IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,564

THE STATE OF FLORIDA,

Appellant/Cross-Appellee,

vs.

DIETER RIECHMANN,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

ANSWER BRIEF OF CROSS-APPELLEE/ REPLY BRIEF OF APPELLANT

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INTRODUCTION

This brief is written in 12 point Courier New Font. The parties will be referred to as they stood in the Court below. The symbol "D.A.R." will refer to the record from the direct appeal, which includes the trial transcripts. The symbols "R." and "T." will refer to the record and transcripts from the Rule 3.850 proceeding, respectively. Defendant has designated the point on appeal as Issue IV. The State has renumbered this as Issue I.

POINT ON APPEAL

I.

THE COURT BELOW ERRED IN FINDING, AFTER AN EVIDENTIARY HEARING UNDER RULE 3.850, THAT DEFENDANT'S COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE OF TRIAL, AND THE COURT ALSO ERRED IN ORDERING A NEW PENALTY-PHASE PROCEEDING WHERE ALTHOUGH THE PROSECUTOR PREPARED THE ORIGINAL DRAFT OF THE SENTENCING ORDER, THE TRIAL JUDGE TESTIFIED THAT HE REVIEWED THE ORDER AND IT REFLECTED HIS FINDINGS, AND WHERE THE TRIAL JUDGE FURTHER MODIFIED THE ORDER IN DEFENDANT'S FAVOR.

POINTS ON CROSS APPEAL [Restated.]

II.

THE LOWER COURT WAS CORRECT IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE DURING THE GUILT PHASE BECAUSE THE EVIDENCE WAS PRESENTED AND COUNSEL MADE STRATEGIC DECISIONS.

III.

THE LOWER COURT PROPERLY REJECTED DEFENDANT'S NEWLY DISCOVERED EVIDENCE CLAIM BECAUSE THE WITNESSES WERE INCREDIBLE, THERE WAS NO UNDISCLOSED DEAL AND THE EVIDENCE WOULD HAVE BEEN INADMISSIBLE.

IV.

THE LOWER COURT WAS CORRECT IN REJECTING THE *BRADY* CLAIMS

BECAUSE DEFENDANT FAILED TO PROVE THAT EVIDENCE WAS SUPPRESSED, THE EVIDENCE WAS AVAILABLE TO DEFENDANT, THE ISSUES COULD AND SHOULD HAVE BEEN RAISED ON DIRECT APPEAL AND THE OUTCOME OF THE PROCEEDING WOULD NOT HAVE BEEN DIFFERENT.

V.

THE LOWER COURT PROPERLY REFUSED TO PERMIT DEFENDANT TO RELITIGATE THE SUPPRESSION ISSUE.

VI.

THE LOWER COURT PROPERLY REJECTED THE CLAIM OF INEFFECTIVENESS RELATED TO THE FEDERAL ACQUITTAL.

VII.

THE LOWER COURT PROPERLY CONCLUDED THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S CLOSING ARGUMENT.

VIII.

THE LOWER COURT PROPERLY REJECTED THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO SEAT AFRICAN AMERICAN JURORS, WHERE DEFENDANT DID NOT PROVE THAT COUNSEL STRUCK ANY JUROR HE WANTED SEATED AND THE JURY INCLUDED AFRICAN AMERICANS.

IX.

THE LOWER COURT PROPERLY REJECTED THE CLAIM THAT COUNSEL WAS INEFFECTIVE IN CROSS EXAMINING THE STATE'S WITNESSES.

STATEMENT OF THE CASE AND FACTS

The State relies upon its statement of case and facts regarding the trial, the direct appeal and the post conviction claims regarding the sentencing issues contained in its initial brief in this matter.

On September 30, 1994, Defendant filed a motion to vacate judgment and sentence pursuant to Fla. R. Crim. P. 3.850, raising the following guilt phase issues, verbatim:

CLAIM I

MR. RIECHMANN WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO CONDUCT ANY INDEPENDENT INVESTIGATION IN THIS FACTUALLY COMPLEX CASE AND BY COUNSEL'S CONSEQUENT FAILURE TO PRESENT ABUNDANT AVAILABLE EVIDENCE OF MR. RIECHMANN'S INNOCENCE, IN VIOLATION OF MR. RIECHMANN'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 21 AND 22 OF THE FLORIDA CONSTITUTION.

A. COUNSEL'S FAILURE TO INVESTIGATE THE FACTS AND CIRCUMSTANCES OF THE ACTUAL OFFENSE AND TO PROVE MR. RIECHMANN'S INNOCENCE.

   1. The failure to find eyewitnesses to the crime.

   2. The failure to ascertain key times and distances.

   3. Descriptions of Mr. Riechmann at the scene.

   4. The failure to present evidence of similar offenses.

B. COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT EVIDENCE OF MR. RIECHMANN'S RELATIONSHIP WITH MS. KISCHNICK.

   1. The state's grossly distorted and false trial evidence.

   2. The wealth of available rebuttal evidence never sought nor presented.

C. COUNSEL'S FAILURE TO DISCREDIT THE TESTIMONY OF "JAILHOUSE INFORMANT" WALTER SMYKOWSKI.

D. COUNSEL'S FAILURE TO TRANSCRIBE AND INTRODUCE THE SECRETLY-RECORDED FOUR-HOUR TAPE OF MR. RIECHMANN'S OCTOBER 29 INTERVIEW WITH MIAMI BEACH POLICE SERGEANT MATTHEWS.

   1. Documentary proof of the good-faith efforts of Mr. Riechmann to assist

investigators shortly after the trauma he had undergone, contrasted with Sgt. Matthews' arsenal of tricks and grotesque ploys.

2. Documentary proof of Mr. Riechmann's lack of fluency in English, and the potential for misunderstanding.

3. Proof of Mr. Riechmann's bereavement.

4. The revealing "bleed over" comments from officers in the adjacent room.

E. COUNSEL'S FAILURE TO DEAL EFFECTIVELY WITH A CLIENT FROM A DIFFERENT CULTURE, TO IDENTIFY AND EXPLAIN RELEVANT CULTURAL FACTORS TO THE JURY, AND TO PRESENT EVIDENCE THAT PROSTITUTION IS A LEGAL REGULATED PROFESSION IN GERMANY.

F. DEFENSE COUNSEL'S FAILURE TO PRESENT EVIDENCE REBUTTING THE STATE'S THEORY THAT THIS MURDER WAS ALL ABOUT MS. KISCHNICK'S "CERVICAL EROSION."

G. COUNSEL'S UNREASONABLE FAILURE TO PRESENT OTHER AVAILABLE EVIDENCE OF MR. RIECHMANN'S INNOCENCE.

CLAIM II

NEWLY DISCOVERED EVIDENCE ENTITLES MR. RIECHMANN TO A NEW TRIAL.

