IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-537

DAVID ALAN GORE

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, David Alan Gore, Defendant below, will be referred to as "Gore" and Appellee, State of Florida, will be referred to as "State". Reference to the record documents will be as follows:

1. "ROA-1" - Record on direct appeal (new case numbering SC60-65201) of the original conviction; *Gore v. State*, 475 So.2d 1205 (Fla. 2007);

2. "PCR-1" - Record from the appeal of the denial of postconviction relief following the original conviction (new case numbering SC60-72202 and 72300); *Gore v. Dugger*, 532 So.2d 1048 (Fla. 1988);

3. "ROA-2" - Record on direct appeal of the resentencing (new case numbering SC60-80916); *Gore v. State*, 706 So.2d 1328 (Fla. 1998);

4. "PCR-2" - Record from the appeal of the denial of postconviction relief following resentencing (case number SC04-1458); *Gore v. State*, 964 So.2d 1257 (Fla. 2007).

5. "PRC-3" – Record for the instant appeal of the successive postconviction motion filed after death warrant signed; "R.1" and "R.2" will designate the record pages from volumes 1 and 2; and "T" the transcript pages.

Supplemental materials will be by the symbol "S" preceding the type of record. Gore's initial brief will be notated as "IB." The appropriate page number(s) follow the record cited.

STATEMENT OF THE CASE AND FACTS

On March 15, 1984, Gore was convicted of first-degree premeditated murder of Lynn Elliot ("Elliot"), two counts of

kidnapping for the abductions of Elliot and RM,[1] and three counts of sexual battery against RM. Gore's jury recommended death by a vote of eleven to one, and on March 16, 1984, the trial court imposed a sentence of death for Elliot's murder. The convictions and sentences were affirmed on direct appeal. *See Gore v. State*, 475 So.2d 1205 (Fla. 1985), *cert. denied*, 475 U.S. 1031 (1986). On direct appeal, this Court found the following facts:

> Gore and his cousin picked up fourteen-year-old [RM] and seventeen-year-old Lynn Elliott who were hitchhiking to the beach. After the glove compartment in the pickup truck fell open and a gun became visible, Gore took the gun and held it to [RM's] head. He grabbed the two girls' wrists and held them together. Gore then said that they should take the girls to Gore's home. He told the girls that if they said or did anything, they would be killed. When they arrived at his home, the girls were handcuffed and taken into a bedroom. The girls then were separated, and Lynn was tied up while [RM] was handcuffed. Gore cut [RM's] clothes off of her and sexually assaulted her on three separate occasions. [RM] testified that she heard noises in the other room after Gore had left her. She heard Gore tell Lynn to shut up or he would kill her. Gore also told [RM] to be quiet or he would slit her throat and that he would do it anyway. Gore then put [RM] in the closet, and, after he left, she heard two or three shots. Gore then came back into the room and put [RM] in the attic where she stayed until rescued by a police officer.
>
> Michael Rock, a fifteen-year-old boy, testified that on July 26, 1983, while riding his bicycle in the area of Gore's home, he heard screaming and observed a naked girl running down the driveway being chased by Gore who was also naked. He saw Gore catch up to her, drag her back to a palm tree, and shoot her twice in the head. Rock went home and told his mother, and she

[1] This victim's name is represented by her initials as she was the victim of sexual assault.

> called the police. The police arrived and surrounded Gore's home. Lynn's body was found in the trunk of the car in the driveway. Her arms and legs had been tightly bound with rope. She had multiple abrasions on her body consistent with falling and being dragged. The gun used to kill her was found in Gore's home.

Gore, 475 So.2d at 1206.[2]

On February 24, 1988, Gore sought state postconviction relief[3] and following the denial of relief, this Court affirmed and denied Gore's state habeas petition. *See Gore v. Dugger*, 532 So.2d 1048 (Fla. 1988). Subsequent to the January 31, 1989 signing of a second death warrant, Gore petitioned the federal district court for a writ of habeas corpus. That court denied relief on Gore's challenges to his conviction, but granted the writ and ordered a new sentencing. *See Gore v. Dugger*, 763 F.Supp 1110 (M.D. Fla. 1989), affirmed, *Gore v. Dugger*, 933 F.2d 904 (11th Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992).[4]

Gore's resentencing was conducted in November, 1992 upon which the jury unanimously recommended a death sentence, which the trial court followed its finding six aggravating factors and

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[2] The overturned penalty phase facts have not been recounted.

[3] On March 3, 1988, Governor Martinez signed Gore's first death warrant.

[4] The federal district court found constitutional error due to the fact that the jury never heard about the potential mitigating evidence of Gore's alleged drug and alcohol abuse, along with evidence that he had been drinking and taking pills around the time of the murder.

five non-statutory mitigating circumstances.[5] This Court rejected each of Gore's appellate challenges and affirmed the death sentence. *See Gore v. State*, 706 So.2d 1328 (Fla.), *cert denied*, 525 U.S. 892 (1998).

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[5] The court found six aggravators: (1) "under sentence of imprisonment" as "Gore was on parole after being convicted and sentenced for trespass of a conveyance while armed;" (2) prior violent felony based on the "trespass conviction involved the threat of violence to a person" and Gore's "contemporaneous convictions for kidnapping and sexual battery satisfied this aggravator;" (3) felony murder based on the sexual battery and kidnapping; (4) "avoid arrest" based on the finding "Elliott was in the process of escaping and was killed for the dominant or sole motive to prevent her from identifying Gore because that would lead to his arrest;" (5) "heinous, atrocious, or cruel" ("HAC") as "Elliott was abducted and handcuffed at gun point, brought to the Gores' residence, and then tightly bound before being sexually assaulted. The court also found that Elliott attempted to flee but Gore caught up with her and dragged her back as she fought to free herself before finally throwing her to the ground and shooting her;" and (6) "cold, calculated, and premeditated" ("CCP") as "Gore participated in a detailed plan to kidnap a young girl using a gun, handcuffs, and rope, to transport her to his residence, commit sexual battery, terrorize and then murder her. He also threatened to kill [RM] and told her he was "going to do it anyway." *Gore v. State*, 706 So.2d 1328, 1331 (Fla. 1997). The court found no statutory mitigation, but five non-statutory mitigators:

> (1) Gore's exemplary conduct while in prison, his past conduct as a model prisoner, his capacity to be one in the future, and his ability to live in prison without being a threat or danger to others; (2) Gore's impoverished childhood; (3) Gore's exemplary conduct during the resentencing proceeding; (4) Gore's depression at the time of the offense; and (5) Gore's love for his children and his separation from them. Finding that the mitigating circumstances were substantially outweighed by the aggravating circumstances, the trial court sentenced Gore to death.

Id., at 1331-32.

Gore pursued state postconviction relief wherein he claimed ineffective assistance of penalty phase counsel among other matters.[6] Relief was denied after an evidentiary hearing, and the Florida Supreme Court affirmed that decision. *See Gore v. State*, 964 So.2d 1257 (Fla. 2007), *cert denied*, 552 U.S. 1197 (2008). Following the conclusion of his state collateral litigation, Gore sought federal review. His federal petition for writ of habeas corpus filed in case number 07-22637-civ-Lenard/Torres was denied and a certificate of appealability was denied by both

[6] If import for this appeal, Gore raised: (Claim III) ineffective assistance of resentencing counsel for (a) calling former state attorney, Robert Stone, as a witness; (b) failing to call an authority from the parole commission to testify about Gore's parole eligibility; (c) failing to lodge cause challenge against juror Tobin; and (d) failing to discover/elicit testimony regarding the fee paid by the state to its expert Dr. Cheshire. Following an evidentiary hearing, the court denied relief finding Stone's testimony was very useful to Gore as he was able to argue Waterfield's sentences were disproportionate and unfair to Gore; Gore's three consecutive life sentences would mean he would not be released; Gore was less culpable than Waterfield as Gore was influenced by Waterfield, and the state made inconsistent arguments at the respective trials of the defendants. The court found Stone's testimony was an accurate statement of the law. This Court affirmed. *Gore*, 964 So.2d at 1268-1271. With respect to Juror Tobin, this Court rejected the claim on the merits finding Tobin's responses would not have warranted a cause challenge. *Gore*, 964 So.2d at 1275. Regarding Dr. Cheshire, the court found that even if the jury had this impeachment evidence, its unanimous death recommendation would not have changed given the six aggravators. This Court affirmed. *Id*. As to counsel's failing to discover and present witnesses who could testify Gore suffered from neurological disorders due to exposure to toxic chemicals and was physically, mentally and emotionally abused by his mother, the court rejected the claim and found Gore had failed to prove his claim factually; this Court affirmed. *Gore*, 964 So.2d at 1273.

the federal district and circuit courts.

On February 28, 2012, the Governor signed a death warrant for Gore. On March 6, 2012, Gore filed a successive motion for postconviction relief in which he raised five claims.[7] The State responded on March 9, 2012 (PCR-3R.1 157-215) with the Case Management Hearing being held on March 13, 2012, and on March 15, 2012, the trial court denied relief summarily. (PCR-3R.2 222-29). Gore appealed (PCR-3R.2 238-39).

[7] (I) Gore's clemency process was arbitrary and capricious violating the Eighth and Fourteenth Amendments of the United States Constitution and corresponding provision of the Florida Constitution; (II) Florida capital sentencing scheme is rendered unconstitutional under the Eighth and Fourteenth Amendments of the United States Constitution as the Governor's power to sign death warrants is arbitrary and standardless; (III) Robert Udell's 2009 disbarment is newly discovered evidence of impeachment, thus, undercutting the denial of prior claims of ineffectiveness of counsel; (IV) Postconviction counsel for Gore's 2003 state collateral proceedings rendered ineffective assistance for failing to call penalty phase counsel Jerome Nickerson at the postconviction evidentiary hearing; and (V) Gore's length on death row renders his execution cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution. (PCR-3R.1 70-130).

SUMMARY OF THE ARGUMENT

Issue I - The trial court determined correctly that there is no constitutional right to effective assistance of postconviction counsel. The case upon which Gore relies, *Martinez v. Ryan*, _ S.Ct. -, 2011 WL 912950 (March 20, 2012), has refused to recognize a constitutional right to postconviction counsel, therefore, Gore may not raise this claim in a successive and untimely motion. The entitlement to equitable relief, in order to excuse a procedural bar in federal court where a claim of ineffective assistance of trial counsel has never been presented in any form, recognized in *Martinez*, does not establish a cognizable claim for relief in a state postconviction proceeding. Because Gore received review on the merits of his claim of ineffective assistance of trial counsel he has been afforded all that any litigant could hope to obtain under the extended review offered by Martinez. Even should Gore be permitted to re-litigate the deficiency prong of his ineffectiveness claim he still would not entitled to relief as he does not challenge the sufficiency of the prior collateral proceeding as it relates to the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984). Consequently, Gore's claim of ineffective assistance of trial counsel remains denied properly based on the lack of prejudice.

Issue II - The trial court correctly determined that Gore's

claim of “newly discovered evidence” was legally insufficient as pled and that the offered evidence, counsel’s subsequent disbarment, was not admissible as impeachment. Alternately, even if Gore were to re-litigate his claim of ineffective assistance of counsel and proves counsel were deficient, relief could not be obtained, as this Court determined previously that *Strickland* prejudice was not proven.

