

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CRIMINAL DIVISION

THE STATE OF FLORIDA,

Plaintiff,

CASE NOS.: F01-07975
F06-032696

vs.

JUDGE THORNTON

SEAN CASEY,

Defendant.

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF
BELATED MOTION TO VACATE CONVICTION AND SENTENCE

INTRODUCTION

In the State's Response to Defendant's Motion for Leave to File Belated Motion to Vacate Conviction and Sentence Filed on or About October 6, 2009 (hereinafter "State's Response"), the State concedes that the Defendant "*cannot* be convicted of both vehicular homicide and DUI manslaughter where there is but a single death." (State's Response at 9). However, the record clearly shows that during the October 17, 2006 plea colloquy, the State's position was that the Court **can** convict the Defendant of both. (Casey's Motion at 9). Notwithstanding this obvious contradiction, the State still moves the Court to deny relief in a disingenuous attempt to avoid accepting the fact that the Court made a fundamental error by adjudicating Casey guilty as to both charges. No procedural

bar exists that prohibits the Court from now correcting this error by vacating the illegal conviction and sentence for vehicular homicide in Case No. F01-07975.

A. DEFENDANT IS PREJUDICED BY ILLEGAL CONVICTION.

The State contends that the Court should not grant relief because such an illegal conviction does not prejudice the Defendant since the conviction for vehicular homicide was not calculated on the Defendant's score sheet and the sentence for that conviction was suspended. (State's Response at 9).¹

However, the Florida courts have **not** treated this as a harmless error. See *Burford v. State*, 8 So. 3d 478 (Fla. 4th DCA 2009) (A conviction for both vehicular homicide and manslaughter is not harmless error *even when a sentence is not imposed.*) (emphasis added). See also *Laines v. State*, 662 So. 2d 1248 (Fla. 3d DCA 1995); *Wheeler v. State*, 662 So. 2d 1009 (Fla. 1st DCA 1995).

In *Kurtz v. State*, 564 So. 2d 519 (Fla. 2d DCA 1990), the trial court entered a final judgment adjudicating Kurtz guilty of [DUI manslaughter, manslaughter, and DUI] but sentenced Kurtz on only the DUI manslaughter conviction. Kurtz challenged the adjudication of guilt for all three offenses on double jeopardy grounds. "The state, of course, argues that the conviction is merely a document and not an act of punishment by the State." *Kurtz* at 520. The Second District disagreed and found "[a] strong argument can be made, however, that '[b]ecause a criminal conviction constitutes a formal judgment of condemnation by the community each additional conviction imposes an additional stigma and causes

¹ The State provides no explanation as to why the Judgment and Sentence sheets signed by Judge Leonard S. Glick on October 17, 2006, indicate that the Defendant's sentence for vehicular homicide was **not** suspended but rather ran concurrent with counts one and three. (Casey's Motion at Appendix "3").

additional damage to the defendant's reputation.'" *Id.* at 520, quoting *Missouri v. Hunter*, 459 U.S. 359, 373, 103 S.Ct. 673, 681-82, 74 L.Ed. 2d 535, 547 (1983).²

B. ILLEGAL CONVICTION IS NOT INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Furthermore, Casey is **not** attempting to raise another ineffective assistance of counsel claim as the State also suggests as a reason to deny relief (State's Response at 5-6), even though, as the State now concedes, it was Casey's trial counsel, Milton Hirsch, who failed to object to Casey being adjudicated guilty of both DUI manslaughter and vehicular homicide during the plea colloquy. (State's Response at 9).³ Neither is Casey attempting to claim ineffective assistance of post-conviction counsel, as the State further alleges (State's Response at 5-6), because Casey's post-conviction counsel, Marcia J. Silvers, was not ineffective. Silvers did, in fact, identify this illegality in Casey's timely second Rule 3.850 motion filed on or about November 14, 2008, albeit as a claim of ineffective assistance of counsel. (Casey's Motion at 9-10). Rather, Casey is claiming that

² As the Information currently stands, the convictions for both DUI manslaughter and vehicular homicide give the wrong impression that Casey was adjudicated guilty of two separate incidents and/or fatalities, which is simply not true. Although it is legal to charge a defendant of both crimes, upon obtaining a conviction for one charge, the other must be dismissed. *E.g. Connor v. State*, 987 So. 2d 130, n.1 (Fla. 2d DCA 2008); *Galiana v. State*, 868 So. 2d 1218 (Fla. 3d DCA 2006); *Leveritt v. State*, 817 So. 2d 891 (Fla. 1st DCA 2002); *Holmes v. State*, 778 So. 2d 534 (Fla. 1st DCA 2001); *State v. Chapman*, 625 So. 2d 838 (Fla. 1993).