A. NEWLY DISCOVERED EYEWITNESSES TO THE MURDER OF KERSTEN KISCHNICK.

B. NEWLY DISCOVERED EVIDENCE THAT THE TESTIMONY OF "JAILHOUSE INFORMANT" WALTER SMYKOWSKI WAS KNOWINGLY FALSE.

C. NEWLY DISCOVERED EVIDENCE OF SUBSEQUENT SIMILAR MURDERS CONFIRMS MR. RIECHMANN'S ACCOUNT OF THE MURDER OF MS. KISCHNICK.

CLAIM III

MR. RIECHMANN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO UTILIZE AVAILABLE EXPERTISE TO REBUT AND DISPROVE CRUCIAL PROSECUTION TESTIMONY ERRONEOUSLY AND UNPROFESSIONALLY ASSERTING THAT BLOODSTAINS AND GUNSHOT RESIDUE EVIDENCE OBTAINED FROM THE AUTOMOBILE PROVED MR. RIECHMANN WAS GUILTY.

A. THE JURY AND COURTS WERE MISLED BY UNREBUTTED ERRONEOUS TRIAL TESTIMONY THAT BLOOD STAINS AT THE CRIME SCENE PROVED MR. RIECHMANN'S ACCOUNT OF THE SHOOTING WAS UNTRUE.

B. DEFENSE COUNSEL'S UNREASONABLE FAILURE TO UTILIZE READILY AVAILABLE EXPERT ASSISTANCE TO DISCREDIT RHODES' PATENTLY UNPROFESSIONAL METHODS AND GROSSLY INCORRECT CONCLUSIONS.

C. COUNSEL'S FAILURE TO DISCREDIT THE STATE'S HIGHLY INCRIMINATING BUT COMPLETELY INVALID "GUNSHOT RESIDUE" TESTIMONY.

D. COUNSEL'S FAILURE TO UTILIZE AVAILABLE EXPERTISE TO REBUT INCORRECT AND MISLEADING FIREARMS AND BULLET EXAMINATION TESTIMONY.

CLAIM IV

THE STATE'S DELIBERATE WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE DEPRIVED MR. RIECHMANN OF HIS FAIR TRIAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9, 16, 21, AND 22 OF THE FLORIDA CONSTITUTION.

A. UNDISCLOSED DEALS WITH KEY PROSECUTION WITNESS WALTER SMYKOWSKI AND THE SUBORNATION OF SMYKOWSKI'S PERJURED TESTIMONY.

B. THE WITHHOLDING OF PROBATIVE AND EXCULPATORY PHOTOGRAPHS.

C. THE WITHHOLDING OF POLICE FORENSIC EXAMINER'S NOTES, WORKUP AND REPORTS.

D. THE WITHHOLDING OF EXCULPATORY POLICE REPORTS.

E. THE WITHHOLDING OF EXCULPATORY GERMAN

INVESTIGATIVE MATERIALS AND OTHER DOCUMENTS.

F. THE WITHHOLDING OF MISLEADING CORRESPONDENCE FROM THE MIAMI BEACH POLICE TO GERMAN AUTHORITIES.

G. THE STATE MISLED THE COURT AND KNOWINGLY RECEIVED FALSE TESTIMONY FROM GERMAN POLICE OFFICERS WENK AND SCHLEITH CONCERNING THEIR SEARCHES OF MR. RIECHMANN'S AND MS. KISCHNICK'S APARTMENT IN RHEINFELDEN, GERMANY.

G. THIS COURT'S MID-TRIAL RICHARDSON HEARING ADDRESSED ONLY A SMALL FRACTION OF THE DISCOVERY VIOLATIONS HEREIN, AND DID NOT ADDRESS AT ALL THE BRADY MATERIALS DISCOVERED ONLY RECENTLY PURSUANT TO MR. RIECHMANN'S POST CONVICTION PUBLIC RECORDS ACT REQUEST.

CLAIM V

MR. RIECHMANN WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S SUDDEN, UNILATERAL AND PATENTLY UNREASONABLE DECISION THAT MR. RIECHMANN TESTIFY AT TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9, 16, 21, AND 22 OF THE FLORIDA CONSTITUTION.

CLAIM VI

MR. RIECHMANN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S UNREASONABLE FAILURE TO SUPPRESS ILLEGALLY OBTAINED EVIDENCE, IN VIOLATION OF MR. RIECHMANN'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLES I, SECTIONS 9, 16, 21, AND 22 OF THE FLORIDA CONSTITUTION.

A. THE FRUITS OF THE ILLEGAL HOWARD JOHNSON'S SEARCH.

B. THE FAILURE TO SUPPRESS ITEMS ILLEGALLY OBTAINED AND INADMISSIBLE IN GERMANY.

1. The failure to use evidence of MBPD's false reports to German authorities.

2. Counsel's failure to suppress evidence taken during the illegal search and seizure of Mr. Riechmann's and Ms. Kischnick's apartment on January 14, 1998.

3. The failure to suppress "Treffpunkt" magazine.

4. The failure to suppress inadmissible incompetent evidence of alleged "prior convictions" in Germany.

C. THE FAILURE TO SUPPRESS MR. RIECHMANN'S STATEMENTS.

CLAIM VII

MR. RIECHMANN WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S UNREASONABLE DECISION TO PREVENT THE JURY FROM KNOWING ABOUT MR. RIECHMANN'S ACQUITTAL OF A FEDERAL GUN CHARGE, IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 21, AND 22 OF THE FLORIDA CONSTITUTION.

CLAIM VIII

MR. RIECHMANN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO OBJECT TO COUNTLESS INSTANCES OF FLAGRANT PROSECUTORIAL MISCONDUCT, IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 21, AND 22 OF THE FLORIDA CONSTITUTION.

A. INFLAMMATORY IMPROPER ATTACKS ON THE DEFENDANT PERSONALLY.

B. IMPROPER COMMENTS ON THE DEFENDANT'S RIGHT AGAINST SELF-INCRIMINATION AND RIGHT TO REMAIN SILENT.

C. MISSTATEMENTS OF THE EVIDENCE AND REFERENCES TO MATTERS NOT IN EVIDENCE.

D. COMMENTS THAT SHIFTED THE STATE'S BURDEN OF

PROOF TO THE DEFENSE.

E. THE STATE'S GROSSLY IMPROPER CLOSING ARGUMENT.

1. Invoking the prosecutor's opinions and expertise as to the credibility of witnesses.

2. Calling the defendant a "liar" and other improper name-calling.

3. Improper attacks on Mr. Riechmann's demeanor and his lifestyle.

4. Improper appeals to the jury to convict Mr. Riechmann for reasons other than evidence of his guilt.

F. THE FAILURE TO OBJECT TO INADMISSIBLE HEARSAY, LEADING QUESTIONS, AND OTHER IMPROPRIETIES.

CLAIM IX

MR. RIECHMANN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S CONDUCT OF JURY SELECTION, INCLUDING COUNSEL'S DISREGARD OF MR. RIECHMANN'S DESIRE FOR AFRICAN-AMERICAN REPRESENTATION, . . . , IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 21, AND 22 OF THE FLORIDA CONSTITUTION.

