

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

STATE OF FLORIDA,  
Plaintiff,

Case No. F01-07975  
F06-032696

Judge Glick

vs.

SEAN CASEY,  
Defendant.

FILED FOR RECORD  
2008 DEC -8 PM 3:22

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

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

Statement of Facts

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

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

### Procedural History

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

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

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

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

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

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

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

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

### Jurisdiction

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

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

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

#### Procedural Bar

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

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

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

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

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

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<sup>1</sup> Motion, p. 5-6.

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

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

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

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

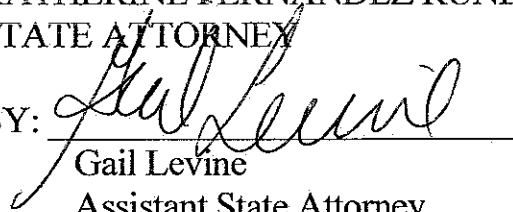
### Conclusion

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

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

Respectfully submitted,  
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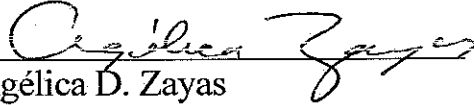
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CERTIFICATE OF SERVICE

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

  
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Angélica D. Zayas  
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