³ By the State conceding that the conviction is illegal on double jeopardy grounds and then asserting that the Defendant, who was represented by counsel, did not object to such an illegal conviction, in essence, the State agrees that Casey's trial counsel was ineffective.

the State was ineffective for offering, and *the Court* was ineffective for adjudicating, what amounts to an illegal conviction for vehicular homicide.

Notably, Judge Leonard S. Glick, who presided over the plea hearing, relied on Casey's trial counsel, Milton Hirsch, to determine a point of law, which was whether or not Casey could be adjudicated guilty as to both charges:

The Court: Could the defendant be adjudicated guilty as to both?

Hirsch: Yes. *He can be adjudicated guilty as to both and sentenced cumulatively.*

The State: Right.

(Casey's Motion at 9). (emphasis added). The Court should not have relied on the Defendant's counsel to determine whether such a conviction was legal. It is the Court's role as the determiner of the law to establish this.

The record shows the Court determined it could adjudicate Casey guilty of both DUI manslaughter and vehicular homicide. (Casey's Motion at 8-9). Yet, every single court in the State of Florida has ruled that it **cannot** adjudicate a defendant guilty of both charges. *See Smallridge v. State*, 904 So. 2d 601, n.2 (Fla. 1st DCA 2005) ("*[T]he court was not empowered to impose separate convictions for both DUI manslaughter and vehicular homicide.*") (emphasis added). Additionally, in *Leveritt v. State*, 817 So. 2d 891 (Fla. 1st DCA 2002), the First District instructed the trial court that the "entry of judgment as to both convictions for DUI manslaughter and vehicular homicide was *erroneous*." The same can be held true in the instant case. Judge Glick made a mistake. He trusted Milton Hirsch and he trusted the State's attorney, but they were wrong, which the State now concedes. (State's Response at 9).

C. THE DEFENDANT DID NOT WAIVE DOUBLE JEOPARDY OBJECTION BY ENTERING INTO NEGOTIATED PLEA; ILLEGAL CONVICTION IS A FUNDAMENTAL ERROR THAT CANNOT BE WAIVED.

The State claims as follows:

[T]he defendant was advised several times during the plea colloquy that the charges of vehicular homicide and DUI manslaughter were duplicative. (Ex. 1, p. 4, 10-13, 22). Nonetheless, the defendant accepted a negotiated plea bargain whereby he would be convicted of both charges and sentenced only to the DUI manslaughter charge. (Ex. 1). This waived any double jeopardy objection.

(State Response at 9). The State relies on *Novaton v. State*, 634 So. 2d 607 (Fla. 1994). (State's Response at 9). However, no court in the State of Florida, or any other jurisdiction, has ever relied on *Novaton* in relation to the specific double jeopardy violation of being adjudicated guilty of both DUI manslaughter and vehicular homicide when there is a single death. *Novaton* is not a DUI manslaughter case; it involves a situation where the appellant committed two separate crimes and challenges "defective" **sentencing** for multiple aggravated battery with a firearm convictions. In *Novaton*, the court specifically noted that the defendant "neither requests that the agreement be vacated nor claims that it was invalid." *Id.* at 609. *Novaton* is inapplicable to the present case.

Moreover, the State is incorrect in that "[t]he defendant claims that his conviction and sentence for vehicular homicide as charged in Count 2 of the Information violates the prohibitions against double jeopardy" alone. (State's Response at 5). Casey also claims that his conviction for vehicular homicide is a **fundamental error**. (Casey's Motion at 11). "Error is fundamental in nature where a manifest injustice involves convicting appellant 'for an offense for which

he could not have been convicted.” *Miller v. State*, 988 So. 2d 138 (Fla. 1st DCA 2008), citing *Silverstein v. State*, 985 So. 2d 635 (Fla. 4th DCA 2008); *Sherwood v. State*, 734 So. 2d 1050 (Fla. 1st DCA 1998); *Dydek v. State*, 400 So. 2d 1255 (Fla. 2d DCA 1981); *Waugh v. State*, 388 So. 2d 253, 254 (Fla. 2d DCA 1980).