Issue III - The constitutional challenge to clemency process conducted in 2012 updating the review he received in 1988 was addressed to a decision that was the Governor’s exclusively and has been denied repeatedly. See *Valle v. State*, 70 So.3d 530 (Fla. 2011); *Johnson v. State*, 27 So.3d 11 (Fla. 2010); *Marek v. State*, 14 So.3d 1123 (Fla. 2009). Hence, the summary denial of the claim was proper.

Issue IV - Gore’s constitutional challenge to the Governor’s discretion to sign a death warrant was denied properly as the claim was not cognizable in a postconviction relief motion, it was pled in legally insufficient terms, and under controlling precedent, *Marek*, 14 So.3d at 998, was meritless.

Issue V - Gore’s assertion that the number of years he spent on death row renders his execution cruel and unusual punishment was denied properly by the trial court as procedurally barred and meritless. The claim had been raised by

Gore in prior litigation and rejected by this Court. Further, this Court has denied such claims repeatedly. *See Gore*, 986 So.2d at 1276.

ARGUMENT

The standard of review for the summary denial of a successive postconviction was set forth in *Ventura v. State*, 2 So.3d 194 (Fla. 2009), where this Court stated:

> Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends upon the written materials before the court; thus, for all practical purposes, its ruling is tantamount to a pure question of law and is subject to de novo review. *See, e.g., Rose v. State*, 985 So.2d 500, 505 (Fla. 2008). In reviewing a trial court's summary denial of postconviction relief, we must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. *See Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000). The Court will uphold the summary denial of a newly-discovered-evidence claim if the motion is legally insufficient or its allegations are conclusively refuted by the record. *See McLin v. State*, 827 So.2d 948, 954 (Fla. 2002).

Ventura, 2 So.3d at 197-98. *See State v. Coney*, 845 So.2d 120, 134-35 (Fla. 2003). This standard applies to the five issues answered herein.

ISSUE I

GORE'S REQUEST TO RELITIGATE HIS PRIOR CLAIM OF INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL WAS DENIED PROPERLY (restated)

The pith of Gore's claim is that *Martinez v. Ryan,* _ S.Ct. -, 2011 WL 912950 (March 20, 2012) (Case No. 10-1001) has conferred upon him an equitable entitlement to **re-litigate, or** in essence **"a do-over"** of his ineffective assistance of trial counsel claim that he had litigated fully in state and federal court. The basis of his request for this "do-over" is that former collateral counsel, Andrew Graham ("Graham"), was ineffective for failing to call the correct witness, and therefore, Gore feels he is entitled to another opportunity to call a different/additional witness at a new hearing in support of his claim that his trial counsel's performance was constitutionally deficient under S*trickland v. Washington*, 466 U.S. 668 (1984). In summarily denying relief below, the trial court, without the benefit of *Martinez,* relied upon the long standing precedent from this Court since *Lambrix v. State*, 698 So.2d 247, 248 (Fla. 1996), that there is **no constitutional right** to effective assistance of postconviction counsel.[8] (PCR-3 227). That ruling remains correct as the United States Supreme Court explicitly stated in *Martinez* that there remains **no constitutional right** to effective postconviction counsel.

[8] Surprisingly, Gore alleges that the trial court's summary denial was predicated on a procedural bar. That is false. The trial court found that Gore's claim had **no merit** as it was predicted on the incorrect legal assumption that he was entitled to raise a constitutional claim of ineffective assistance of counsel. (IB 6, 11)

Martinez slip op. at 10. Consequently, there is nothing in *Martinez* which warrants a reversal of the trial court's ruling in this appeal. *See also Maples v. Thomas,* 132 S.Ct. 912, 922 (2012)(reaffirming rule that negligence of postconviction counsel does not establish claim for relief under *Coleman* as defendant bears the risk of negligent conduct on the part of his agent (lawyer)).

Summary denial is also appropriate for the following five reasons: (1) Because *Martinez* is not a constitutional change in the law, much less a fundamental one as required by the rule, Gore is barred from raising this issue pursuant to Fla. R. Crim. Pro., 3.851 (d)(2); (2) *Martinez* is limited solely to the propriety of permitting **federal review** pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254, and therefore, has no impact on Florida's procedural/substantive law applicable to collateral litigation; (3) Gore received that which *Martinez* recognizes as an equitable entitlement, i.e., initial review of his ineffective assistance of counsel claim; (4) Gore has not and cannot establish that he is entitled to an equitable remedy as he was not abandoned by counsel nor was he ever without notice of the factual predicate for his claim and how he was to go about proving his claim; and (5) allowing Gore the opportunity to re-litigate his unsuccessful claim so that he may establish that his trial

counsel were deficient would not alter the findings that there was no prejudice established under *Strickland* irrespective of who he called at the original evidentiary hearing or who he might wish to call at a new hearing. For all or any of the reasons, summary denial of this claim must be affirmed.

First, in order to have heard his successive and untimely motion for postconviction relief, Gore must meet the requirements of Rule 3.851 (d)(2). He is unable to do that because his claim is predicated on *Martinez* which is not a fundamental constitutional right that has been given retroactive application by this Court or the United States Supreme Court. To the contrary, the United States Supreme Court has refused explicitly to recognize its holding as a constitutional one, and instead, explained that **its rationale is based solely on principles of equity.** *Martinez,* slip op. at 5, 10. The Court noted that its holding "ought not put a significant strain on state resources", because the ruling was not a constitutional one, and therefore, all the protections and requirements associated with a constitutional ruling do not apply. *Id.* As a result, Gore is procedurally barred from raising this claim in this successive and untimely motion; affirmance of the trial court's summary denial is warranted. *Chandler v. State,* 75 So.2d 267, 268-269 (Fla. 2011)(affirming summary denial of claim under 3.851(d)(2) as claim is not based on a constitutional rule that

is retroactive); *Marek v. State* 8 So.2d 1123, 1128 (Fla. 2009) (refusing to consider defendant's claim in untimely, successive motion as the United States Supreme Court precedent upon which he relied was not a constitutional new rule entitled to retroactive application).[9]

Second, as noted above, *Martinez* confers **an equitable exception**, not a constitutional right, to permit **federal habeas review** of a claim that previously had been foreclosed under AEDPA. Consequently, *Martinez* has absolutely no application herein as it grants nothing to Gore in this **state** collateral proceeding. The impact of *Martinez* to Gore, even if it applied to him, would only be **realized in federal court** and only if he were permitted to file a successive federal habeas petition under 28 U.S.C. § 2254.

In explaining the impact of *Martinez* the Court stated:

> **It merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted**. In this case, for example, Martinez's "ground for relief" is his ineffective-assistance-of-trial-counsel claim, a claim that AEDPA

[9] Nor is Gore permitted to re-litigate a claim that has been decided on the merits previously. As Gore concedes he is seeking a second evidentiary hearing so that he may try again to establish deficiency with the presentation of different evidence. He cannot do this under Florida law. *Deson v. State,* 775 So. 2d 288 (Fla. 2000)(explaining that re-litigation of a claim previously decided on the merits is prohibited as a defendant's has had "his day in court" and it would be a waste of judicial resources); *Breedlove v. Singletary,* 595 So. 2d 8, 10 (Fla. 1992) (precluding re-litigation of an issue by arguing different grounds).

> does not bar. Martinez relies on the ineffectiveness of his postconviction attorney to excuse his failure to comply with Arizona's procedural rules, **not as an independent basis for overturning his conviction**

Id. slip op. at 11 (emphasis added). In other words, for those federal habeas defendants who are able to establish an equitable entitlement, of which Gore is not one, *Martinez* offers only **federal review** and not relief. Therefore, *Martinez* has no impact whatsoever on this Court's analysis of state substantive and procedural law germane to the issues in this or any other state collateral litigation. The equitable right bestowed is only **federal review** of a claim which by its nature, could not even manifest itself, if at all, until a defendant files a federal habeas petition and the state asserts a procedural bar predicated on a previous state law default. Consequently, there is no relief that this Court could grant under *Martinez.*

Third*, Martinez,* is of no assistance whatsoever to Gore as he has already received that which the defendant, Martinez, had been denied and that is **a first judicial review on the merits** of his ineffective assistance of counsel claim. In this appeal, Gore ignores this fatal distinction to his claim, and instead, attempts to shift the focus to a baseless indictment against pre-*Martinez* case law, i.e., *Lambrix* and *Butterworth v. Kenny,* 714 So. 2d 404 (Fla. 1998). Gore is wrong as *Martinez* does not permit a **second** opportunity to re-litigate this claim, and as

will be demonstrated below, Florida law for the past fifteen years already provides equitable safeguards to capital postconviction defendants beyond that recognized in *Martinez*.

Martinez is replete with qualifying language that limits its reach only to those defendants who have never been permitted to litigate in the first instance, the merits of a claim of ineffective assistance of trial counsel. For instance, the issue for which review was granted in *Martinez* was whether a state prisoner's ineffective assistance of counsel claim, which had never been reviewed in state court due to a state procedural bar, could and should be reviewed in a 28 U.S.C. §2254 proceeding for the first time in federal court. Briefly, the state default was the result of Martinez's collateral counsel's unilateral determination that there were no meritorious claims to be raised for collateral review, therefore, none were pursued. *Martinez,* Slip op. at 1. When a second attorney sought to raise an ineffective assistance of counsel claim, review was precluded based on a state procedural default for failing to raise the claim within the time period in which to file an initial state collateral pleading. Martinez then sought federal habeas relief pursuant to 28 U.S.C. §2254, however, the state argued that the prior default precluded federal review of the claim. *Martinez,* Slip op. at 4. Consequently **no court**, state or federal, had ever reviewed the merits of Martinez's ineffective

assistance of counsel claim due to **counsel's** unilateral actions.

That lack of an initial collateral review was the genesis of the Supreme Court's holding that:

> The precise question here is whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding. To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default. This opinion qualifies Coleman by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.

Martinez, Slip op. at 5. The Court further explained:

> As *Coleman* recognized, this marks a key difference between initial-review collateral proceedings and other kinds of collateral proceedings. When an attorney errs in initial-review collateral proceedings, **it is likely that no state court at any level will hear the prisoner's claim**. This Court on direct review of the state proceeding could not consider or adjudicate the claim. *See, e.g., Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935); *Murdock v. Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875); *cf. Coleman, supra*, at 730–731, 111 S.Ct. 2546. And if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, **no court will review the prisoner's claims**.

Slip op at 6. (emphasis added).

It is clear that the Court's decision to recognize a **limited equitable entitlement** to effective representation of collateral counsel to permit review of an otherwise procedurally

barred claim was premised solely on the concern that there should be a mechanism for an **initial** court review of a claim of ineffective assistance of trial counsel. *Id.* at 7-8. That is not the situation Gore brings to this Court.

Gore filed his **verified** motion for postconviction relief in the initial review proceeding afforded to him under Fla. Rule Crim. Pro. 3.851; a fact he obviously does not and cannot deny. *Gore*, 964 So.2d at 1257. Gore was granted an evidentiary hearing on his claim of ineffective assistance of counsel, and he presented multiple lay and expert witnesses, including co-penalty phase counsel, Robert Udell ("Udell") in support of that claim. Gore appealed the denial of relief of that claim to this Court. *Gore*, 964 So.2d at 1257. Following the denial of relief by this Court, Gore sought and received federal habeas review of his ineffective assistance of counsel claim. *Gore v.* McDonough, case number 07-22637-civ-Lenard/Torres.[10] Gore's claim has had **three** judicial reviews, which is obviously twice more than that which has been deemed equitable under *Martinez.* Therefore, Gore is not entitled to the relief he seeks. *Martinez* does not confer an entitlement to **another opportunity** to utilize a different

[10] Gore was denied a Certificate of Appealibility (COA) by the district court judge. Gore then sought a COA from the Eleventh Circuit Court of Appeal which was also denied. *Gore v. D.O.C.* Case No. 089-14060 (11th Cir. September 9, 2008). And the United States Supreme Court denied certiorari review of that claim. *Gore v. D.O.C.* Case No 08-8639 (2009)

strategy and call different witnesses at a second hearing in the hopes of obtaining a more favorable result. Rather it merely recognizes that a defendant should receive an initial review. Martinez, who was deprived completely of any judicial review of his claim, was granted **equitable relief** in the form of a waiver of the procedural default. Gore, was provided and utilized the "initial-review" of his ineffective claim in both state and federal court; now, merely is dissatisfied with the result, wants another review. *Martinez* does not apply here and affirmance of the summary denial is warranted.