A. COUNSEL'S REFUSAL TO COMPLY WITH MR. RIECHMANN'S EXPRESSED DESIRE TO SEAT AFRICAN-AMERICAN JURORS.

* * * *

CLAIM X

MR. RIECHMANN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S UNREASONABLE ERRORS AND OMISSIONS ON CROSS EXAMINATION OF THE STATE'S WITNESSES.

* * * *

CLAIM XII

MR. RIECHMANN WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S CLOSING ARGUMENT

AT THE GUILT PHASE OF TRIAL.

CLAIM XIII

MR. RIECHMANN WAS DEPRIVED OF HIS RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW BY THE STATE'S FAILURE TO BRING HIM TO SPEEDY TRIAL AND HIS ATTORNEY'S FAILURE TO DEMAND IT, IN VIOLATION OF THE CONSTITUTIONS AND LAWS OF THE UNITED STATES AND FLORIDA.

(R. 35, 38, 41, 48, 55, 62, 68, 73, 98, 107, 111, 120, 121, 123, 125, 130, 140, 148, 151, 156, 173, 175, 180, 198, 209, 219, 227, 247, 258, 274, 283, 295, 310, 315, 321, 354, 356, 358, 360, 363, 365, 372, 386, 389, 404, 406, 407, 409, 412, 414, 419, 422, 426, 447, 470, 479). During the evidentiary hearing, Defendant moved to amend his motion to assert a claim that counsel was ineffective for failing to have a second attorney appointed, which the lower court permitted over the State's objection. (T. 1374-78, 1383)

On November 3, 1995, the post-conviction court granted an evidentiary hearing as to all of the guilt phase claims except claim 12. (R. 2146-51, 2154A). With regard to claim 12, Defendant conceded that no evidentiary hearing was necessary. (T. 103) The hearing was conducted on May 13-17, June 11, and July 17-19, 1996. (T. 197).

At the hearing, Monika Seeger, Defendant's landlady, testified that she accompanied the German police the first time they searched Defendant's apartment in Germany. (T. 266-67) The police did not have a warrant at that time. (T. 267) The second time the police came, they had a warrant, and she showed them into the apartment.

(T. 267) However, they told her she did not have to stay, and she left. (T. 267) On the third visit, the German police simply got the key from Ms. Seeger and entered the apartment alone. (T. 267) Florida officials accompanied the police on a fourth visit to the apartment. (T. 268)

Dr. Alexander Brickler, a board certified family doctor who practices obstetrics and gynecology, testified that he had extensive experience in delivering babies and taught family practice residents to manage normal pregnancies and deliver babies. (T. 358-62) On voir dire, Dr. Brickler conceded that gynecology is a distinct field from obstetrics.

Dr. Brickler stated that he had reviewed Ms. Kischnick's medical records from her German gynecologist regarding treatment on September 2, 1987 and September 11, 1987. (T. 365-66) The records reflect that Ms. Kischnick was complaining of generalized abdominal pain. (T. 366) She was diagnosed with bilateral subacute salpingitis, an inflammation of the fallopian tubes. (T. 367) Dr. Brickler stated that this was a type of pelvic inflammatory disease and that this disease was common. (T. 368) Ms. Kischnick was prescribed antibiotics and was responding to the treatment at her second visit. (T. 368-69)

Dr. Brickler also testified that he reviewed Ms. Kischnick's autopsy report. (T. 369) The report indicated that the fallopian tubes were unremarkable and that dark tan discoloration was found

on her cervix. (T. 371) Dr. Brickler opined that this confirmed that she had responded to the treatment. (T. 371) Dr. Brickler also stated that Ms. Kischnick suffered from cervical erosion, a minor problem. (T. 373)

Based on these reports, Dr. Brickler opined that Ms. Kischnick was not seriously ill at the time of her death. (T. 377) He stated that menstrual cramps or gas could also have caused Ms. Kischnick to double over in pain. (T. 378)

On cross, Dr. Brickler conceded that Ms. Kischnick's condition would cause pain and that different people have different tolerances for pain. (T. 381) He also admitted that he could not say how much pain Ms. Kischnick experienced. (T. 381-82) Dr. Brickler agreed that the prosecutor's statements in closing that Ms. Kischnick was treated for inflammation of the fallopian tubes and had cervical erosion were supported by the records he reviewed. (T. 380-81)

Stuart James, an expert in blood stain pattern interpretation, testified that there are three classifications of blood stains, low velocity, medium velocity and high velocity. (T. 425) Low velocity stains are produced from blood dripping from a wound and are large and circular. (T. 425-26) Medium velocity stains are general produced from beating with a blunt object and are smaller. (T. 427) High velocity stains are generally produced by gunshot wounds and are very small. (T. 427) High velocity stains can be described as

a mist-like dispersion and are similar to mist produced by aerosol cans. (T. 427) In practice, the lines between the classifications are not always clear. (T. 428)

In this case, Mr. James examined the crime scene photographs, the autopsy report, the police reports, portions of the trial transcript, the depositions of David Rhodes, the State's blood stain expert, and the clothing of the victim and Defendant. (T. 413-20) Based on this evidence, Mr. James opined that the victim was in the front passenger seat of the car, facing forward, when she was shot. (T. 440-41)

Mr. James noted that the blood stains in the car were only subjected to a presumptive test to determine if they were blood. (T. 430-31) He opined that a negative result clearly demonstrates that the substance was not blood but that a positive test did not necessarily mean that the stains were blood. (T. 431-32) Other substances, such as aloe, could cause a positive test. (T. 431) Further, the test did not distinguish between human blood and other kinds of blood. (T. 431-32) As such, Mr. James stated that he would not have opined that blood was on the blanket without further testing. (T. 432-33)

Mr. James stated that back spatter is the dispersion of blood back in the direction of the shooter caused by a bullet entrance wound. (T. 442) He opined that there was no back spatter in this case because of the lack of mist-like dispersion. (T. 443) While

there were specks of presumptive blood on the passenger's window, he did not believe that they were the result of back spatter. (T. 443-44) Mr. James stated that these specks may have come from the exhalation of blood or from back spatter. (T. 450-52) Because he could not be sure the blood was back spatter, he could not offer an opinion regarding the amount of opening in the window. (T. 454-56) However, he agreed that it was possible that the window was opened 3 and 3/4 inches if the blood was back spatter. (T. 455-56)

Further, Mr. James stated that he did not believe that the description of the material on the headliner of the passenger window was consistent with back spatter. (T. 444) He admitted that he had not seen pictures of this area or the material but stated that the bullet was of too small a caliber to produce the quantity of brain matter described. (T. 444-45) Because there was no brain matter on the window, Ms. James believed that the material on the headliner was deposited after the gunshot. (T. 445)