In *Miller, supra*, Judge Allen relies on *Novaton* for the proposition that an appellant waives his right to appeal even fundamental error upon the entry of a negotiated plea.⁴ The First District reversed and found, “Where this is one possible interpretation of *Novaton*, it is an interpretation that would lead to significant concerns in the future regarding the rights of defendants to challenge the most fundamental errors.” *Miller* at 139.

In the instant case, the Florida courts have made it clear that a defendant cannot be convicted of vehicular homicide if he or she has been convicted of DUI manslaughter when there is a single death. The State acknowledges that DUI manslaughter was the “primary charge” on Casey’s score sheet. (State’s Response at 2, n.1). It concedes Casey was also convicted of vehicular homicide. (State’s Response at 2). Thus, Casey was convicted “for an offense [vehicular homicide] for which he could not have been convicted” because he was convicted of DUI manslaughter. The conviction for vehicular homicide is, indeed, a fundamental error. Again, the State’s reliance on *Novaton* fails.

During the plea colloquy, Casey heard his trial counsel advise the Court that he *could* be adjudicated guilty as to both DUI manslaughter and vehicular homicide, he heard the State concur, and he also heard Judge Glick explain to him that he could be adjudicated guilty as to both. It is absurd that the State, and the

⁴ *Miller* involved multiple armed robbery convictions.

Court for that matter, would expect Casey to have stood up in court and voiced his objection to this double jeopardy violation and fundamental error of law. Casey was not trained in the law at that point and his first encounter with the criminal justice system was when he was arrested in this cause.

Judge Glick explained to Casey as follows:

The Court: You will also be pleading guilty to count two, vehicular homicide slash failure to stop, which is a separate first-degree felony that if it were standing alone would carry a statutory maximum punishment of 30 years in state prison. And depending on the circumstances of any particular case *that punishment could be imposed separately* from Count Number One [DUI manslaughter]... Because you are pleading guilty to counts one and two, they are duplicitous as far as the law is concerned *for sentencing purposes*. You will go, you will be pleading guilty to it; you will be adjudicated guilty of this charge as well as of the other two charges...

(Casey's Motion at 8) (emphasis added). This explanation made by Judge Glick is erroneous. The Florida courts have made it *pellucidly* clear that these charges are duplicitous not only for sentencing purposes but also for adjudicating purposes. As pointed out by Casey in his motion, there is not a single case in the State of Florida where a higher court has upheld a conviction, obtained by jury or plea, where a defendant has been adjudicated guilty of both DUI manslaughter and vehicular homicide when there is a single death, even when the sentence for vehicular homicide was suspended. (Casey's Motion at 10). In his motion, Casey cited 23

cases to this effect. (Casey's Motion at 6-7). The State cannot cite one case to the contrary.

The Court was in error and must now correct its mistake. When Casey accepted the State's plea offer, he trusted that the judge and the State's attorney, upholders of the law, were offering a legal conviction devoid of fundamental errors. Casey's adjudication of guilt for vehicular homicide is not lawful when he was also adjudicated guilty for DUI manslaughter. This violates the prohibition in the state and federal constitutions against double jeopardy, which the State now concedes (State's Response at 9) and is a clear fundamental error as defined in *Miller, supra*. Nonetheless, in its Response, the State hides behind procedural bars to avoid the inevitable – Casey's conviction for vehicular homicide must be vacated.

D. NO PROCEDURAL BAR EXISTS PROHIBITING THE COURT FROM CORRECTING ILLEGAL CONVICTION.

First, the State argues that Casey's claim is not "good cause" to justify granting a belated post-conviction motion under Rule 3.050, Florida Rules of Criminal Procedure. (State's Response at 5). Such a position is so incredible it does not even warrant a response. Casey's conviction for both DUI manslaughter and vehicular homicide is **illegal**. Period. "[I]f an illegal conviction is not well within the concept of exceptional circumstances and manifest injustice...it is not easy to imagine what would be." *Sigler v. State*, 881 So. 2d 14, 17 (Fla. 4th DCA 2004), decision affirmed, *State v. Sigler*, 967 So. 2d 835 (Fla. 2007). The State's attorney, an officer of the court, the enforcer of the law, broke the law in offering such an illegal conviction. It is time the State takes responsibility for its mistake.