Gore alleges that Florida case law regarding appointment of postconviction counsel, namely, *Lambrix* and *Kenny,* have been abrogated following the "jurisprudential upheaval occasioned by *Martinez."* (IB 6) The rationale behind *Murray v. Giarrantano* 492 U.S. 1 (1989) and *Finley v. Pennsylvania* 481 U.S. 51 (1987) is that constitutionally mandated postconviction counsel was not needed as an additional safeguard beyond the trial to assure reliability of the criminal process. Gore asserts that rationale has now been rejected by *Martinez* and therefore, Florida law has also been overruled. Gore could not be more wrong.

Whatever the rationale behind *Murray* and *Finley,* this Court and the legislature had determined previously that additional safeguards beyond the trial and the direct appeal were to be put in place in Florida. The prescience of both this Court and

Florida's legislature regarding an **equitable entitlement** to postconviction counsel is well documented as Florida has recognized this right since 1997, with the creation of Fla. Stat. §27.7001. Therein capital defendants are given the **statutory right** to postconviction counsel. The legislative intent/rationale in providing collateral counsel is as follows:

> It is the intent of the Legislature to create part IV of this chapter, consisting of ss. 27.7001–27.708, inclusive, to provide for the collateral representation of any person convicted and sentenced to death in this state, *so that collateral legal proceedings to challenge any Florida capital conviction and sentence may be commenced in a timely manner and so as to assure the people of this state that the judgments of its courts may be regarded with the finality to which they are entitled in the interests of justice*. It is the further intent of the Legislature that collateral representation shall not include representation during retrials, resentencings, proceedings commenced under chapter 940, or civil litigation.

(emphasis added). In tandem with this statutory right is the creation of the judiciary's supervisory role regarding collateral counsel's performance.[11] §27.711 (12) provides:

> (12) The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall

[11] The supervisory oversight of counsel's performance in no way confers a constitutional right to effective assistance of postconviction counsel nor should it be so interpreted. *See* §27.711(10*); Martinez* slip op. at 11. (rejecting claim that there is a constitutional right to effective representation of collateral counsel); *Maples v. Thomas* 132 S.C.t 912 (2012)(reaffirming long standing principle that negligence on part of collateral counsel is not grounds for relief.)

> also receive and evaluate allegations that are made regarding the performance of assigned counsel. The Chief Financial Officer, the Department of Legal Affairs, the executive director, or any interested person may advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to receive compensation from the capital defendant, or failure to file appropriate motions in a timely manner.

Florida, for at least the past fifteen years, has indeed provided further safeguards beyond the trial and direct appeal in the **identical** way that the *Martinez* Court has just recognized:

> Like most other states, Florida, to ensure the credibility and constitutionality of its death penalty process, has provided postconviction representation only in cases where the defendant has been sentenced to death. This statutory right to representation acts to ensure meaningful access to the courts in a complex area of the law and to ensure that our death penalty process is constitutional. As Justice O'Connor noted in her concurring opinion in Murray,
>
> > *[Bounds]* allows the States considerable discretion in assuring that those imprisoned in their jails obtain meaningful access to the judicial process. Beyond the requirements of Bounds, the matter is one of legislative choice based on difficult policy considerations and the allocation of scare legal resources. Our decision today rightly leaves these issues to resolution by Congress and the state legislatures.
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> 492 U.S. at 13, 109 S.Ct. at 2772 (O'Connor, J., concurring) (emphasis added).

Kenny 714 So. 2d. at 409 *receeded from on other grounds; See also Maas v. Olive* 992 So. 2d 196, 205 (Fla. 2008)(explaining

that a court's decision to exceed cap on attorneys fees in postconviction cases is but an example of the court's authority to ensure adequate representation and access to courts in capital cases as provided in chap. 27); *Remeta v. State,* 559 So. 2d 1132 (Fla. 1999)(same); *Coleman v. State* 930 So.2d 580 (Fla. 2006)(J. Anstead concurring in part and dissenting in part(recognizing role given to the courts by the Legislature to monitor closely services provided by registry counsel in postconviction cases); *Ventura v. State*, 2 So. 3d 194 (Fla. 2009)(exercising supervisory authority to monitor whether counsel filed timely reply brief); *Trease v. State* 41 So. 3d 119 (Fla. 2010)(explaining that because there is a statutory right to postconviction counsel a *Faretta* inquiry is required whenever defendant seeks to discharge counsel and dismiss pending motion); *see* also 3.851(i)(1-6) which requires a "complete inquiry" to ensure a "knowing and voluntary" decision to forego postconviction litigation; see *also* 3.851(d)(2)(C) which permits a capital defendant to file an untimely motion for postconviction relief based on postconviction counsel's failure to do so).

Many of these equitable entitlements have been embraced and codified in non-capital cases as well. *Steele v. Kehoe, 747 So. 2d 931, 934 (Fla. 1999*)(recognizing a due process right to file an out of time collateral challenge to conviction/sentence if

counsel had agreed to file such a motion but failed to do so); *Wlliams v. State*, 777 So. 2d 947 (Fla. 2001)(extending standards of due process established in *Kehoe* to circumstance where counsel failed to file a notice of appeal following representation that such a notice would be filed); *Russo v. Akers*, 724 So.2d 1151, 1152 (Fla. 1998)(recognizing authority to provide counsel in postconviction proceedings in non-capital cases derives from due process concerns); *Graham v. State*, 372 So.2d 1363, 1365-1366 (Fla. 1979)(exercising discretion to appoint postconviction counsel in non-capital cases includes considerations such as complexity of issues and meritorious nature of claims); see 3.850 (b)(3) which permits a non-capital defendant to file an untimely motion for postconviction relief based on counsel's failure to do so.

Martinez has not exposed any deficiency in Florida's initial-review/collateral proceedings. As documented above, Florida's long established procedural and substantive/statutory entitlements in the initial-review collateral proceedings, could serve as a template to other jurisdictions that are seeking ways to implement the requirements of *Martinez.* In fact based on the all the procedural safeguards in place for capital defendants, Florida law forecloses any real possibility that what occurred to Martinez could ever befall a capital defendant in Florida. Gore's indictment of Florida's postconviction procedures is

completely baseless.

Fourth, because *Martinez* is founded in principles of equity, Gore cannot establish an entitlement to relief. Instructive is the Supreme Court's other very recent opinion, *Maples v. Thomas,* 132 S.Ct. 912, 922 (2012), which also involved whether to excuse a procedural bar in federal court based on the complete abandonment of postconviction counsel in the state collateral proceedings. Therein, the Court explicitly reaffirmed its prior determination that:

> **Negligence on the part of a prisoner's postconviction attorney does not qualify as "cause**." *Coleman*, 501 U.S., at 753, 111 S.Ct. 2546. That is so, we reasoned in Coleman, because the attorney is the prisoner's agent, and under "well-settled principles of agency law," the principal bears the risk of negligent conduct on the part of his agent. *Id*., at 753–754, 111 S.Ct. 2546. See also Irwin v. Department of Veterans Affairs, 498 U.S. 89, 92, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) ("Under our system of representative litigation, 'each party is deemed bound by the acts of his lawyer-agent.' " (quoting *Link v. Wabash R. Co., 370 U.S*. 626, 634, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962))). Thus, when a petitioner's postconviction attorney misses a filing deadline, the petitioner is bound by the oversight and cannot rely on it to establish cause. *Coleman*, 501 U.S., at 753–754, 111 S.Ct. 2546. We do not disturb that general rule.

Naples 132 S.Ct. at 922.(emphasis added). However, the Court determined, that based on "principles of agency law and fundamental fairness," the rule reaffirmed above does not apply when,

> A markedly different situation is presented, however, when an **attorney abandons his client without notice,**

> **and thereby occasions the default. Having severed the 923 principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative**. *See* 1 Restatement (Third) of Law Governing Lawyers § 31, Comment f (1998) ("Withdrawal, whether proper or improper, terminates the lawyer's authority to act for the client."). His acts or omissions therefore "cannot fairly be attributed to [the client]." *Coleman*, 501 U.S., at 753, 111 S.Ct. 2546. See, e.g., *Jamison v. Lockhart*, 975 F.2d 1377, 1380 (C.A.8 1992) (attorney conduct may provide cause to excuse a state procedural default where, as a result of a conflict of interest, the attorney "ceased to be [petitioner's] agent"); *Porter v. State*, 339 Ark. 15, 16–19, 2 S.W.3d 73, 74–76 (1999) (finding "good cause" for petitioner's failure to file a timely habeas petition where the petitioner's attorney terminated his representation without notifying petitioner and without taking "any formal steps to withdraw as the attorney of record").

Id at 922-923.(emphasis added). Both *Martinez* and *Maples* are premised strictly on equitable concerns which include specifically; the opportunity to have at least one judicial review[12] of an ineffective assistance of counsel claim;[13] and the recognition that a defendant is entitled to be relieved from the ill effects caused by the complete and unknown abandonment of counsel. *See also Holland v. Florida* 130 S.Ct. 2549 (2010)(explaining that although attorney negligence does not warrant equitable tolling of time limits for the filing of a

[12] Martinez was completely unaware that his initial postconviction lawyer chose not to pursue any claims on his behalf in the initial postconviction process. *Martinez* slip op. at 4.

[13] *Martinez* is limited to the single issue of trial counsel's effectiveness because the right to such counsel is "a bedrock principle in our justice system." *Martinez* , Slip op 9.

federal habeas petition, the abandonment or misconduct of counsel does).

Gore cannot obtain any equitable remedy because the basis for the relief requested herein does not and cannot include the requisite claim that either he was abandoned by his counsel during his initial postconviction proceedings as described in *Maples,* nor does he claim that any action was taken or failed to have been taken without his knowledge as described in *Martinez*.[14] Gore as required by Florida law[15], signed and verified the facts in the motion which contained the claim of ineffective assistance of counsel. Gore was present for and witnessed all

[14] Additionally, equitable relief is foreclosed to Gore as he waited until the eve of his execution to complain about the circumstances of his postconviction litigation that occurred in 2003. He alleges that the basis for his claim is the opinion of this Court which was rendered in 2007. Yet Gore waited until after the Governor signed his death warrant on February 28, 2012, to finally bring this claim. His delay justifies denial of equitable relief. *See Holland v. Florida*, 130 S.Ct. 2549 (2010)(explaining that Holland's persistence and diligence in seeking redress for his claims that postconviction counsel abandoned him justified the equitable remedy he received) *Cf. Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 654, 112 S.Ct. 1652, 1653, 118 L.Ed.2d 293 (1992) (Whether a claim is framed "as a habeas petition or as a [42 U.S.C.] § 1983 action, [what is sought is] an equitable remedy.... A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief").