Further, he did not believe that the blood on the driver's side of the car could have come from back spatter because it was in front of the wound. (T. 445-46) Mr. James did not believe that the back spatter could have ricocheted and ended up on the driver's door either. (T. 446-47)

Mr. James opined that there was no back spatter on Defendant's clothing. (T. 456) However, he did see stains on the right thigh of the pants that were consistent with exhaled blood. (T. 456-57) As

such, Mr. James stated that Defendant had to be in the driver's seat when the blood was exhaled. (T. 471)

Mr. James did not believe that the exhalation of blood would explain the blood on the driver's door because it was too far from the victim's nose, from which most of the blood was exhaled. (T. 457-58) Further, because the blood spots on the driver's door were round, Mr. James believed that the blood struck the door at a 90 degree angle. (T. 459-60) One possible explanation of this blood was that it came from the flicking of blood off of a finger. (T. 460-61) As such, Mr. James disagreed that back spatter or exhalation of blood were the only possible sources of the blood on the door and the blanket. (T. 456)

Mr. James admitted that the string convergence test is a valid test in the field of blood stain analysis. (T. 467-68) However, he believed that it was misapplied in this case. (T. 468-69) The angle of impact is supposed to be considered in this test. (T. 468-69) Assuming a 90 degree impact, the strings would never converge. (T. 468-70) Further, the position of the door at the time the blood was deposited would affect the test. (T. 470-71)

With regard to the blanket that was in the driver's seat at the time, Mr. James stated that it was examined visually and microscopically, and no blood was found. (T. 472-73) A moist piece of filter paper was also pressed against the top and bottom of the blanket, and presumptive blood spatter was found. (T. 473-75) Mr.

James opined that the filter paper test was not recognized as a valid test. (T. 475) He stated that a light wiping of blood may have left a stain that would appear to be spatter in this test. (T. 475) Further, Mr. James opined that the fact that there was blood on both the top and bottom of the blanket rendered any conclusion regarding spatter invalid. (T. 475-76)

Mr. James stated that he believed the blood spatter on the left leg of the victim's pants, her purse and three dollar bills was exhaled blood. (T. 479-80) Because there was blood on the money but not on the pants under the money, Mr. James opined that the money was on her leg at the time she exhaled the blood. (T. 480-81) Mr. James believed that this stain pattern was relevant because it corroborated Defendant's statement that Ms. Kischnick was tipping the person giving them directions when she was shot. (T. 482)

Mr. James stated that no conclusion could be drawn regarding the location of Defendant at the time of the shooting from the blood stain pattern. (T. 483-84) The only conclusion Mr. James felt could be drawn was that Defendant's pants were in the area of Ms. Kischnick when she exhaled blood. (T. 484)

Mr. James stated that he presumed experts in the field of blood stain analysis would have been available "depending upon scheduling" to provide testimony similar to his in 1988. (T. 484) Mr. James admitted that 1988 was the year he moved to South Florida. (T. 484)

On cross, Mr. James admitted that Mr. Rhodes had never testified that the spots were anything other than presumptive blood and in fact corrected the lawyer on this subject at trial. (T. 488-94) Further, Mr. Rhodes acknowledged that the presumptive blood on the blanket might have been other substances or dog's blood. (T. 494) He also stated that he could not explain the blood on the bottom of the blanket, that it did not seep through from the top and that top could have been deposited at another time. (T. 494-97)

Mr. James disagreed with Mr. Rhodes' testimony that it was high velocity blood spatter but admitted that the size of the spots was consistent with that. (T. 498-99) However, Mr. James admitted that Mr. Rhodes acknowledged Mr. James' problem with the fibers breaking up the stains. (T. 499-500)

Mr. James also conceded that Mr. Rhodes had acknowledged that the blood on Defendant's pants was exhaled. (T. 501-02) Further, the use of the term "aspirated" instead of the term "exhaled" was not significant because it is a common mistake and what was meant was explained. (T. 501-02)

Additionally, Mr. James acknowledged that Mr. Rhodes stated that he was unsure how the blood got on the driver's door. (T. 509-11) Mr. Rhodes only stated that it was consistent with high velocity spatter or exhalation of blood. (T. 509) Mr. James conceded that the phrase "consistent with" indicated that there were other possible explanations. (T. 507-09)

Mr. James stated that his opinion that the string test was invalid is based on Mr. Rhodes description of the blood spots. (T. 518) Mr. James conceded that directionality of such small blood spots would be difficult to tell and that Mr. Rhodes had indicated that one spot showed directionality. (T. 518-21)

Mr. James stated that he did not mean to infer that the blood on the driver's door occurred as the result of Defendant flicking blood off of his fingers while in the driver's seat. (T. 525) Mr. James refused to state whether the spots were consistent with Defendant's testimony regarding flicking his fingers. (T. 525-27)

Mr. James conceded that Mr. Rhodes was correct that the passenger window could be opened no more than 3 and 3/4 inches at the time the blood was deposited on it. (T. 528-31) He also acknowledged that Mr. Rhodes stated that he could not conclusively determine the source of this blood and properly stated that the entire pattern had to be examined to draw a conclusion. (T. 532-34)

Mr. James stated that he did not find Mr. Rhodes' testimony "wrong or deceitful." (T. 534) He felt the attorneys overstated the conclusions from that testimony and that Mr. Rhodes should have given more examples of other explanations. (T. 534-35)

Mr. James admitted that the blood stains showed that Ms. Kischnick's head was on its right side after the shooting, that her head had to be at least straight ahead, if not turned to the left, while the seat was not reclined, to explain the blood on her pants

and on the left while the seat was reclined. (T. 539-46) He stated that the lack of exhaled blood on the right side of her body indicated that her head was to the left as she exhaled blood. (T. 556-57) He acknowledged that Defendant testified that her head was to the right after the shooting and remained that way through the time he reclined the seat and the time he left the car to summon help. (T. 539-46) However, Mr. James refused to admit that this was inconsistent with Defendant's testimony. (T. 539-46)

Raymond Cooper, an expert in firearms identification and gunshot residue analysis, testified that he found a number of articles regarding gunshot residue analysis. (T. 558-71) Similar articles would have been available in 1987 and 1988. (T. 572-73) Mr. Cooper stated that the articles were contained in authoritative publications. (T. 577-82) The court permitted the introduction of the articles that were available at the time of trial. (T. 586)

Mr. Cooper agreed with Mr. Quirk's trial testimony regarding the type of bullet that was fired and its characteristics. (T. 589) Mr. Cooper stated that this type of bullet was readily available. (T. 590) Based on the characteristics, Mr. Cooper opined that the bullet could have been fired by 9 different models of .38 caliber weapons and five different models of .357 caliber weapons. (T. 593-97) Mr. Cooper considered three of these models unusual and the remainder common. (T. 597-98)