Then, the State contends the claim is successive. (State's Response at 7). It cites Rule 3.850(f), which provides, in part:

A second or successive motion *may* be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits *or*, if new and different grounds are alleged, the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

(State's Response at 7). Nothing in Rule 3.850(f) prohibits the Court from reviewing second or successive motions. The motion must contain a new or different ground that the Court has not adjudicated *or* the movant must show why the new ground was not asserted in a previous motion. If the Florida Legislature sought to require both conditions, it would have employed the word "and" and not "or" in the rule.

In the instant case, Casey's illegal conviction claim is a completely new ground for relief. The record reflects, and the "Procedural History" in the State's Response shows, that **all** of Casey's previous claims have been on ineffective assistance of counsel. (State's Response at 3-4). The State pointed out that "[Casey's] counsel did raise a double jeopardy violation claim in the Rule 3.850 motion for post-conviction relief filed on or about November 14, 200[8], albeit as an element of a claim of ineffective assistance of counsel." (State's Response at 5). However, Casey's present claim directly challenges the illegal conviction not merely resulting from the ineffectiveness of his trial counsel. Moreover, as explained earlier, the State was just as ineffective for offering an illegal conviction

as part of the plea agreement and the Court was even more ineffective for explaining to Casey that the conviction was legal when, in fact, it was not.⁵

E. THE COURT DOES HAVE JURISDICTION BECAUSE PRESENT CLAIM IS UNRELATED TO CLAIMS ON APPEAL.

The State further contends that since the Court's denial of his Rule 3.850 motion filed on or about November 14, 2008, which included this double jeopardy/fundamental error claim as an element of ineffective assistance of counsel, is now on appeal in the Third District (Case No. 3D09-2555), this Court lacks jurisdiction to address the merits of this new claim. (State's Response at 8). This argument contradicts the State's own position regarding this issue made during a similar instance previously in this case.

On or about December 8, 2008, the State filed its Preliminary Response to the Defendant's second Rule 3.850 motion filed on or about November 14, 2008, while the denial of the Defendant's first Rule 3.850 motion was pending on appeal. The State presented exceptions to the rule that the trial court lacks jurisdiction to review a successive motion under these circumstances. One exception is when the issues raised in the successive motion are **unrelated** to the issues raised in the motion pending on appeal. (See Exhibit "1" at 4). The State cited *Jones v. State*, 787 So. 2d 35 (Fla. 2d DCA 2001); *Norman v. State*, 739 So. 2d 1258 (Fla. 1st DCA 1999); *Kimmel v. State*, 629 So. 2d 1110, 1111 (Fla. 1st DCA 1994).

The Defendant agrees. The instant motion sets out to determine whether the State erred in offering, and the Court erred in adjudicating, an illegal conviction

⁵ Judge Glick told Casey: "...they are duplicitous as far as the law is concerned for sentencing purposes." (Casey's Motion at 8). Therefore, Judge Glick clearly was informing the Defendant that they are **not** duplicitous by law for **adjudicating purposes**. As previously explained, this is a fundamental error.

and the other motion, now under review by the Third District, sets out to determine whether Casey could raise additional claims of ineffective assistance of counsel in a successive Rule 3.850 motion. This Court *can* make a determination as to whether the conviction for vehicular homicide is illegal without affecting the Third District's review. In fact, the Third District is **not** reviewing the double jeopardy violation or fundamental error claim. It is not even reviewing whether Casey's trial counsel was ineffective for failing to object to this illegal conviction because this Court never ruled on the merits of this claim. Again, the Third District is solely reviewing whether Casey is precluded from raising new claims of ineffective assistance of counsel in a successive Rule 3.850 motion. This issue is completely **unrelated** to the double jeopardy violation/fundamental error claim presented in this motion.