[15] Under Florida law, all defendants must verify the accuracy of the facts contained in the motion. Without that verification, the motion must be dismissed. *See Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993); 3.851 (e)(1).

the testimony that was presented on his behalf at the evidentiary hearing. Gore has never complained that he was ever unable to communicate with his counsel or that there was a fundamental difference between him and counsel regarding litigation of this claim. The facts of this case belie any entitlement to Gore, based on the equitable principles as detailed in *Martinez* or *Maples*.

Fifth, even if Gore is able to overcome all the legal obstacles to this claim, he is still not entitled to relief. Gore's request it to "re-do" the evidentiary hearing in the hopes of establishing the first prong[16] of *Strickland*, he would still be not be entitled to relief. In denying his claim of ineffectiveness of counsel both the trial court and this Court determined that the record revealed certain strategies and irrespective of whether counsel had been deficient, Gore did not establish the requisite prejudice under *Strickland*. Given that *Strickland*, 466 U.S. 687-89, requires the defendant prove both

[16] In his motion below, he pled that his initial collateral proceedings were lacking with respect to the evidentiary presentation regarding the deficiency prong of *Strickland*. His "*Martinez* claim" focused solely on this portion of the prior hearing and failed to challenge in any way Udell's or Nicherson's performance with respect to the prejudice prong of *Strickland.* Therefore because of this fatal pleading deficiency, *Martinez* is of no assistance to him as his claim is not a challenge to the entire process as was the claim in *Martinez.* Gore offers no legal support/argument that would elevate this deficient pleading into a viable cause of action pursuant to *Martinez.*

deficient performance by counsel and prejudice, judicial findings that no prejudice resulted forever precludes relief on the issue as it matters not what new evidence of deficiency he may offer.

For instance, with respect to the decisions involving calling former prosecutor Robert Stone ("Stone"), this Court upheld the trial court's finding that the **record itself** demonstrates there were beneficial reasons for eliciting Stone's testimony. This Court explained:

> Despite this predicted unfriendliness, Stone was seemingly called for a strategic reason that both Udell and this Court recognized on direct appeal: to elicit testimony that Waterfield was not sentenced to death and, because the State had argued that both Gore and Waterfield were equally culpable, proportionality necessitated that Gore also not receive the death penalty. *See Gore*, 706 So.2d at 1335. Other possible strategic reasons for calling Stone include the presentation of testimony that Gore had received life sentences for the kidnapping and sexual battery crimes perpetrated on Elliot and Martin (illustrating that Gore would likely never be released from prison), and to elicit testimony demonstrating the inconsistent statements that the State made with regard to the culpability of Gore and Waterfield. With three viable strategies, Nickerson's decision to call Stone does not qualify as deficient performance.

Gore, 964 So.2d at 1269. This Court further found that regardless of whether co-postconviction counsel Jerome Nickerson ("Nickerson") was deficient, there was no prejudice, as Stone provided favorable testimony. *Id.* at 1270.

Regarding Gore's claim that Nickerson failed to object to

Stone's testimony on Gore's possibility of parole, again this Court rejected the issue finding no prejudice "due to the record and overwhelming evidence supporting the trial court's finding of six aggravators at resentencing." *Id*.

Gore claimed that counsel was deficient for not presenting mitigation of "various neurological disorders" stemming from "acute pesticide toxicity." The trial court and this Court found the claim was "completely meritless." That finding was not based on the failure to call Nickerson to explain his decisions, it was based on the failure to present any evidence that Gore was ever exposed to any of the chemical(s) much less that he suffered from any illness, not to mention any lasting malady." *Gore*, 964 So.2d at 1275. This Court noted the extensive mitigation presented at the resentencing,[17] and even if the trial

[17] This Court stated:

> Gore's counsel called approximately ten witnesses, including Michael Maher and Peter Maculuso, who were both mental health experts. In preparing for his testimony, Dr. Maher reviewed a medical history of Gore, which was provided by Gore's counsel, and questioned Gore about his background. The mitigation that was presented included the following: (1) Gore was the son of hard-working parents; (2) Gore was shy and introverted in comparison to Waterfield; (3) Gore's divorce and separation from his children had negatively affected him; (4) Gore used alcohol around the time of the murder; and (5) Gore was an alcoholic. Moreover, Udell testified that all mitigation that "seemed consistent with [Gore's] best interests" was presented at the resentencing. This evidence establishes that Gore's counsel was not deficient.

court had found mitigation involving neurological disorders, characterized as a "tenuous theory at best," there would be no prejudice given the strong evidence supporting the six aggravators in this case. *Gore*, 964 So.2d at 1275.

With respect to the impeachment of Dr. Cheshire, this Court upheld the lower court's finding that no prejudice resulted as Nickerson extensively impeached Cheshire on matters directly related to his findings and relevant to the issue before the jury. *Id.* at 1271.

This Court also found no prejudice in trial counsel's failure to challenge a juror for cause as the juror's responses were not improper. *Id.* at 1275. Also counsel's failure to request an expanded instruction on the "CCP" aggravator, was not prejudicial because regardless of the instruction given there was overwhelming evidence to support this factor. *Id.* at 1276.

Regardless of which attorney, Udell or Nickerson, was responsible for any particular aspect of this case, took the lead in the penalty phase, or testified at the postconviction evidentiary hearing, the record and both state and federal review establish unequivocally that Gore received the professional, constitutional representation dictated by *Strickland*. Gore never established the requisite prejudice under

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Gore, 964 So.2d at 1274-75.

Strickland. Because Gore cannot overcome those findings of no prejudice, a second evidentiary hearing re-plowing the same field of deficient performance by either counsel would not change the outcome. Summary denial was warranted and should be affirmed.

ISSUE II

GORE'S CLAIM OF NEWLY DISCOVERED EVIDENCE OF IMPEACHMENT OF ROBERT UDELL TO ALLOW RE-LITIGATION OF A PREVIOUSLY REJECTED CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED PROPERLY (restated)

Here, Gore asserts that the October 29, 2009 disbarment of penalty phase counsel, Robert Udell ("Udell") and testimony from co-penalty phase counsel, Jerome Nickerson ("Nickerson"),[18] is newly discovered evidence which was discovered diligently and would produce a different result than his 2003 postconviction litigation of his ineffective assistance of counsel claims. (IB 29-30, 33-39).[19] Gore maintains that the "newly discovered"

[18] Nickerson had not been called to testify at the 2003 evidentiary hearing.

[19] As will be addressed below, Nickerson, Gore's penalty phase counsel, was not presented to the trial court as "newly discovered evidence/witness," but as a witness Gore wished to present to offer additional impeachment of Udell in the event an evidentiary hearing was granted to re-litigate the 2003 ineffective assistance of penalty phase counsel claim. Gore is being disingenuous with this Court in that in one issue he asserts that 2003 postconviction counsel was ineffective in not presenting Nickerson (Argument I) and then asserting here that Nickerson somehow qualifies as "newly discovered" for purposes of Argument II. These are inconsistent factual allegations which should not be tolerated.

disbarment and other impeachment of Udell undercuts the credibility findings afforded Udell's 2003 evidentiary hearing testimony by the trial court and this Court to such an extent that it is sufficient to permit re-litigation of the ineffective assistance of counsel claim rejected in *Gore*, 964 So.2d at 1257. (IB 34, 37). Also, Gore alleges that Udell's testimony was relied upon to such an extent, that the prejudice analysis was "also fatally flawed." (IB 38). Gore submits that the trial court erred in limiting its discussion to Udell's disbarment, finding the claim legally insufficient, and that the disbarment is not admissible as impeachment evidence. The State disagrees as Gore did not present a cognizable claim, it was legally insufficient as pled, and was time barred. Moreover, the disbarment is not admissible impeachment evidence, but even if it were, Gore would not be able to establish ineffectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984) given this Court's resolution of those claims in *Gore*, 964 So.2d at 1257.

In rejecting Gore's claim, the trial court reasoned that to prevail on an ineffective assistance claim, the defendant must satisfy both the deficiency and prejudice prongs of *Strickland*, but that the court need not make a specific ruling on the performance prong if the prejudice prong was not satisfied, citing *Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986). (PCR-3R.2 225-26). The trial court also reasoned:

> And for a claim of newly discovered evidence, the Florida Supreme Court has held:
>
> > . . . that a defendant bears the burden of establishing two requirements in order for a conviction to be set aside on the basis of newly discovered evidence: (1) the asserted evidence must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. *Jones v. State* (*Jones II*), 709 So.2d 512, 521 (Fla. 1998).
>
> *Wyatt v. State*, 71 So.3d 86, 99 (Fla. 2011). The Florida Supreme Court reaffirmed "[t]hat is not to say that all new evidence, although not in existence at the time of trial but related to a case, is the equivalent of newly discovered evidence for the purposes of establishing a postconviction claim. *See, e.g., Kearse [v. State*, 969 So.2d 976, 987 (Fla. 2007)] (holding that evidence of conduct by State's expert witness in a separate, federal criminal case that postdated the appellant's trial did not constitute newly discovered evidence of impeachment material)." *Wyatt*, 71 So.3d at 100 n.14.

(PCR-3R.2 226). It was the trial court's conclusion that Gore's claim was legally insufficient. Gore did not "show how Udell's 2009 disbarment for alleged conduct between 2005 and 2008 establishes deficient performance or prejudice at Gore's 1992 resentencing or his 2003 postconviction evidentiary hearing." (PCR-3R.2 226). Based on *Pantoja v. State*, 59 So.3d 1092, 1096-97 (Fla. 2001) and *Fernandez v. State*, 730 So.2d 227, 282 (Fla. 1999), the trial court concluded that the disbarment "is not admissible as impeachment evidence." (PCR-3R.2 226). The trial

court's rationale is supported by the record and case law.

Initially, it must be noted that Gore's claim before the trial court, in his pleading and Case Management argument, was that Udell's disbarment was newly discovered evidence and that having discovered "this new evidence [of Udell's disbarment], Mr. Gore's postconviction counsel sought . . . Nickerson" who then provided evidence belying "much of Udell's testimony in 2003." (PCR-3R.1 107; PCR-3T 36-37). In rebuttal, it was to Udell's disbarment alone that Gore pointed as the impetus for his newly discovered evidence claim. (PCR-3T 42-43). Gore concluded his written claim by asserting "[i]n **light of Udell's disbarment . . . and the fact that he is the subject of an on (sic) ongoing criminal investigation**, it is imperative that Mr. Gore be allowed to present evidence in support of his ineffective assistance of counsel claim." (PCR-3R.1 110) (emphasis supplied). Given this pleading, Gore's assertion that the trial court erred in not addressing Nickerson's proffered testimony as "newly discovered" is disingenuous. Gore did not offer Nickerson as "newly discovered evidence" only as evidence to impeach Udell further at an evidentiary hearing. The trial court properly addressed the issue as one of newly discovered evidence of Udell's disbarment. Furthermore, as will be addressed below, the claim was subject to summary denial as one that was not cognizable under Rule 3.851 as Gore was not

attacking his conviction or sentence. Also, the claim was insufficiently pled, time barred, and Udell's testimony did not form the basis for this Court's rejection of the 2003 postconviction litigation; thus, any additional impeachment would not render a different result under a *Strickland* analysis.