Mr. Cooper also agreed with Mr. Rao's findings regarding the

gunshot residue. (T. 600-01) He stated that these findings were consistent with a person having either fired a gun, been in close proximity to a gun when it was fired or handled a recently fired gun. (T. 602) However, he asserted that there was no way to distinguish between these three options. (T. 602-03) As such, he disagreed with Mr. Rao's conclusion that the evidence showed that Defendant fired a gun. (T. 605) He stated that being in a car when a gun is fired in the window on the opposite side is sufficiently close in proximity to have residue on one's hands. (T. 616-17)

Mr. Cooper stated that gunshot residue is expelled from the breach and the muzzle of a weapon when it is fired. (T. 612) The particles coming from the breach tend to be round, and the particles coming from the muzzle tend to be irregularly shaped. (T. 612-13)

On cross, Mr. Cooper admitted that some of the gunshot residue would be blocked by the window and the roof of the car if the window was partially closed. (T. 617-19) Additionally, the further the gun was from the window, the smaller the amount residue entering the car. (T. 619) Ms. Kischnick's body would also block some of the particles. (T. 619) The only significance that Mr. Cooper found to the fact that Ms. Kischnick had fewer particles on her hand than Defendant had on his was that her hands had to be away from the shot. (T. 619-20)

Mr. Cooper admitted that the three types of weapons identified

by Mr. Quirk were contained within the types of weapons he identified. (T. 623) He also conceded that Mr. Quirk testified that his list was not presented as an exclusive list. (T. 622-23) He also acknowledged that Mr. Quirk had stated that the type of bullet used was common. (T. 624)

Mr. Cooper stated that he did not know if the database he used to generate his list of possible types of weapons included all of these types of weapons in 1987 or 1988. (T. 625-26) Further, Mr. Quirk relied upon the database of weapons available from the Metro-Dade Crime Lab. (T. 626-27) Mr. Cooper acknowledged that reliance on such databases was not uncommon. (T. 627)

Over the State's relevance objection, Officer Richard Cosner, from the computer support division of the Miami Police Department, presented crime statistics broken down by neighborhood for the northern portion of the city. (T. 636-39) Officer Cosner stated that these statistics would have been available in 1988. (T. 655)

Karen McElrath, an associate professor of criminology from the University of Miami, testified that based on her reading of ***Miami Herald*** articles from 1983 to 1995, she determined that the pattern of tourist crimes began in 1991. (T. 659-70) The problem of tourist crime peaked in 1993, which resulted in a concerted official effort to reduce it. (T. 677, 679-80) In her research, the first reported incident of a tourist being shot when asking directions was in 1990. (T. 674-75)

On cross, Ms. McElrath testified that she was unaware of the particular manner of how many of these tourist crime occurred. (T. 688-90) She was unaware of whether any of the tourist crimes did not involve rental cars. (T. 690) In fact, she admitted that she had not even read all of the newspaper articles on which she based her opinion. (T. 690-91)

David Arthur testified that he used the crime statistics to create a color coded map of Miami. (T. 705-08) He categorized the level of crime into five levels and used the colors red, pink, orange, yellow and green to depict these levels. (T. 708-10) The area in which Defendant now asserts that the crime occurred was colored pink. (T. 711-12)

Richard Mueller, a private investigator, testified that he drove from N.E. 63rd Street, starting a half block west of Biscayne Boulevard, to Indian Creek Drive and 67th Street at 10:15 P.M. on May 6. (T. 718-20) The distance driven was 5.3 miles, and it took 15 minutes. (T. 722-23) Mr. Mueller estimated that he was delayed for a minute and a half to two minutes due to construction at the turn from Biscayne onto the 79th Street Causeway. (T. 723) He also estimated that Bayside was 50 blocks south of his starting point, that there were 10 blocks to a mile and that starting at Bayside would add four miles to the trip.

On cross, Mr. Mueller admitted that he had not explored other routes. (T. 724) Further, he could not say that his estimate of the

time accurately reflected the time the trip would have taken at the time of the crime because he was unaware of the road conditions then. (T. 724)

Richard Klugh, an assistant federal public defender, represented Defendant in his federal case. (T. 728-29) The trial judge in that case granted a judgment of acquittal on two counts and the jury acquitted Defendant on the third. (T. 729) Mr. Klugh believed that the federal charges were brought merely as a way of detaining Defendant while the police investigated Ms. Kischnick's murder. (T. 732-35)

During his representation of Defendant, Mr. Klugh met with Defendant between 6 and 8 times. (T. 735) Mr. Klugh took three years of high school German and two years of college German, and would speak to Defendant in both English and German. (T. 736) However, he would enlist an interpreter if he had anything of substance to communicate to Defendant. (T. 736) Mr. Klugh did so because he wanted to ensure that everything was accurate and felt Defendant was overly confident in his ability to speak English. (T. 736-38)

Immediately after the acquittal, Mr. Klugh tried to get Defendant released because he felt that an INS detainer lodged against Defendant was improper. (T. 739) Simultaneously, Miami Beach Police were trying to keep Defendant in custody. (T. 739-40) Eventually, the federal authorities decided to release Defendant

from the INS hold, and he was immediately arrested for the murder. (T. 741-42)

As a result of the detainer, Mr. Klugh continued to represent Defendant after his acquittal. (T. 741) Mr. Klugh believed Miami Beach Police were aware of the representation because they had control of the evidence used in the federal case, and he had communicated with them regarding it. (T. 740-41) Additionally, Mr. Klugh informed everyone present at the time of Defendant's arrest that he would continue to represent him. (T. 742) Mr. Klugh asserted that he even went to state court with Defendant until a state public defender was appointed to represent him. (T. 743)

Mr. Klugh put Mr. Carhart and Defendant in contact, and spoke to Mr. Carhart about the murder case. (T. 745-46) Additionally, Mr. Klugh met with Defendant a few times after he was taken into State custody. (T. 747)

Mr. Klugh had occasion to speak with Defendant regarding the murder. (T. 747) During this discussions, Mr. Klugh believed that Defendant displayed an appropriate level of emotion. (T. 757)

During trial, Mr. Carhart called Mr. Klugh and informed him that he was going to call Defendant to testify. (T. 767-68) Mr. Carhart requested Mr. Klugh's assistance in explaining the need for his testimony and preparing him to do so. (T. 768) Mr. Klugh agreed to do so. (T. 768) When Defendant was informed, he appeared shocked. (T. 768) According to Mr. Klugh, Defendant protested and

inquired why he had not been prepared in advance. (T. 769-70) Mr. Klugh stated that Defendant then took the stand after 10 to 15 minutes of discussion without any preparation. (T. 770-71)

Mr. Klugh did not believe that Defendant was prepared to testify. (T. 774-75) Mr. Klugh did not feel that the use of an interpreter was sufficiently explored and that the interpreter was incompetent. (T. 774-75)

In preparing Defendant to testify in federal court, Mr. Klugh wrote out every question and went over the answer with him. (T. 780-81) Further, evidence regarding the state case was excluded and the federal authorities were unaware of Defendant's criminal history. (T. 781) However, Mr. Klugh never ascertained whether Defendant had a criminal history at the time of the federal trial. (T. 783-84)