Assuming, for the sake of argument only, that the Court finds the instant motion is, indeed, related and the trial court does not have jurisdiction, again, following the State's argument in its Preliminary Response filed on or about December 8, 2008, the better course of action would be to hold this motion in abeyance pending resolution of the pending appeal. (See Exhibit "1" at 4-5). *Tompkins v. State*, 894 So. 2d 857, 859-860 (Fla. 2005); *Washington v. State*, 823 So. 2d 248, 249-250 (Fla. 4th DCA 2002).

However, in the interest of judicial economy, there should be no bar prohibiting the Court from correcting what amounts to, and which the State concedes, is an illegal conviction. *Sigler v. State*, 881 So. 2d 14, 17 (Fla. 4th DCA 2004), decision affirmed, *State v. Sigler*, 967 So. 2d 835 (Fla. 2007).

Casey's conviction, being adjudicated guilty for both DUI manslaughter and vehicular homicide, is illegal. It violates the state and federal constitutions and

goes against **all** rulings in the Florida courts. The State, the Court, and the Defendant's counsel were all in error. It is time the justice system corrects this mistake, which never would have happened if Judge Glick had not relied on Casey's trial counsel in determining what was legal or not legal but instead researched the issue himself fulfilling his duty as the determiner of the law. Both parties now concede the conviction is illegal, "[i]t does not follow, however, that the Court is obligated to ignore, and thereby effectively condone, what amounts to an illegal conviction." *Hoover v. State*, 511 So. 2d 629 (Fla. 1st DCA 1987).

CONCLUSION

Accordingly, for the aforementioned reasons and for "good cause" shown, a ruling on the merits of Casey's claim presented in his belated motion for post-conviction relief and the vacating of Casey's conviction and sentence for vehicular homicide in Case No. F01-07975 is mandated.

Respectfully submitted,



SEAN CASEY, *Pro se*
DC#B03942
New River Correctional Institution
7819 N.W. 228th Street
Raiford, Florida 32026

OATH

Under penalties of perjury, I declare that I have read the foregoing Reply Memorandum and that the facts stated in it are true.




SEAN CASEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 10, 2009, I handed a true and correct copy of the foregoing Reply Memorandum to the legal mail collection officer at New River Correctional Institution for delivery by U.S. mail to:

Angelica D. Zayas
Assistant State Attorney
E.R. Graham Building
1350 Northwest 12th Avenue
Miami, Florida 33136



SEAN CASEY, *Pro se*

Exhibit 1

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

Case No. F01-07975
F06-032696

Judge Glick

vs.

SEAN CASEY,
Defendant.

CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
CLERK OF COURT
L. A. B. A.

2009 DEC -8 PM 3:22

FILED FOR MARY ELLE BUCK

PRELIMINARY RESPONSE TO DEFENDANT'S MOTION FOR POST
CONVICTION RELIEF FILED ON OR ABOUT NOVEMBER 14, 2008

COMES NOW KATHERINE FERNANDEZ RUNDLE, State Attorney of the Eleventh Judicial Circuit of Florida, by and through the undersigned Assistant State Attorney, and files this Response to the Defendant's Motion For Post Conviction Relief Filed On Or About November 14, 2008, and respectfully submits that the defendant, Sean Casey, is entitled to no relief.

Statement of Facts

The State submits that the deposition testimony, suppression hearing testimony, the evidentiary hearing testimony, and other factual allegations offered by the Defendant in support of his post conviction claims are irrelevant to the question of whether this court has jurisdiction to address the defendant's successive motion while appellate review of the denial of the first motion is pending. These factual allegations are also irrelevant to whether the instant motion may be summarily denied as successive. Therefore, the State has intentionally refrained from including a Statement of Facts in this

preliminary response and reserves the right to address the factual allegations set forth in the Defendant's motion only if it becomes necessary to address the merits of the Defendant's claims. The failure to specifically address the Defendant's factual allegations should not be construed as an express or implied agreement with or acceptance of the facts as described by the Defendant.

Procedural History

The Defendant was initially charged with one count DUI manslaughter in violation of §316.193(3)(c)3.b of the Florida Statutes and one count of vehicular manslaughter in violation of §782.071(2) of the Florida Statutes as a result of a traffic fatality that occurred on March 11, 2001. The charging document was ultimately amended to include a charge of leaving the scene of a crash involving a death in violation of §316.027(1)(b) of the Florida Statutes.

