred claim. He simply re-characterizes the very issue that is now procedurally barred and labels it as "Schulp evidence." That does not meet the standard under Schulp. Schulp is an extraordinarily narrow exception that provides for presentation of **new** evidence to then allow for the review of the procedurally defaulted claim. The procedurally barred issues and the new evidence cannot be one in the same. It is not designed to allow for a second chance to reargue old claims standing alone. As argued previously, Owen presented this identical issue of ineffective assistance of counsel during his previous postconviction motion. (PCR 89-126). Moreover he was granted an evidentiary hearing in order to develop that claim. Owen, 773 So. 2d at 512 n. 4. However as recognized by the Florida Supreme Court:

Owen's ineffectiveness and conflict claim (i.e., claim 3) is a fact-based issue that requires development at an evidentiary hearing, which Owen-by his actions below-opted to forego. The claim thus is waived.

Id.(emphasis added). Owen's attempt to relitigate the propriety of his waiver is improper. This issue must be dismissed as an abuse of the process. Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995)(finding it inappropriate to use different argument to relitigate issue previously raised and rejected on appeal);

Zeigler v. State, 632 So. 2d 48, 51 (Fla. 1993)(same); Preston v. State, 564 So. 2d 120, 123 (Fla. 1990)(same).

#### ISSUE IV

THE TRIAL COURT PROPERLY DENIED APPELLANT'S BRADY CLAIM AS IT IS UNTIMELY AND THEREFORE PROCEDURALLY BARRED.

Appellant claims that the trial court erred in summarily denying his claim that the state withheld evidence under Brady v. Maryland, 373 U.S. 83 (1963). Following a 1991 conviction in Michigan, appellant was court-ordered into a mental health treatment program as a part of his sentence. During his participation in that treatment program, appellant was under the care of therapist, Linda Burkholder. According to appellant, his therapist maintained notes of these sessions in a "steno pad." Appellant is now alleging that the state is in possession of these notes and has not ever turned them over to the defense. Appellant makes this allegation based on the following. Ms. Burkholder turned over her therapy file to the F.B.I. in 1984. During the pre-trial discovery of this case, the state provided appellant with the information from appellant's participation in the treatment program but the notes of Ms. Burkholder were not in the discovery materials. Appellant therefore assumes that Ms. Burkholder turned over her personal notes to the F.B.I. and the F.B.I. turned those notes over to the state. The trial court summarily denied the entire motion finding it to be successive, untimely, and an abuse of the process. (PCR 248).

First, this issue is untimely as it should have been raised

either prior to trial or during litigation of the first motion for postconviction relief. Clearly, appellant could have ascertained from his former therapist when and what information was turned over to state agencies prior to the filing of this second motion for postconviction relief.

Second, Owen has not legally shown that "steno notes" from his own mental health therapist are or can be considered Brady evidence. In other words Owen has not claimed nor would he be able to establish that such information was unavailable to him irrespective of due diligence. It is Owen who is in the best position to know or uncover the existence of corroborating evidence of his mental illness that may be in the possession of his own confidential therapist. See Downs v. State, 740 So. 2d 506, 512 (Fla. 1999)(upholding dismissal of Brady claim as abuse of process in a successive motion since defendant was aware of the existence of the information); Robert v. State, 568 So. 2d 1255, 1260 (Fla. 1990)(rejecting Brady claim where defendant was aware of evidence of his intoxication during the crime); Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000)(same); Maharaj v. State, 778 So. 2d 944, 954 (Fla. 2000).<sup>4</sup> It is clear that appellant is attempting to seek review of his underlying

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<sup>4</sup> The state would also note that the issue is legally insufficient as pled. The fact that these "steno notes" were in the possession of the Federal Bureau of Investigation does not establish that they were ever in the possession of the State of Florida.

claims of ineffective assistance of counsel by casting this issue as a Brady violation. Summary denial was proper.

In summary the state asserts that this *pro se* motion is successive, untimely, and therefore constitutes an abuse of the process. It is clear that the issues raised within are either identical or are a variation on the issues previously raised and rejected by this Court.

ISSUE V

THE TRIAL COURT'S ORDER SUMMARILY DENYING APPELLANT'S MOTION WAS PROPER AS IT CONTAINED AN ADEQUATE RATIONALE FOR THE DENIAL OF ALL RELIEF.

Appellant claims that the trial court's order denying appellant's *pro se* motion was inadequate as it did not contain record attachments or specify what information contained in the court file was considered by the lower court. The state asserts that the trial court's order was sufficiently detailed in its explanation and record attachments were not required.

This Court has previously rejected appellant's claim that record attachments are required when claims are denied on procedural bar grounds. Diaz v. Dugger, 719 So. 2d 865, 866 (Fla. 1998)(rejecting appellant's claim that summarily denied claims require attachments of the record); Asay v. State, 769 So. 2d 974, 989 (Fla. 2000)(reasserting rule that summary denial without attachments of the record is proper for procedurally barred claims). All that is required of the trial court is to state its rationale for denying relief. Diaz, 719 So. 2d at 867. The trial court complied with that directive. There can be no confusion over the trial court's rationale. The substance of Claims I through III are identical to claims raised in the first motion for postconviction relief. The attachments to the state's response support that assertion and were reviewed by the court. Consequently the trial court's rationale is evident.

This second and therefore successive motion was improper. Additionally, attempts to re-litigate issues in successive motions constitutes an abuse of the process.

Appellant's Claim IV regarding an alleged Brady violation was untimely as it was premised on facts that could have and should have been known either before trial or at the time of initial motion for postconviction relief. Again, appellant's attempt to overcome that defect in a successive motion is an abuse of process. The trial court's order was sufficient to apprise this Court of its rationale.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm the trial court's SUMMARY DENIAL of Appellant's successive motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was sent by United States mail, postage prepaid, to James Driscoll, Jr., Capital Collateral Regional Counsel-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33691-1136, this \_\_\_\_ day of September, 2002.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

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CELIA A. TERENCE  
Assistant Attorney General