On cross, Mr. Klugh admitted that he was aware that one of the jurors had spoken to a reporter about his opinion of whether Defendant would be convicted. (T. 776) However, he did not recall that being part of the decision to have Defendant testify. (T. 776-77) He believed that Defendant was called because of dissatisfaction with Defendant's home movie of the day of the shooting. (T. 777)

Edith Georgi Houlihan, a state assistant public defender, represented Defendant for a month beginning around New Year's Day on 1988. (T. 799-800) During the course of this representation, she

met with Defendant several times. (T. 800) Defendant asked Ms. Georgi to file a motion to preserve the car, which Ms. Georgi stated she did and which she believed was granted. (T. 800-01)

After Ms. Georgi was replaced as counsel, she continued following the case, speaking to Mr. Carhart and Defendant and attending portions of the trial. (T. 802-03) Ms. Georgi stated that while Defendant's English was not perfect, he could "certainly get the point across." (T. 804) She did not believe an interpreter was necessary and felt that Defendant understood more than he could express. (T. 804)

Ms. Georgi was amazed that Defendant was called to testify. (T. 807) She had spoken to both Defendant and Mr. Carhart and been informed that Defendant would not be. (T. 805) She did not think Defendant was prepared and believed it was counsel's decision that he testify. (T. 807-08) However, she did not observe any portion of the testimony. (T. 809)

Ms. Georgi opined that Defendant should not have testified because he was not prepared, the State's case was circumstantial, Defendant's statement was presented by the State and the language difference would have accounted for the failure to testify, so that the jury would not have been inclined to hold it against him. (T. 830-32) Further, Defendant's criminal history should have militated against his testifying. (T. 832-33)

Ms. Georgi admitted that she was not saying that Defendant

should never have been called to the stand. (T. 842) She merely felt it was unreasonable because it was unplanned. (T. 842-43) She admitted that trials do not always go as planned but stated that any major surprise during trial resulted from a lack of preparation. (T. 834-44) She also conceded that rushing the State to trial is a valid strategy. (T. 847-48)

Ms. Georgi admitted that she was unaware that Defendant wanted a speedy trial or whether he had precluded counsel from going to Germany to investigate his background. (T. 850-51)

Ms. Georgi conceded that cross examination of the State's expert may negate the need to call a defense expert. (T. 853) However, she refused to comment on whether having the State's expert admit that he was unsure of his opinion would be effective. (T. 853-54) She also declined to comment on whether calling a witness who would contradict Defendant was effective. (T. 854-55)

Hiltrud Brophy testified that she was the official court reporter in this matter. (T. 868-69) During courtroom proceedings, she was either at the defense table or next to the witness stand. (T. 869) Ms. Brophy stated that Defendant was able to speak basic English at the time of his arraignment. (T. 872-73) During the course of the proceedings, his English improved. (T. 872-73)

During jury selection, she recalled that Defendant was extremely interested and preferred to listen to the proceedings in English, asking for translations of words or phrases. (T. 870)

Defendant expressed an interest in having African-Americans on the jury, and counsel did not agree. (T. 871) Ms. Brophy recalled one particular juror Defendant wanted, over whom Defendant and counsel argued. (T. 871) However, she could not remember who the juror was nor who excluded that juror. (T. 898)

Michael Klopf testified that he was incarcerated at Metro Correctional Center (MCC) with Walter Smykowski and Defendant. (T. 971-94) Some months later, he and Mr. Smykowski were both transferred to Eglin Air Force Base. (T. 974-75)

Mr. Klopf testified Mr. Smykowski told him in the spring of 1988 that he had been contacted by the State while at Eglin and asked if Defendant made any incriminating statements. (T. 975-76, 978) Mr. Klopf stated that Mr. Smykowski had said that he had told the State that no such statements had been made. (T. 976) According to Klopf, Smykowski asserted that he had been promised help with his federal sentence if he testified that Defendant had made an incriminating statement. (T. 977) Mr. Klopf claimed that he counseled Mr. Smykowski against testifying and informed him that the State could not help him with a federal matter. (T. 977) Mr. Klopf alleged that Mr. Smykowski agreed that he would not testify. (T. 977-78)

On cross, Mr. Klopf admitted that he had a number of fraud convictions and had approximately 24 aliases. (T. 981-82) He admitted that he was not in the same building of MCC with Defendant

and Mr. Smykowski when they shared a cell. (T. 982-83)

Mr. Klopf stated that he learned of Mr. Smykowski's testimony from *Miami Herald* reports at the time of trial. (T. 980) However, he did not try to contact anyone about his alleged conversation with Mr. Smykowski until 1994, when he contacted Mr. Carhart. (T. 971-72)

He claimed that he did not try to contact anyone at the time because he was afraid of retaliation from prison officials. (T. 990) He asserted that after his initial release in 1990, he attempted to contact his lawyer so that the lawyer could contact Mr. Carhart, but the lawyer was on vacation. (T. 990-91) By the time the lawyer was back, he had become a federal fugitive, which he remained until his rearrest in 1993. (T. 991) However, he admitted that he could have spoken to his attorney at the time of trial or have written an anonymous letter. (T. 991-92)

Hans Lohse, a former federal inmate, testified that Mr. Smykowski had a reputation for dishonesty. (T. 1760) When he learned that Mr. Smykowski had testified against Defendant, he had another inmate write a letter to defense counsel, offering to testify. (T. 1760,1775-76)

Steven Potolsky, Defendant's capital litigation "expert," testified that competent counsel would have realized that he needed to confront the State's experts. (T. 1058-60) To do so, counsel should have read learned treatises and consulted defense experts.

(T. 1060-61) Mr. Potolsky felt that counsel should have used treatises to impeach the State's experts, as well. (T. 1061) Additionally, Mr. Potolsky felt that calling defense experts was necessary. (T. 1065-69)

Mr. Potolsky opined that defendants generally should not be called to testify in criminal cases, particularly capital cases. (T. 1086-87) He saw no reason why Defendant was called in this case. (T. 1089)

Early Stitt testified that in 1983 or 1984 he used to sell crack cocaine on Biscayne Boulevard. (T. 1173-75) Around 10 p.m. one night in 1983 or 1984, he was doing so in the area of 63rd Street. (T. 1175-76) A car with two white passengers[1] came down 63rd Street and was approached by other drug dealers from the street. (T. 1776-77) Mr. Stitt heard a gunshot and fled north on Biscayne. (T. 1177-78) He saw the car pass him as he did so. (T. 1178)

He admitted that his extensive drug use clouded his memory. (T. 1174) He admitted that Defendant's investigator had refreshed his recollection before he testified. (T. 1185-86) In fact, Defendant's investigator had coached him regarding the details in 1994. (T. 1186)

He also stated that gunfire was not normal in that area at

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[1] Mr. Stitt initially stated that both were male but when defense counsel questioned this, Mr. Stitt stated that it was a male and a female. (T. 1177)

that time. (T. 1175) He also asserted that he did not want anyone to know that he had witnessed a shooting and hid for a month as a result. (T. 1178-79)