On September 10, 2004, the Defendant failed to appear in court and an *alias capias* was issued. Upon his return, the Defendant was charged with failing to appear while on bail in violation of §843.15(1)(a), Florida Statutes, in Case F06-32696. On September 1, 2006, the Defendant filed a demand for speedy trial in the traffic fatality case. When the traffic fatality case was called for trial on October 17, 2006, the State offered the defendant a plea to the bottom of the guidelines. After litigating certain pretrial motions, the Defendant entered a negotiated plea of guilty to DUI manslaughter, vehicular manslaughter and leaving the scene of a crash resulting in death. In exchange for his plea, the Defendant was sentenced to 11.5 years in state prison with

the sentence as to count two suspended. The Defendant also entered a plea of guilty to the charge of failing to appear while on bail and was sentenced to 366 days consecutive to the sentence imposed in the other case.

On or about November 2, 2006, the Defendant filed a motion to vacate his plea alleging that trial counsel advised him to flee before trial, assisted him in his efforts to remain in Chile, and encouraged him to take the plea to prevent him from explaining that counsel advised him to flee. As a result, the Defendant claimed that he was deprived of conflict-free counsel. On or about January 5, 2007, the Defendant filed an addendum to his claim, arguing that trial counsel was ineffective for failing to call the Defendant as a witness at the hearings on the motions to suppress.

On January 8, 2007, an evidentiary hearing on this motion was held. The Defendant and his mother, Genevieve Casey, testified in support of the post conviction claims. The State presented the testimony of trial counsel, Milt Hirsch and Michael Haber, and the Defendant's therapist, Michael Rappaport. Following the evidentiary hearing, the trial court denied the motion for post conviction relief, finding that the Defendant's motion was nothing more than an expression of "buyer's remorse." A written order denying Appellant's motion for post conviction relief was filed on March 5, 2007.

On February 8, 2008, the Defendant was granted permission to file a belated appeal challenging the denial of his first motion for post conviction relief. This appeal is currently pending in the Third District Court of Appeal.

On or about November 14, 2008, the Defendant filed the instant motion for post conviction relief. In this motion, the Defendant suggests that trial

counsel was ineffective for 1) failing to object to a plea “induced” by the trial court judge; 2) misadvising the Defendant of the consequences of his guilty plea; 3) failing to object to an inadequate amount of time to consider the plea offer from the State; 4) failing to properly investigate all available witnesses and defenses; and 5) failing to object to an illegal conviction and sentence. The defendant also revisits his claim of conflict by suggesting that he has new evidence to support the claim previously raised.

Jurisdiction

As a general rule, the trial court does not have jurisdiction to address the merits of a successive motion for post conviction relief while the denial of the first motion is pending appellate review. *Tompkins v. State*, 894 So. 2d 857, 859 (Fla. 2005) (“the circuit court did not have jurisdiction to consider Tompkins' motions while the appeal of the denial of his previous motions, which raised similar claims, was pending in [Florida Supreme] Court”); *Washington v. State*, 823 So. 2d 248, 249 -250 (Fla. 4th DCA 2002); *Gobie v. State*, 188 So. 2d 34 (Fla. 3d DCA 1966). However, there seems to be an exception to this rule where the issues presented in the second or successive motion are unrelated to the issues raised in the first motion. *See, e.g., Jones v. State*, 787 So. 2d 35 (Fla. 2d DCA 2001); *Norman v. State*, 739 So. 2d 1258, 1258 (Fla. 1st DCA 1999); *Kimmel v. State*, 629 So. 2d 1110, 1111 (Fla. 1st DCA 1994). Although a successive post conviction motion may be dismissed for lack of jurisdiction where the denial of a previously filed motion is pending appellate review, it has been suggested that the better course of action would be to hold a timely filed motion in abeyance pending the

resolution of the pending appeal to avoid the expiration of the two-year limitation for filing such motions during the appellate review of the first motion. *Tompkins v. State*, 894 So. 2d 857, 859-860 (Fla. 2005); *Washington v. State*, 823 So. 2d 248, 249 -250 (Fla. 4th DCA 2002).

For the reasons set forth below in support of the argument that the Defendant's claim is procedurally barred, the State cannot in good faith assert that the issues raised in the successive motion are unrelated to the issues raised in the first motion which is pending appellate review. Accordingly, the motion should be held in abeyance pending disposition of the pending appeal.