Moreover, Gore is offering inconsistent factual allegations which should not be tolerated by this Court. In Argument I, Claim IV below, Gore asserts that postconviction counsel was ineffective for not having procured Nickerson for the 2003 evidentiary hearing. A claim of ineffective assistance for not having presented Nickerson is the diametric opposite of a claim that Nickerson is a newly discovered witness who may offer impeachment testimony. Either counsel was ineffective for not finding/presenting a witness or the witness could not have been found with the use of due diligence. Gore may not have it both ways. Likewise, Gore's reliance on Justice Scalia's dissent in *Martinez* does not establish that Gore's successive motion is transformed into an "initial" review as that term is defined in *Martinez*. As presented in Issue I, and incorporated here, Gore received a full postconviction review and *Martinez* offers Gore no basis to re-litigate his ineffectiveness of counsel claim.

Additionally, Gore admits that in his case "it matters little whether Udell was disbarred" (IB 40). Yet that was the thrust of his postconviction motion, the disbarment was newly

discovered evidence of impeachment of Udell, and the asserted gateway to overcome the time bar on a successive postconviction relief motion. Again, Gore is altering the argument he made before the trial court. Here, he argues that it is all of the information developed in the disbarment proceedings, a deposition in an unrelated case, and Nickerson's testimony that should be considered newly discovered and impeachment evidence showing Udell was not credible in his 2003 evidentiary hearing testimony.

However, the relief Gore requested below and of this Court, is to be granted a **second postconviction evidentiary hearing** to re-litigate what he was unable to prove in 2003, namely, ineffective assistance of penalty phase counsel, a claim which was denied in large measure in *Gore*, 964 So.2d at 1257, because Strickland prejudice was unproven. Such is an improper use of Rule 3.851(e)(2), Fla.R.Crim.P. and is a valid basis for affirming the summary denial of relief. Moreover, the instant claim was insufficiently pled as Udell's 2009 disbarment is not "newly discovered evidence" as defined by this Court. Gore did not allege, let alone show, how Udell's disbarment or any alleged additional evidence of impeachment developed thereafter, impacts in the least the sentencing or how a lesser sentence would be imposed if the jury learns that Udell was disbarred years after sentencing. Further, Gore has not even attempted to

plead how the disbarment is admissible evidence at trial. Other than a general statement in his initial brief (IB 40) that actions taken in an unrelated case years after Gore's 1992 trial and 2003 evidentiary hearing somehow show bias and motivation to be untruthful, Gore has failed to show that such would be relevant and admissible in his case. For these reasons, the claim was insufficiently pled and the summary denial was proper.

Moreover, the situation in *Kearse*, 969 So.2d at 987 is analogous to the issue here, namely, evidence developed after trial offered as additional impeachment. Such does not establish "newly discovered evidence" as defined by *Jones v. State* (*Jones I*), 591 So.2d 911, 916 (Fla. 1991); *Jones v. State* (*Jones II*), 709 So.2d 512, 521 (Fla. 1998). The fact Udell was disbarred years after trial and after his postconviction evidentiary hearing testimony does not establish that he was ineffective in the 1992 resentencing or untruthful in the 2003 evidentiary hearing. As such, the trial court correctly determined that the claim was legally insufficient as pled. That ruling is supported by this Court's decision in *Kearse v. State*, case no. SC11-244 (Fla. October 21, 2011) wherein Kearse, in his second successive postconviction motion, raised the identical claim against the same attorney. There, Kearse argued that Udell's 2009 disbarment was newly discovered evidence of impeachment. This Court affirmed the summary denial in its Order disposing of the case.

> Billy Leon Kearse filed a second successive postconviction motion in which he asserted that his prior claim of ineffective assistance of counsel should be reexamined in light of newly discovered evidence about his trial counsel. The postconviction court summarily denied the motion. We hereby affirm the postconviction court's summary denial. Because Kearse did not present any evidence that would probably result in a finding that trial counsel was ineffective, the postconviction court properly denied his newly discovered evidence claim as legally insufficient.

(PCR-3R.2 201-02) This Court should treat Gore's claim based on Udell's disbarment the same as it treated Udell's disbarment evidence in Kearse's second successive motion and affirm the summary denial of relief.

Also, "newly discovered evidence" must also be admissible evidence. *See Kokal v. State*, 901 So.2d 766, 775 (Fla. 2005); *Jones II*, 709 So.2d at 521. The evidence Gore wishes to have admitted at a new postconviction hearing is not admissible evidence for impeachment purposes. Udell's 2009 disbarment is not admissible impeachment evidence. *See Pantoja*, 59 So.3d at 1096-97 (reaffirming that impeachment of a witness's credibility only may be done through showing a "felony conviction or by a conviction involving a crime of dishonesty or false statement"); *Fernandez*, 730 So.2d at 282 (opining "evidence of particular acts of ethical misconduct cannot be introduced to impeach the credibility of a witness. The only proper inquiry into a witness's character for impeachment purposes goes to the

witness's reputation for truth and veracity."). An attorney's disbarment is not a conviction, thus, it may not be used for impeachment purposes. The trial court's rejection of Gore's claim on this point should be affirmed.

The trial court did not make findings regarding the timeliness of Gore's motion or on diligence as the State withdrew its argument. (PCR-3R.2 225-27; PCR-3T 40).[20] In spite of this, Gore asserts he should have received an evidentiary hearing as the State had offered non-record evidence[21] regarding the timeliness and due diligence of the successive motion. Under section 90.202(6), judicial notice may be taken of court records, *See Hunt v. State*, 613 So.2d 893, 898, n.5 (Fla. 1992). The State pointed to *Kearse v. State*, case no. SC11-244 (Fla. October 21, 2011) and Gore's own appellate records in his postconviction appeal in case number SC04-1458. Without

[20] Timeliness was not an issue in *Kearse v. State*, case no. SC11-244 (Fla. October 21, 2011).

[21] The State relied upon Gore's admission that Udell was disbarred on October 29, 2009 and noted such was a matter of public record on this Court's web site as well as that of the Florida Bar and Florida courts are permitted to take judicial notice of such records. Gore recognized that Nickerson may have relevant information (PCR-3R.2 211-15) and with the issuance of this Court's July 5, 2007 opinion in *Gore*, 964 So.2d at 1257, Gore was on notice as to how this Court assessed the respective roles of Udell and Nickerson. Gore's pleading before this Court in SC04-1458 (PCR-3 211-15) refutes the allegation that it was Udell's disbarment that prompted Gore to seek Nickerson. Given this, Gore's request for re-litigation of his ineffectiveness claims and to offer Nickerson's testimony should be found time barred under Rule 3.851(d)(2)(A) and *Glock*, 776 So.2d at 251.

question, reliance on Gore's admission of the date of Udell's disbarment and on Gore's appellate records is not referring to non-record material. However, as noted above, to the extent that a hearing might be required on the "due diligence" prong for timeliness of the motion and "newly discovered evidence," the State withdrew that argument.

In addition to the legal insufficiency of the claim and the fact the disbarment is not admissible at trial, this Court should also recognize that Gore has not shown how Udell's disbarment coupled with Nickerson's proffered testimony would result in a finding of ineffective assistance under *Strickland* given the record in this case and this Court's prior resolution of the claim in *Gore*, 964 So.2d at 1257. *Strickland*, 466 U.S. at 687-89, requires a defendant to (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." *Maxwell*, 490 So.2d at 932.

In his Rule 3.851 motion, and again here, Gore discusses Udell's deposition taken in an unrelated case following his 2009 disbarment where he admitted concern about the possibility of

criminal charges stemming from admissions he made in his disbarment proceedings. (PCR-3R.1 104-05; IB 35-36) Pointing to that deposition, Gore alleges Udell may have wanted to curry favor with the State in his 2003 testimony. Gratuitously, Gore questions whether the State knew anything about Udell's credibility at the time of the 2003 evidentiary hearing. (PCR-3R.1 104-05; IB 36) Gore's argument is speculative at best. What Gore would have this Court conclude is that in 2003, Udell testified as he did in order to curry favor with the State somehow in anticipation that in 2005-2008 he would engage in certain conduct that would lead to his disbarment in 2009, and as a result, he would face a criminal investigation into his handling of client funds. Equally speculative is the unfounded suggestion that the State may have known in 2003 that Udell would be involved in activities in 2005-2008 which could lead to his disbarment and prompt a criminal investigation. Based merely on the timing of the actions leading to disbarment (2005-2008), and the date Udell was disbarred (October 29, 2009), the suggestion the State may have had a basis to question Udell's credibility in 2003 is absurd, appears to be offered for no reason other than to besmirch the State, and is legally insufficient on its face. It affords Gore no basis to challenge the trial court's summary denial of relief or a basis to re-litigate the ineffective assistance of counsel claim rejected in

Gore, 964 So.2d at 1257. Moreover, even if the allegations are taken as true, Udell may not be impeached with his disbarment, *Pantoja v. State*, 59 So.3d 1092, 1096-97 (Fla. 2011) and *Strickland* prejudice cannot be shown.

Gore submits that the trial court took an erroneously narrow view of the alleged impeachment evidence, limiting it to the disbarment action. He claims that the impeachment includes that Udell falsified billing information in unrelated cases and that such is admissible to show bias and a motivation to lie in Gore's case (IB at 40). However, Gore has not shown that what counsel may have done in an unrelated case years after trial is relevant here. *See Fernandez v. State*, 730 So.2d 277, 282 (Fla. 1999) (noting impeachment of a witness's character by specific acts of misconduct, such as the alleged unethical conduct in unrelated matter, is improper impeachment of a witness). Gore can obtain no support from section 90.608(2), Fla. Stat. to assert that Udell may be impeached with the information contained in the disbarment to show Udell was biased in favor of the State in 2003 in anticipation of what Udell may do in 2005 and face in 2009. For Gore's argument to prevail, it requires such a stacking of potentialities as to render the argument specious, and of course, the evidence irrelevant and inadmissible. Failing to prove relevancy and admissibility of the disbarment/impeachment evidence, Gore again fails to show he

has newly discovered admissible evidence that would procure for him a different sentencing result. Hence, it follows that the trial court did not err in finding the claim legally insufficient and subject to summary denial.

Although not addressed directly by the trial court in its summary denial, even if a second evidentiary hearing were held, Gore would not be entitled to relief as *Strickland* prejudice could never be established. Gore's sole assertion for seeking an evidentiary hearing for his successive Rule 3.851 motion is that Udell's testimony has been undermined by his subsequent disbarment and Nickerson's proffer, thus, demanding re-litigation of the 2003 claims. However, those portions of Udell's testimony Gore claims are open to attack all involve the deficiency prong of the *Strickland* claim. The record completely refutes Gore's claim that resolution of these issues by the state courts was predicated on Udell's testimony alone. (IB 39) It was not, as is clear from a review of Udell's testimony. Rather, Udell's testimony was irrelevant, marginal at best, as the ultimate conclusion was that no *Strickland* prejudice was proven. Impeachment of Udell with his disbarment and Nickerson's alleged account would not alter this Court's determination in the least that the *Strickland* claims were unproven.