Mr. Stitt did not remember seeing Hilton Williams, the other alleged "eyewitness," that night. (T. 1180-82) However, Mr. Williams did approach Mr. Stitt in 1994 and inquired if he recalled it. (T. 1181-82)

He admitted that he had 38 prior convictions and had three to four aliases. (T. 1186-88) He was also impeached with a prior statement he gave to the State during the pendency of the post conviction proceedings in which he stated that the shooting occurred after midnight. (T. 1191-93)

Mr. Williams testified that in 1986 and 1987 he lived at the corner of 63rd Street and Biscayne. (T. 1201-03) One night he saw a red rental car containing a white man and woman come down the street. (T. 1203-05) The car initially stopped by one group of people but they could not understand the people in the car. (T. 1204) The car then approached Mr. Williams' group, which included Mr. Stitt. (T. 1204-06) One person approached the car, realized the people in the car did not want drugs, pulled a gun and shot into the car. (T. 1204) The driver then sped north on Biscayne. (T. 1207)

Mr. Williams had ten prior felony convictions. (T. 1208-09) Mr. Williams was confronted with the fact that he had stated in his

affidavit that his wife was with him that evening. He admitted that he had changed this portion of his testimony and his testimony was whatever suited his purposes at the time. (T. 1220-22)

On cross, Mr. Williams stated that he approached the open driver's window of the car. (T. 1225) He said that he tried to talk to Defendant, but he was unable to understand Defendant's response. (T. 1229) He asserted that the shots were fired through the driver's window. (T. 1231)

He admitted that at the time, he was unwilling to get involved. (T. 1238) He claimed that he decided to come forward when Defendant's investigator contacted him in 1994. (T. 1238-39) He then brought other alleged witnesses to the investigator. (T. 1241-42)

He initially denied that he had received any compensation from the investigator other than two lunches. (T. 1239-40) However, he admitted under questioning from defense counsel that the investigator had provided him with a hotel room while he looked for the other witnesses. (T. 1243)

Richard Ecott, a crime scene technician, testified that he took crime scene photos in this matter. (T. 1315-18) He used two rolls of 24 exposure film and took 32 pictures. (T. 1318) George Traveis, Ecott's supervisor, whose report Defendant was depending on to show that more pictures had been taken, testified that he did not take any photos and that at the time he filed his report, he

did not know how many pictures Ecott had taken. (T. 1330-32) As such, his report only indicates the number of exposures, not the number of pictures. (T. 1332)

Fleata Douglas, another crime scene technician, testified that she did not know how many photos she took, that she had testified at trial that she had taken 4 to 5 rolls of 24 to 36 exposure film, and that she did not know whether she took complete rolls. (T. 1342-46) Another crime scene technician, Lydia Shows, testified that she took one roll of 36 exposure film but did not know if she used the complete roll. (T. 1350-51)

Beth Sreenan, one of the prosecutors in this matter, testified that defense counsel had originally not planned to depose the State's witnesses from Germany, despite having deposed every other State witness, because Defendant did not want counsel to go to Germany. (T. 1421) In fact Defendant personally waived his right to have these witnesses deposed. (T. 1422) However, defense counsel did depose these witnesses after the State brought them to the United States for trial, which resulted in a continuance. (T. 1422-23) During these depositions, Defendant was present, corrected the interpreter and appeared to act as co-counsel. (T. 1428-29)

Ms. Sreenan went to the scene on the night of the crime. (T. 1412-13) She observed Defendant expressing dislike for African-Americans. (T. 1436) She informed defense counsel of these remarks and of other racist remarks Defendant had made. (T. 1443-46) Based

on these conversations, defense counsel moved to exclude evidence of Defendant's statement, which the State had planned to elicit to show that Defendant would not have asked a black man for directions. (T. 1446-47)

She stated that she had directed an investigation of the route Defendant described in his statement to police.[2] The police drove from Bayside to the site where the car stopped, using the 125th Street, the 163rd Street, the 41st Street and the 79th Street Causeways, on a Sunday evening, the same day of week on which the murder occurred. (T. 1457-58) They were able to reach the scene within 35 minutes under all of these scenarios and communicated this information to defense counsel. (T. 1458)

Ms. Sreenan stated that this matter was tried very quickly at Defendant's insistence, which resulted in the State being limited in its investigation of the case. (T. 1459-60) Based on her discussions with Defendant and defense counsel, she believed that this was a strategic decision and in accordance with Defendant's wishes. (T. 1460-61)

Ms. Sreenan stated that Smykowski contacted the State regarding his testimony. (T. 1465) She stated that Smykowski was threatened with prosecution if he lied and was not promised anything if he told the truth. (T. 1466) She believed that

[2] Defendant stated that he traveled north on Biscayne Boulevard and got lost in the area of West Dixie Highway. (T. 1455)

Smykowski was truthful because he knew details about Defendant that had not been publicized. (T. 1467-69)

Ms. Sreenan stated that she only became aware that a German court had ordered suppression after the 3.850 motion was filed. (T. 1479) As such, this order did not enter into the State's decision not to introduce the fruit of the second search in Germany. (T. 1479)

She believed that all of the police reports were provided and did not recall whiting out any portions. (T. 1511-13) She did recall that the police had written one report on the inconsistencies in Defendant's statement and that author was not correct regarding the physical evidence in that report. (T. 1514-15)

Thomas Quirk, the State's firearm examiner, testified that the list of firearms produced by Mr. Cooper included several firearms with rifling characteristics that were not entirely consistent with the bullet from the victim. (T. 1562-67) Further, some of the guns on the Cooper list may not have been produced until after the crime. (T. 1572)

Mr. Carhart, Defendant's trial counsel, testified that he discussed jury selection with Defendant. (T. 1623) However, Mr. Carhart selected the jury. (T. 1623) He did recall that Defendant wanted African-Americans on the jury. (T. 1639-40) However, Mr. Carhart was concerned that the fact that Defendant alleged that an

African-American was the killer might elicit an adverse reaction from such jurors. (T. 1639-40) Further, black jurors were chosen. (T. 1641)

Mr. Carhart admitted that he was informed of the names of individuals interviewed by the German police and the content of their statements. (T. 1642-45) He also contacted Defendant's family in Germany. (T. 1651-52) However, he did not believe they were available to help Defendant. (T. 1652)

He did not hire a blood spatter expert because he considered Mr. Rhodes' testimony benign at first. (T. 1626) Because Mr. Rhodes had only reported presumptive blood, Mr. Carhart focused on demonstrating the way the blanket could have became contaminated. (T. 1627-29) Further he did not know that blood spatter expert testimony was available. (T. 1691)

Mr. Carhart attempted to find the scene of the crime and employed an investigator to look for it. (T. 1629-31) However, he could not because Defendant was unable to provide sufficient information about the location. (T. 1630)