Procedural Bar

Rule 3.850(f) expressly provides that "A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules." Where the grounds raised in the second or successive motion could have been raised in the first motion, the trial court may properly dismiss the second motion. *See, e.g., Moore v. State*, 820 So. 2d 199 (Fla. 2002)(holding that a successive 3.850 motion can be denied on the ground that it is an abuse of process, if there is no reason why the issue could not have been raised in a previous motion); *Franklin v. State*, 923 So. 2d 1199, 1199 (Fla. 3d DCA 2006); *Scrambling v. State*, 919 So. 2d 671 (Fla. 5th DCA 2006)(holding that defendant's 3.850 motion for postconviction relief was procedurally barred as successive where the

“defendant's current rule 3.850 motion is one that could have or should have been raised in his first rule 3.850 motion”); *Eloisaint v. State*, 868 So. 2d 680 (Fla. 3d DCA 2004). More specifically, a defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by filing successive motions. *Jones v. State*, 591 So. 2d 911 (Fla. 1991). Where a previous motion for postconviction relief raised a claim of ineffective assistance of counsel, a trial court may summarily deny a successive motion that raises an additional ground for ineffective assistance of counsel. *Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997); *Tafero v. State*, 524 So. 2d 987 (Fla. 1987); *Card v. Dugger*, 512 So. 2d 829 (Fla. 1987); *Christopher v. State*, 489 So. 2d 22 (Fla. 1986). See also *Ragan v. State*, 643 So. 2d 1175, 1176 (Fla. 3d DCA 1994).

In his first motion for post conviction relief, the Defendant claimed that counsel was ineffective for failing to call him as a witness at the suppression hearing and for urging him to take the plea offered by the State to hide his own alleged wrongdoing. In addition to revisiting his claim of conflict, the Defendant now claims that counsel was ineffective for 1) failing to object to a plea “induced” by the trial court judge; 2) misadvising the Defendant of the consequences of his guilty plea; 3) failing to object to an inadequate amount of time to consider the plea offer from the State; 4) failing to properly investigate all available witnesses and defenses; and 5) failing to object to an illegal conviction and sentence. Having raised claims of ineffective assistance of counsel in his first motion, the Defendant is precluded from raising new allegations of ineffective assistance of counsel in this successive motion. Having specifically raised the alleged conflict of counsel in his first motion, the Defendant is precluded from raising it once again in this successive motion.

Relying on *Aikens v. State*, 488 So. 2d 543 (Fla. 1st DCA 1986), the Defendant attempts to avoid this procedural bar by claiming that there is a justifiable reason for not asserting these claims previously. (Defendant's Memorandum of Law in Support of Motion for Post Conviction Relief ("Memorandum"), p. 11-13). This reliance, however, is misplaced. In *Aikens*, the appellate court held that the defendant was justified in filing a second motion for post conviction relief pursuant to Rule 3.850 because the Florida Supreme Court had not decided the legal issue raised in the second motion when the first motion was filed. In other words, *Aikens* was justified in filing the second motion because the claim could not have been raised in the first motion. *Aikens*, 488 So. 2d at 544-545. In contrast, the arguments raised by the Defendant in this successive motion are claims that could have, and should have, been raised in his first motion.

The suggestion that the Defendant's successive motion is justified because post conviction counsel was negligent or ineffective in the preparation of the first motion is similarly without merit.¹ Claims of ineffective assistance of postconviction counsel do not present a valid basis for relief. *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996), *cert. denied*, 522 U.S. 1122, 118 S.Ct. 1064, 140 L.Ed.2d 125 (1998). *See also Gonzalez v. State*, 990 So. 2d 1017, 1034 (Fla. 2008) ("To the extent that Gonzalez is making an ineffective assistance of postconviction counsel claim, this Court has repeatedly rejected such a claim."); *Kokal v. State*, 901 So.2d 766, 777 (Fla. 2005) ("We have repeatedly held that claims of ineffective assistance of postconviction counsel are not cognizable."); *Waterhouse v. State*, 792 So. 2d 1176 (Fla. 2001); *Downs v. State*, 740 So. 2d 506, 514 (Fla. 1999).