Impeachment of Dr Cheshire[22] on financial bias - In rejecting the claim of ineffectiveness for not cross-examining State expert, Dr. Cheshire, on financial bias, this Court noted that Udell was of the opinion that financial bias questions are "overrated," but Udell's opinion in no way factored into this Court's rejection of the ineffectiveness claim. The basis for rejecting the claim was that ***Strickland* prejudice was not shown**. *Gore*, 964 So.2d at 1271. This Court found that the resentencing record "demonstrates that Nickerson extensively cross-examined Cheshire on his substantive conclusions, which unlike financial bias questions, directly attacked his conclusions" and even if the deficiency prong is satisfied, *Strickland* prejudice was not established. *Id*. at 1272 This conclusion was based on the fact that five people who had had contact with Gore during or shortly after the murder reported no signs of alcohol impairment leading this Court to decide that Dr. "Cheshire's testimony was not essential to the trial court's finding the existence of no statutory mitigators on resentencing." *Id*. at 1272. Moreover, this Court reasoned that even if Dr. Cheshire could have been

[22] Dr. Cheshire was used by the State to undercut Gore's mental health mitigation. "Dr. Cheshire testified that Gore was not an alcoholic, did not have a dependent personality disorder, and did not have an extreme mental or emotional disturbance; but was instead suffering from adult antisocial behavior without mental illness. He also testified that it was impossible for Gore to ingest the amount of alcohol he claimed and show no signs of impairment." *Gore v. State*, 964 So.2d 1257, 1272 (Fla. 2007)

impeached on financial bias and one or more mitigators could have been found "a death sentence would have been likely still due to the strength of the six aggravators that were independently found." Based on these findings and conclusions, without question, Udell's evidentiary hearing testimony had no impact on the ultimate rejection of the claim, as the focus and deciding factor was lack of *Strickland* prejudice. Re-litigation of the claim in an attempt to impeach Udell with inadmissible disbarment evidence or Nickerson's new account must be rejected as a futile act sought merely for delay.

Pesticide exposure[23] as mitigation – In rejecting the claim of ineffective assistance of penalty phase counsel for not presenting mitigation of neurological disorders from pesticide exposure, this Court assessed the testimony of the two entomologists presented at the evidentiary hearing and found it "demonstrated that the theory that Gore suffered neurological disorders from pesticide exposure was extremely tenuous, at best." *Gore*, 964 So.2d at 1274. In fact, "some of [Gore's]

[23] In rejecting the 2003 ineffectiveness claim that counsel failed to present mitigation of "various neurological disorders" stemming from "acute pesticide toxicity," the trial court noted it had heard from two family members and two doctors of entomology. It was the trial court's finding that the claim was "completely meritless;" that "[n]one of this evidence establishes or proved Gore's claims. Most importantly, not one witness ever testified that Gore was ever exposed to any of the chemical(s) much less that he suffered from any illness, not to mention any lasting malady." (PCR-2 at 989).

chemical composition levels, such as with mercury and cadmium, were troublesome because they were too low" and Gore had a "normal lead blood level." *Id*. As this Court found, "there was no direct evidence, such as a medical diagnosis, that Gore actually suffered from any neurological disorders, which he now argues resulted from exposure to agricultural chemicals." *Id*. This Court stated:

> **Even if Gore's counsel was deficient, we conclude that there was no prejudice**. As previously described, extensive mitigation[24] was already presented at the resentencing. Even if the trial court at resentencing had found this one additional mitigating factor involving neurological disorders from citrus grove pesticide exposure, which is a tenuous theory at best, this would not have overcome the trial court's finding of six aggravating factors which, as previously described, are supported by strong evidence. Therefore, we conclude that counsel's failure to

[24] This Court had stated:

> Gore's counsel called approximately ten witnesses, including Michael Maher and Peter Maculuso, who were both mental health experts. In preparing for his testimony, Dr. Maher reviewed a medical history of Gore, which was provided by Gore's counsel, and questioned Gore about his background. The mitigation that was presented included the following: (1) Gore was the son of hard-working parents; (2) Gore was shy and introverted in comparison to Waterfield; (3) Gore's divorce and separation from his children had negatively affected him; (4) Gore used alcohol around the time of the murder; and (5) Gore was an alcoholic. Moreover, Udell testified that all mitigation that "seemed consistent with [Gore's] best interests" was presented at the resentencing. This evidence establishes that Gore's counsel was not deficient.

Gore, 964 So.2d at 1274-75.

> present the mitigating evidence with regard to the citrus grove pesticide exposure is not of such a nature that "confidence in the outcome is undermined" due to the failure to present this evidence.

Gore, 964 So.2d at 1274 (emphasis supplied). Gore offers nothing even remotely explaining how Udell's recent disbarment or Nickerson's proffered testimony impacts these findings and conclusions. Such is an alternate basis for the denial of relief; this Court should affirm.

Udell's deference to Nickerson - In resolving the allegation in the prior postconviction appeal, this Court noted portions of Udell's testimony and concluded that his deferring to Nickerson "could have been considered 'sound trial strategy'" and that "any mistaken belief that Gore had as to Nickerson's experience was reasonable, because . . . Nickerson appeared to know everybody and was completely 'immersed' in the area of capital litigation" *Gore*, 964 So.2d at 1273. Re-litigation to impeach Udell's testimony that he deferred to Nickerson would not call into question this Court's ruling. As the record shows, Nickerson was with Capital Collateral Counsel in 1988 and litigated Gore's 1988 state postconviction relief motion. Nickerson was involved intimately in Gore's postconviction case where he examined five family members and friends at the state evidentiary hearing. (PCR-1 3-4, 354, 388, 447, 492, 582). Clearly, Nickerson was representing Gore and examining witnesses

for mitigation purposes some four years before Udell came to represent Gore on March 3, 1992, and therefore, was an obvious choice to join the re-sentencing team. Impeachment of Udell's testimony with his recent disbarment or Nickerson's offered testimony as to Udell's preparedness would not call into question the rejection of the claim by this Court, *Gore*, 964 So.2d at 1273. Likewise it would not undermine the trial court's 2004 determination that no evidence was presented to prove Nickerson was not qualified to represent Gore and that he was defending a bar grievance, or that and that even if true, it "would have effected (sic) the verdict of the jury" (PCR-2 989).

Likewise, Gore has offered nothing here to address either the deficiency or prejudice prongs of *Strickland*. Even assuming Udell should not have deferred to Nickerson, a finding rejected by this Court, Gore has not pled how the resentencing recommendation or sentence would have been different. This renders the claim legally insufficient. Furthermore, as noted above, Gore's offer of additional mitigation allegedly missed in the resentencing was rejected by this Court as unproven. More important, there was a finding by this Court that extensive mitigation on mental health issues and family background had been presented at the resentencing and that the additional mitigation involving neurological disorders, "was a tenuous theory at best," "and would not overcome" the six aggravators

supported by strong evidence. Gore has offered nothing here to allow for re-litigation of this claim and such was denied properly. This Court should affirm.

In summation, Gore's references to Udell's testimony all point to additional challenges to the *Strickland* deficiency prong alone. However, to obtain relief, both the deficiency and prejudice prongs must be established. *Strickland*, 466 U.S. at 688-89. Gore did not make that showing below, and has offered nothing here to call into question the summary denial of relief. Even if Udell's testimony is rejected in its entirety based on the disbarment and suggested impeachment by Nickerson and *Strickland* deficiency is assumed, Gore has not shown how this would call into question this Court's findings of lack of prejudice. Furthermore, gore's offer that mitigation of: (1) "impossibility" of receiving parole; (2) "exemplary" prison record; (3) alleged exposure to pesticides and abuse of alcohol/drugs in general and at the time of the offense; and (4) background/family history does not assist his claim. This information either was considered at resentencing and/or on postconviction. Gore has failed to identify how these mitigators were treated previously or how Udell's disbarment/impeachment would have the slightest impact on those rulings.

On direct appeal, and again in the 2003 postconviction litigation, Gore's eligibility for parole was addressed. This

Court concluded that Gore's jury was instructed properly as to his parole eligibility and that it is "highly unlikely" that a witness, claiming that "for all practical purposes" Gore would not receive parole, would change the resentencing decision (jury voted unanimously for death). It further concluded that there was no *Strickland* prejudice shown as there were six aggravators and no statutory mitigators; confidence in the outcome was not undermined. *Gore*, 964 So.2d at 1271. Gore's "exemplary prison record" was found proven and given little weight. (ROA-2 at 4573); *Gore*, 706 So.2d at 1332, 1336 (recognizing mitigation found by trial court and affirming sentence). Gore's "mental health mitigation" was addressed and rejected as not proven in the sentencing order (ROA-2 4570-72); those findings were not challenged on appeal. *Gore*, 706 So.2d at 1332. On postconviction review, the matter was addressed under an ineffective assistance claim and it was determined that no prejudice was proven even if mental health mitigation stemming from pesticide intoxication was considered proven. *See Gore*, 964 So.2d at 1273-75.

Gore's alleged alcoholism or use of controlled substances was addressed and rejected at both the resentencing (ROA-2 4575) and on postconviction review. *Gore*, 964 So.2d at 1272 (finding there was no evidence Gore was intoxicated at time of the crime). Background history and "family mitigation" were discussed in the sentencing order and given weight, were

outlined in *Gore*, 964 So.2d at 1275, and taken into consideration by this Court when determining that penalty phase counsel was not ineffective. Gore has offered nothing to establish that these factors would establish prejudice on re-litigation of the ineffectiveness claim, but more important, he has not shown that confidence in his sentence could be undermined by Udell's 2009 disbarment or Nickerson's testimony. Gore is not entitled to a second opportunity to litigate ineffectiveness of counsel claims, and he has made no showing that even if he were afforded such an opportunity that he could show not only deficiency, but more important in this context, *Strickland* prejudice. This Court should note these deficiencies as a further basis for affirming the summary denial of relief.

ISSUE III

SUMMARY DENIAL OF GORE'S CHALLENGE TO THE APPLICATION OF THE CLEMENCY PROCESS TO HIS CASE WAS PROPER (restated)

Gore asserts that the summary of the denial of his constitutional challenge to the clemency process based on the Eighth and Fourteenth Amendments was erroneous. The attack below and here is devoted solely to what he terms the "updated process" of the clemency proceedings that occurred in his case. Specifically, he complains that although the victims of his crimes received correspondence from the Florida Parole Commission informing them of their right to participate in the

clemency update, he did not receive a similar letter/invitation. (IB 43-45). He claims the trial court failed to recognize that he had a continuing interest in life guaranteed by the Due Process clause of the Fourteenth Amendment (IB 46) and the clemency process utilized here impermissibly foreclosed him from participating in the "update process" resulting in prejudice which was exacerbated by the fact that, his original 1987 clemency proceeding was not accurate as, "it was devoid of mitigating information presented during Gore's subsequent, and only arguably constitutional, sentencing proceeding, and as such the board did not possess extensive information which would have made a case for mercy." (IB 50-51).

The summary denial entered by the trial court was based on the fact the Governor considered executive clemency, determined it was not appropriate in Gore's case, that this Court has "rejected judicial review of discretionary executive branch clemency procedures as a violation of the separation of powers doctrine," and that Gore "has no constitutional right to a clemency proceeding or commutation of his death sentence." (PCR-3r.2 224). That ruling was proper as the claim was: (1) challenging a determination which was exclusively within the Executive's discretion, (2) legally insufficient to warrant relief under controlling precedent, (3) not cognizable, (4) untimely, and (5) procedurally barred. *See Marek v. State*, 14

So.3d 985 (Fla. 2009); *Marek v. State*, 8 So.3d 1123 (Fla. 2009); *see also Marek v. McNeil*, 2009 WL 2488296 (S.D. Fla. Aug 13, 2009); *Bundy v. State*, 497 So.2d 1209, 1211 (Fla. 1986); *Rutherford v. State*, 940 So.2d 1112, 1121-23 (Fla. 2006); *King v. State*, 808 So.2d 1237, 1241 n.5, 1246 (Fla. 2002); *Glock v. Moore*, 776 So.2d 243, 252 (Fla. 2001); *Provenzano v. State*, 739 So.2d 1150, 1155 (Fla. 1999); *Grossman v. State*, 29 So.3d 1034, 1044 (Fla. 2010); *Johnston v. State*, 27 So.3d 11 (Fla. 2010), *Valle v. State*, 70 So.3d 530, 550-551 (Fla. 2011).

The constitutional challenge to the clemency procedure conducted herein is based on Gore's faulty premise regarding the nature and origin of the clemency process. In Florida, the clemency process is derived solely from the Florida Constitution and is strictly an Executive function. *Parole Comm'n v. Lockett*, 620 So.2d 153, 154-55 (Fla. 1993). As recognized by the federal court in *Marek,* 2009 WL 2488296 at 3, the Florida Supreme Court has interpreted the Florida Constitution to mean that the "people of [Florida] chose to vest sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of grace." *Id*. (*citing Sullivan v. Askew*, 348 So.2d 312, 315 (Fla. 1977)).[25] Therefore, the federal district court concluded

[25] Florida's Rules of Executive Clemency (rev. 2007) provide in pertinent part that the "Governor has unfettered discretion to deny clemency at any time, for any reason."

that a Florida death row inmate cannot pursue a constitutional due process claim because "Florida has not created a protected interest in life or liberty with respect to the clemency proceeding." *Marek*, 2009 WL 2488296 at 3. Indeed, death row inmates have no constitutional right to the commutation of a sentence. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280 (1998), nor do they have a constitutional right to clemency proceedings. *See Herrera v. Collins*, 506 U.S. 390, 414 (1993); *See Woodard*, 523 U.S. at 278 (stating "[s]ince the Governor retains complete discretion to make the final decision [regarding clemency] ... the State has not created a protected interest."). This Court should affirm the summary denial of relief as Gore does not have a constitutional right to seek the relief he requests.

Also, this Court has repeatedly rejected challenges to the Governor's discretion grounded in the clemency procedures. *Bundy*, 497 So.2d at 1211 (explaining that "[i]t is not our prerogative to second-guess the application of this exclusive executive function" of clemency as it would amount to a violation of the separation of powers doctrine);[26] *Johnston*, 27

[26] It must also be noted that this Court in *Bundy* reasoned:

> Second, the governor and cabinet held an earlier clemency hearing in relationship to appellant's conviction for the Tallahassee murders and found no basis on which to grant him relief. We cannot say that

So.3d at 24-26 (same); *Rutherford*, 940 So.2d at 1121-23 (rejecting claim that clemency process amounts to "flipping a coin," and thus, judicial review is required); Glock, 776 So.2d at 252 (refusing to confer a right to capital defendants to participate in a second clemency proceeding). The trial court properly denied Gore's suggestion judicial review was required as such review is precluded by this Court's settled precedent.

Likewise, Gore's specific complaint of not being "invited" to participate in the clemency update process, has been rejected previously by this Court on numerous occasions. In *Marek*, 8 So.3d at 1130-1131 this Court rejected the same issue raised here, namely that the Governor's updated correspondence with the Florida Parole Commission 20 years after Marek's full clemency proceeding, was "one-sided, arbitrary and standardless," thereby, entitling him to relief. Explicitly, this Court explained that a death row inmate is not "entitled to time to prepare and present an application for clemency before an execution." *Marek*, 8 So.3d at 1129-1130. In fact in Marek's subsequent successive postconviction motion, filed on the eve of an execution, this Court upheld the summary denial stating:

> the executive branch was required to go through the motions of holding a second proceeding when it could well have properly determined in the first that appellant was not and never would be a likely candidate for executive clemency.

Bundy v. State, 497 So.2d 1209, 1211 (Fla. 1986).

> **This Court did not dispute Marek's factual assertion that he was not informed of the Governor's request for information about him in September 2008 but, rather, decided that as a matter of law we would not "second-guess" the executive clemency proce**ss. Marek has not provided any authority holding that he must be provided notice before a death warrant is signed or that the Governor may not sign the death warrant of an individual whose death sentence is final and who has had the benefit of a clemency proceeding. In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998), five justices of the United States Supreme Court concluded that some minimal procedural due process requirements should apply to clemency proceedings. But none of the opinions in that case required any specific procedures or criteria to guide the executive's signing of warrants for death-sentenced inmates. Accordingly, Marek has not provided any reason for this Court to depart from its prior decision.

Marek, 14 So.3d at 998 (emphasis added); *see Grossman,* 29 So.3d at 1044 (explaining that defendant's argument of a denial of an opportunity to present at a new clemency proceeding newly discovered evidence about his life since his formal clemency proceedings in 1988 to be meritless as the court will not and cannot encroach on the unfettered power of the Executive Branch in clemency decisions and procedures). The trial court was bound by *Marek*, 14 So.2d at 998 and *Grossman* to deny relief; the claim was legally insufficient as pled and this Court should affirm.

Gore also asserts that although he participated in his original 1987 clemency proceedings, the result was not accurate as it did not include all the evidence presented at his 1992 resentencing, (IB 50-51). He argues that the truncated and

inadequate "update process" has exacerbated the prejudice he suffers because the original proceeding was so "flawed." The summary denial of relief on this ground was warranted as his argument is predicated on the faulty premise that judicial review of an entirely discretionary act of the Executive Branch of government is permitted. As this Court has held explicitly in well-established precedent regarding this identical issue, Gore has no constitutional right to review let alone relief.

In *Johnston*, 27 So.3d at 24-26, as here, the defendant claimed that his previous full clemency proceeding was inadequate because since then he had developed further mitigation at a postconviction hearing which should be considered in a new clemency proceeding. In rejecting the argument, this Court recognized past precedent which precludes judicial review of the Executive Branch's clemency proceedings. *Johnston*, 27 So.3d at 24. This Court rejected the very argument Gore raises herein reasoning:

> **Johnston contends that his original clemency hearing was inadequate to protect his rights because it was conducted before his full life history and mental illness history were developed. We rejected a similar argument in Bundy that time must be given to prepare and present a case for clemency in a second clemency proceeding before the death sentence may be carried out.** *Bundy*, 497 So.2d at 1211. We also noted in *Marek v. State*, 14 So.3d 985 (Fla. 2009), after Marek raised a second challenge to the clemency process, that "five justices of the United States Supreme Court concluded [in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998)] that some

> minimal procedural due process requirements should apply to clemency ... [b]ut none of the opinions in that case required any specific procedures or criteria to guide the executive's signing of warrants for death-sentenced inmates." *Marek*, 14 So.3d at 998. We again conclude that no specific procedures are mandated in the clemency process and that Johnston has been provided with the clemency proceedings to which he is entitled.

Johnston, 27 So. 3d at 25-26. (emphasis added); *Valle v. State*, 70 So.3d at 550-551 (same). This Court should affirm the summary denial of relief.

It must be noted that Gore's claim does not constitute a challenge to the validity of his judgments of convictions or sentences, all of which were affirmed on direct appeal. In fact, Gore does not dispute he is eligible for a death warrant and has been eligible for years. Furthermore, clemency proceedings are not part of the trial -- or even of the adjudicatory process; they do not determine the defendant's guilt or innocence, and are not intended to enhance the reliability of the trial process. Rather, clemency proceedings are conducted by the Executive Branch, independent of judicial review. *Woodard*, 523 U.S. at 284 (citing *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 7-8 (1979)); *Bundy v. Dugger,* 850 F.2d 1402, 1424 (11th Cir. 1988)(explaining Eighth Amendment concerns focus on the judicial processes of trial and appellate review and not the discretionary processes such as clemency). Yet, Gore sought clemency relief via a legal pleading, his Rule

3.851 motion, that it was intended solely to challenge the legal propriety of a trial. Hence, a Rule 3.851 motion could not afford Gore a vehicle for the relief he sought. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981) (explaining that the granting of clemency is not based on legal grounds, it is purely discretionary and is "simply a unilateral hope.") Moreover, the instant death warrant signed by Governor Scott on February 28, 2012, provides, "WHEREAS, executive clemency, as authorized by Article IV, Section 8(a), Florida Constitution, was considered pursuant to the Rules of Executive Clemency and it was determined that executive clemency is not appropriate; . . . ." This establishes conclusively that Gore received that to which he was entitled,[27] i.e., "clemency was again considered by the executive branch prior to the signing of the warrant." *See Valle*, 70 So.3d at 551; *Johnston*, 27 So.3d at 24. As in *Valle* and *Johnson*, this Court should affirm the denial of relief.

As a final point, Gore was never precluded from presenting his "new" information to "make a case for mercy" at the original 1987 clemency proceeding. Although Gore identified the information presented at his 1992 resentencing (IB 51-54) as "new," a review shows conclusively it was information known to

[27] As such, Gore's reference to *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998); *Young v. Hayes*, 218 D.3d 850, 852-53 (8th Cir. 2000); *Workman v. Summers*, 136 F.Supp.2d 896, 898 (M.D. Tenn. 2001); and *Allen v. Hickman*, 407 F.Supp.2d 1098, 1103-04 (N.D. Cal. 2005) does not suggest a different result.

him long before his 1987 clemency proceeding as all of it relates to his own life experiences. For instance, the information falls into the following four broad categories: (1) chronic alcohol/drug use; (2) alcohol use the time of the crime; (3) alleged control exhibited by his cousin and co-defendant Freddie Waterfield; and (4) marital difficulties and associated child custody issues. Gore does not explain why this was not presented in 1987. In fact, he attempted to present much of this mitigation at his 1984 penalty phase. *Gore,* 532 So.2d at 1049-1051. Clearly, the availability of these "life experiences" in 1984 is un-refuted, and thus, were known and available for the 1987 clemency review. However, Gore does not explain why he never presented the information then or pursued further clemency review at any time during the past 25 years. As an alternate basis for affirming the denial of postconviction relief, this Court should find Gore waived his claim which was untimely, procedurally barred, and without merit.

ISSUE IV

THE TRIAL COURT'S SUMMARY DENIAL OF GORE'S CONSTITUTIONAL CHALLENGE TO THE GOVERNOR'S DESCRETION TO SIGN DEATH WARRANTS AND CALL FOR JUDICAILLY IMPOSED RULES TO CONSTRAIN THE GOVERNOR'S DISCRETION (restated)

Again pointing to the Eighth Amendment, Gore asserts that his execution is improper under the Eighth Amendment. He posits that the Governor has "absolute discretion to decide who lives

and who dies. . .," but to be constitutional, "[t]here must be enforceable standards placed upon the Governor's otherwise limitless power to decide amongst the approximate 400 individuals on Florida's death row who lives and who dies." (IB 58, 61). As he did in Issue III, Gore **does not dispute that he is legally eligible, and since 2009, has remained eligible for a death warrant**. Instead, he basically wants to know, "why me and not one of the other 42 people who are also legally ready." What Gore seeks, but to which he is not entitled, are some sort of "enforceable standards" be applied to the purely executive function of signing a death warrant. (IB 61) Relying upon *Valle*, 70 So.3d at 551-52 and *Marek*, 14 So.3d at 998, the trial court summarily denied relief finding "[t]here was no dispute that Gore is eligible for a death warrant" and that "the Governor has the discretion to determine when to sign a death warrant on any given eligible capital defendant." The trial court's decision did not ignore Gore's asserted claim that standards were needed to constrain the Governor's discretion; instead it noted Gore's claim noted such standards were demanded by Gore, but precedent dictated the denial of relief. That decision should be affirmed as the trial court followed the controlling precedent in denying this untimely, legally insufficient claim.