¹ Motion, p. 5-6.

Accordingly, the defendant cannot justify a successive post conviction motion by claiming ineffective assistance of post conviction counsel. *Tompkins v. State*, 45 Fla. L. Weekly S897, 2008 WL 4824085, 11 -12 (Fla. November 7, 2008); *Jimenez v. State*, 33 Fla. L. Weekly S805, S807, 2008 WL 2445461 (Fla. June 19, 2008).

The defendant also attempts to justify his renewed claim of conflict by alleging the existence of newly discovered evidence to support the claim. (Motion, p. 5; Memorandum, p. 10). In support of this allegation, the Defendant relies on a fax allegedly sent by the Defendant to his attorney approximately three years before the Defendant filed his first motion for post conviction relief, claiming that the fax was unavailable when he filed his first motion because “the Defendant did not remember sending this fax until his mother found it in Chile.” (Memorandum, p. 10).

“By definition, newly discovered evidence concerns facts that were ‘unknown by the trial court, by the party, or by counsel at the time of trial’ and which could not have been discovered by the defendant or counsel through the use of due diligence.” *Downs v. State*, 740 So. 2d 506, 514 (Fla. 1999). *See also Robinson v. State*, 707 So. 2d 688, 691 (Fla. 1998); *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997); *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991). The fact that the Defendant “did not remember” authoring or sending the fax to his trial counsel before it was “found” by his mother among his personal belongings in Chile, does not create a claim of newly discovered evidence justifying piecemeal litigation. The conversations and communications between the Defendant and his attorney relative to the claim that trial counsel urged the Defendant to flee prior to trial necessarily took place before the Defendant fled and before the Defendant filed his first

motion. Thus, the Defendant was fully aware of the contents of these communications long before he filed his first motion for post conviction relief. Moreover, as the author of the fax allegedly sent to trial counsel approximately three before he filed his first motion, the Defendant was in the best position to tell his attorney about the fax and the possibility that a copy of the fax could be found among his personal belongs in Chile. The record reflects that the Defendant filed his first motion less than three weeks after he entered his guilty plea. Although the Defendant was incarcerated at the time he filed his first motion and could not have personally retrieved his belongs from Chile, there is no legitimate reason that he could not have sent his mother to retrieve his belongs from Chile before filing his first motion, as he ultimately did before he filed the second motion. Clearly there was no need to file the first motion and proceed to a hearing on that motion before reviewing his own files for possible evidence to support his claims. The Defendant's failure to investigate his own files before filing his first motion cannot justify additional review of a matter that has been fully litigated at an evidentiary hearing. *See, e.g., Gentry v. State*, 464 So. 2d 659, 661 (Fla. 4th DCA 1985) (defendant is precluded from filing a subsequent post-conviction motion which alleges the same ground for relief previously disposed of after an evidentiary hearing).

Conclusion

WHEREFORE, based upon the foregoing reasons and authorities cited herein, the State of Florida requests that this Honorable Court hold Defendant's Motion For Post Conviction Relief Filed On Or About November 14, 2008, in abeyance pending appellate review of the denial of the Defendant's first motion.

In the alternative, the State of Florida requests that the motion be dismissed as successive pursuant to Rule 3.850(f). The State of Florida expressly reserves the right to address the merits of the Defendant's claims in the event that the requests for dismissal are denied.

Respectfully submitted,
KATHERINE FERNANDEZ RUNDLE
STATE ATTORNEY

BY: 

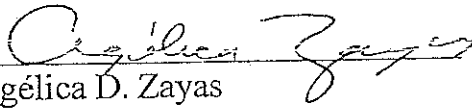
Gail Levine
Assistant State Attorney
Florida Bar #466591
E.R. Graham Building
1350 N.W. 12th Avenue
Miami, Florida 33136-2111
(305) 547-0100

BY: 

Angélica D. Zayas
Assistant State Attorney
Florida Bar #0822256
E.R. Graham Building
1350 N.W. 12th Avenue
Miami, Florida 33136-2111
(305) 547-0100

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above was mailed to Marcia J. Silvers, Esq., Counsel for the Defendant, 799 Brickell Plaza, Suite 606, Miami Florida 33131, on this 8th day of December, 2008.



Angélica D. Zayas
Assistant State Attorney