Gore has not presented a cognizable ground for postconviction relief; instead, he challenges a determination

which lies exclusively within the Executive's discretion. Gore's claim was legally insufficient to warrant relief under this Court's controlling precedent. *Marek*, 14 So.3d at 998 (rejecting request to review claim that Governor's decision to sign a death warrant on any given capital defendant is one-sided and arbitrary). In *Valle*, 70 So.3d at 551-52 this Court rejected the identical claim explaining:

> **In essence, Valle raises a claim similar to Marek's and is asking this Court to second-guess the Governor's decision in determining when to sign Valle's death warrant because other inmates were also eligible for a death warrant.** However, this Court has always proceeded very carefully in addressing such a claim since it triggers separation of powers concerns. *See, e.g., Johnston*, 27 So.3d at 26 ("[W]e decline to depart from the Court's precedent, based on the doctrine of separation of powers, in which we have held that it is not our prerogative to second-guess the executive on matters of clemency in capital cases."); *In re Advisory Opinion of the Governor*, 334 So.2d 561, 562–63 (Fla. 1976) ("This Court has always viewed the pardon powers expressed in the Constitution as being peculiarly within the domain of the executive branch of government."). Here, Valle has not provided any reason for this Court to depart from its precedents, and we therefore affirm the circuit court's denial of relief.

(emphasis supplied). *See Johnston*, 27 So.3d at 26; *Marek*, 8 So.3d at 1129–30, *Marek v. McNeil*, 2009 WL 2488296 (S.D. Fla. Aug 13, 2009).

Gore's criticism of the Executive's ministerial act of signing a death warrant (62-66) does not constitute any challenge to the validity of his judgments of convictions and

sentences, all of which were affirmed on direct appeal, and renders his claim not cognizable under rule 3.851.[28] Furthermore, "the concern derived from the Eighth Amendment regarding capital cases focuses on the judicial processes of trial and appellate review, not on the discretionary state process (i.e., executive clemency) succeeding them." *See Bundy*, 850 F.2d at 1423-1424. Gore's complaint that the Governor initiated the execution process without justifying his decision to do so, or may have focused on Gore' case based on information gleaned from the media, does not undercut his executive discretion nor does it present a cognizable basis for postconviction relief. The trial court recognized this in its order, and denied relief properly. *Marek*, 8 So.3d at 1129–30. This Court should affirm.

ISSUE V

THE TRIAL COURT PROPERLY DENIED GORE'S EIGHTH AMENDMENT CHALLENGE TO HIS SENTENCE BASED ON THE NUMBER OF YEARS HE SPENT ON DEATH ROW ARE PROCEDURALLY BARRED AND MERITLESS (restated)

[28] *See, Jarvis v. Chapman*, 118 Fla. 577, 593, 159 So. 282, 288 (Fla. 1934) (recognizing "[n]o statute requires the defendant to be present when the Governor fixes the date of the execution of the sentence. Gore, as provided in *State v. Haddox*, 40 S.E. 387 (W.Va. 1901), has had his trial, been convicted, and sentenced to death. All that remains to be done is to fix the time and carry the execution into effect. Whether it be long or short, on one date or another, is for the law to fix, the convicted person having forfeited his life by his criminal conduct is permitted no voice in the matter. Such ministerial duties have nothing to do with the trial"); *People v. Flannelly*, 128 Cal. 83, 60 P. 670 (1900) (holding defendant is not entitled to be present when the warrant fixing the time and place of his execution is issued.)

It is Gore's contention that the trial court erred in finding procedurally barred the claim that the time he has spent on death row (28 years) violates the Eighth Amendment to the United States Constitution as the trial court failed to take into consideration that he now has spent an additional five years on death row, thus, the claim was not barred. Contrary to Gore's position, the trial court not only found the matter barred as Gore had raised this issue in his postconviction motion following resentencing, Gore, 964 So.2d at 1276, but meritless under controlling precedent from this Court. Gore has failed to offer anything to calling question the repeated rejection of similar challenges.

In denying relief, the trial court determined that this issue was raised by Gore previously and rejected by this Court which had opined:

> Gore argues that his twenty-three years served on death row is cruel and unusual punishment, and violates both the Eighth and Fourteenth Amendments of the United States Constitution. This Court has consistently rejected the argument that serving time on death row is cruel and unusual punishment, regardless of the time served. *See Lucas v. State*, 841 So.2d 380, 389 (Fla. 2003) (holding that over twenty-five years on death row is not cruel and unusual punishment); Foster v. State, 810 So.2d 910, 916 (Fla.2002) (holding that twenty-three years on death row is not cruel and unusual punishment). **Gore's exercise of his constitutional rights through the appeal and postconviction process has prevented his death sentence from being executed, so he may not claim a constitutional violation due to his length of**

> **time on death row**. *See Knight v. State*, 746 So.2d 423, 437 (Fla. 1998) ("[N]o federal or state courts have accepted [the] argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay."). Therefore, Gore's claim is without merit.

Gore, 964 So.2d at 1276 (emphasis added). (PCR-3R.2 227-28). Having raised the issue previously, the matter was procedurally barred under *See Marajah v. State*, 684 So. 2d 726, 728 (Fla. 1996) (finding it inappropriate to use collateral attack to re-litigate previous issue); *Harvey v. Dugger*, 656 So.2d 1253, 1256 (Fla. 1995) (same). Such was proper.

The trial court also cited Valle, 70 So.3d at 552 in recognition that this Court has "rejected similar claims." (PCR-3R.2 228). In *Valle*, this Court reasoned:

> Valle next contends that the circuit court erred in summarily denying his claim that the thirty-three years he has spent on death row constitutes cruel and unusual punishment. Under this Court's clear precedent, Valle's claim is facially invalid, and the circuit court did not err in summarily denying relief. In Tompkins, this Court observed that "no federal or state court has accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay." 994 So.2d at 1085 (*quoting Booker v. State*, 969 So.2d 186, 200 (Fla. 2007)). In line with *Tompkins*, this Court has repeatedly held this claim to be meritless. *See, e.g., id*. (rejecting claim that twenty-three years on death row constituted cruel and unusual punishment); *Booker*, 969 So.2d at 200 (rejecting claim that almost thirty years on death row constituted cruel and unusual punishment); *Gore v. State*, 964 So.2d 1257, 1276 (Fla. 2007) (rejecting claim that twenty-three years on death row constituted cruel and unusual punishment);

> *Rose v. State*, 787 So.2d 786, 805 (Fla.2001) (holding as without merit cruel and unusual punishment claim of death row inmate under death sentence since 1977).
>
> Furthermore, while Valle asserts that the State repeatedly botched his trials and resentencings during his first ten years on death row, thereby extending the length of his incarceration, **he has contributed to the remaining twenty-three years of delay in his execution. Since his death sentence became final in 1991, Valle has continued to exercise his constitutional rights in challenging his convictions and sentence**. He filed a postconviction motion in state court, multiple habeas petitions in this Court, and a habeas petition in federal court, the denial of which was affirmed on appeal in 2006. Valle "cannot now contend that his punishment has been illegally prolonged because the delay in carrying out his sentence is in large part due to his own actions in challenging his conviction[s] and sentence." *Tompkins*, 994 So.2d at 1085. Therefore, the circuit court did not err in summarily denying Valle's claim.

Valle, 70 So.3d at 552 (footnote omitted). See also, *Tompkins v. State,* 994 So.2d 1027, 1085 (Fla. 2008); *Rose v. State*, 787 So.2d 786, 805 (Fla. 2001); *Elledge v. State*, 911 So.2d 57, 77 (Fla. 2005).

As the trial court found, Gore's claim also lacked merit under *Valle*, 70 So.3d at 1276. The record supports this determination as Gore's actions, i.e., his continued attempts to prohibit his execution have led to what he considers his prolonged stay on death row.[29] Since this Court's rejection of

[29] Indicative of the lack of sincerity of Gore's argument here, Gore, undeterred, and apparently uncaring of the time it would require to litigate such issues, raised additional claims in the instant successive postconviction motion, and now on appeal, that sought to create layers of review to capital litigation

this claim in *Gore*, 964 So.2d at 1276, Gore continued to exercise his constitutional rights in federal court pursuant to 28 U.S.C. §2254. As noted the Statement of the Case and Facts above, Gore was denied all relief in federal court and the federal district, pursuant to 28 U.S.C. §2253, refused to grant a certificate of appealability for appellate review. Under §2253, a certificate should be granted if a "petitioner makes a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell,* 537 U.S. 322 (2003). The federal district court determined that Gore's claims did not reach that level. That conclusion was upheld by the Eleventh Circuit Court of Appeal as well as the United State Supreme Court on May 5, 2009. As recognized in *Tompkins*, 994 So.2d at 1085, Gore "cannot now contend that his punishment has been illegally prolonged because the delay in carrying out his sentence is in large part due to his own actions in challenging his conviction[s] and sentence."

Likewise, Gore is not entitled to relief based on *Lackey v. Texas*, 514 U.S. 1045 (1995). Therein, the Supreme Court denied certiorari and, therefore, declined to review a death row

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process that would obviously extend even further his stay on death row. For instance, Gore sought the assistance of the courts to implement rules, procedures and judicial oversight into the Executive Branch's ministerial duty to initiate the actual execution process and he argued for the creation of a substantive right to constitutionally effective postconviction counsel which would add yet another "tier" of litigation to the process.

inmate's petition that claimed his execution after 17 years on death row would constitute cruel and unusual punishment. Justice Stevens' memorandum on denial of certiorari acknowledged that the Court's denial of certiorari does not constitute a ruling on the merits, and suggested that the lower courts first determine how much of the 17-year time period was attributable to petitioner's abuse of the judicial system through repetitive, frivolous filings and how much, if any, was attributable to prosecutorial or institutional delay. In other words, even under Justice Stevens' memorandum on denial of certiorari, a criminal defendant cannot bootstrap himself into a "cruel and unusual punishment" claim by abusing the state appellate and postconviction litigation systems to his advantage through the repetitive filing of meritless appeals and petitions, and thereafter claim that the State is precluded from enforcing the judgment and sentence. Consequently, even under Justice Stevens' view, Gore would not be entitled to relief as he clearly falls in the category of defendants who delay execution by filing repeated and meritless attacks upon the conviction and sentence. *See Thompson v. Sec'y for the Dep't of Corr.*, 517 F.3d 1279, 1283-1284 (11th Cir. 2008); *White v. Johnson*, 79 F.3d 432, 439 (5th Cir. 1996).

Moreover, Gore's reliance upon dicta in dissenting opinions and judgments of foreign courts is misplaced as the Supreme

Court has never issued an opinion holding that a death sentence becomes unconstitutional if a state is delayed in carrying out that sentence. In fact, in *Carey v. Musladin*, 549 U.S. 70 (2006), the Court held that a state court's rejection of a claim cannot be contrary to, or an unreasonable application of, the Supreme Court's clearly established precedent when the Court has never issued any precedent on the issue. Foreign case law is not binding and cannot be used to supplant the binding precedent of the Florida Supreme Court. The summary denial of relief was proper and should be affirmed.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: John Abatecola, Esq., 20528 Torre Del Lago Street, Estero, FL 33928; and Linda McDermott, Esq., McClain & McDermott, P.A., 141 NE 30th Street, Wilton Manors, FL 33334 this 29th day of March, 2012.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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