Mr. Carhart stated that Defendant's version of events was that he drove north on Biscayne Boulevard, planning to go over the Julia Tuttle Causeway. (T. 1657-58, D.A.R. 3242-44) When he reached 163rd Street, he realized that he had gone too far and tried to get back via West Dixie Highway. (T. 1658-59, D.A.R. 3242-45)

The investigator also looked for the waiter who had served

Defendant and Ms. Kischnick shortly before the crime. (T. 1633) However, he had left the restaurant and moved. (T. 1633) Because the State did not dispute Defendant's version of what occurred at the restaurant, Mr. Carhart felt the matter was less relevant. (T. 1676-77)

Mr. Carhart decided that Defendant should be advised to testify after he learned that one of the jurors had allegedly told a journalism student that the other jurors thought Defendant was guilty. (T. 1634-35) He also considered the atmosphere in the courtroom and how he felt trial had gone in making this decision. (T. 1635-36)

Mr. Carhart did receive a letter from an inmate regarding Mr. Smykowski's veracity. (T. 1637-38) He discussed it with Defendant and chose not to call the witness because of his criminal record. (T. 1637-39) Further, he spoke to Defendant about other witnesses who might provide testimony regarding Mr. Smykowski. (T. 1690) He chose not to call these witnesses because Smykowski's reasons for testifying were obvious and these witnesses were not present when Defendant spoke to Smykowski. (T. 1711)

Kevin Digregory, the lead prosecutor in this matter, testified that all of the crime scene photographs were provided to the defense. (T. 1795-1800)

He stated that Mr. Smykowski's intermediary requested that Janet Reno contact the federal magistrate and asked that he be

allowed to remain. (T. 1801-02) However, Mr. Digregory did not speak to Ms. Reno. (T. 1802) He did not recall Smykowski asking for anything or being promised anything in exchange for his testimony. (T. 1803)

After oral and written argument of counsel, (T. 1895-1958, R. 5883-5999, 6000-6024), the post-conviction court entered an exhaustive, 56-page order on November 4, 1996, rejecting Defendant's claims as to the guilt phase and re-affirming Defendant's conviction. (R. 6025-71).

SUMMARY OF THE ARGUMENT

The lower court erred in vacating Defendant's sentence. The trial court did independently weigh the aggravating and mitigating circumstances. Further, there was no prejudice from the ex parte contact with the prosecutor.

Counsel was not ineffective during the penalty phase. Counsel did investigate Defendant's background, which revealed nothing helpful. Defendant did not want counsel to do further investigation or present any mitigation. Further, a jury who had just found that Defendant murdered the victim for money would not be terribly impressed with testimony that they had a good relationship from people who barely knew them. Evidence that Defendant was a good person would not have affected the outcome either, as it was previously considered by the trial judge, who independently

concluded that it was “far outweighed” by the aggravators.

The lower court properly rejected Defendant’s claim that his counsel was ineffective with regard to the State’s experts. The points Defendant says should have been elicited were elicited at trial.

Trial counsel was also not ineffective with regard to the investigation or presentation of the factual witnesses. The evidence was present at trial.

The lower court properly rejected the claims of newly discovered evidence. The evidence was incredible, cumulative impeachment and inadmissible.

The alleged *Brady* materials were disclosed, irrelevant, nonexistent, and known to Defendant. Further, some of these issues were raised on direct appeal and could and should have been raised on direct appeal.

The suppression issue was raised on direct appeal. The lower court properly determined that it could not be relitigated here.

The acquittal on the federal gun charges was irrelevant and did not show that Defendant had no ulterior motives in assigning the insurance benefits or making statements.

The issue of the propriety of the State’s comments was already litigated. Further, the record reflects that Defendant was a liar, so there was no impropriety in calling him one.

Defendant does not have a right to a fair cross section on his

petit jury. Further, he did not show that counsel struck any of the jurors he wanted seated, and African Americans sat. Defendant also failed to show that his counsel was ineffective in the manner in which he cross examined the State's witnesses.

ARGUMENT

I.
THE LOWER COURT ERRED IN VACATING DEFENDANT'S SENTENCE.

A. THE TRIAL COURT DID INDEPENDENTLY WEIGH THE AGGRAVATING AND MITIGATING FACTORS, *SPENCER* DOES NOT APPLY RETROACTIVELY AND NO PREJUDICE WAS SHOWN FROM THE EX PARTE CONTACT.

On the State's appeal, Defendant contends that the trial judge's sentence was not independent. The evidence, however, reflects that the weighing process and the sentence were in accordance with the requirements of *Patterson v. State*, 513 So. 2d 1257 (Fla. 1987), which was applicable at the time of Defendant's 1988 sentencing.

As noted in the State's initial brief, the prosecutor prepared a proposed sentencing order including the same two (2) aggravators (pecuniary gain and CCP), that he had previously argued to the judge and jury in the presence of the defendant and defense counsel. The trial judge, nonetheless modified the proposed aggravators, substantially revising the findings on CCP, by deleting two paragraphs thereon in the proposed order. Moreover,

the proposed order did not include any mitigating factors. The trial judge, however, again revised the proposed order and found that a mitigating factor - the defendant having been "a good person"[3] - was established through affidavits even though none of the affiants had testified. Having found this mitigating factor, the sentencing judge then independently concluded that, "[t]he aggravating circumstances far outweigh the non-statutory mitigating circumstance." (R. 2261) This language, too, was not contained in the proposed order prepared by the prosecutor; as noted, the proposed order did not include any mitigation. *Compare* R. 2261 and R. 2272. Finally, the judge announced the sentence and the sentencing order was entered after a hearing where the defense was allowed an opportunity for both argument and presentation of evidence. (D.A.R. 5309)

The above historical evidence derived from the differences in language between the proposed order and the final order, both of which were in existence since the time of the 1988 sentencing, demonstrates that the critical "weighting process" at issue in *Patterson* was in fact independent in the instant case. *Patterson*, 513 So. 2d at 1262. The above evidence of independent sentence and weighing process was further corroborated by the sentencing judge's testimony at the evidentiary hearing below. The judge testified

[3] The testimony at the post-conviction evidentiary hearing below was to the same effect as will be seen in the ensuing section B of this argument.

that the sentencing order reflected his own conclusions and findings. (T. 1724-25) The record thus unequivocally reflects that the requirements of *Patterson* were complied with.

As to the ex-parte contacts between the judge and prosecutor, Defendant has relied upon *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), *Rose v. State*, 601 So. 2d 1181 (Fla. 1991), and their progeny. Said cases, however, were decided after the 1988 sentencing herein. The requirements of *Spencer* are not retroactive. *Armstrong v. State*, 642 So. 2d 730, 738 (Fla. 1994). Indeed, this Court has specifically held that such ex parte contacts do not "automatically" entitle a defendant to a resentencing in cases such as this where the original sentencing occurred prior to *Spencer*. *Card v. State*, 652 So. 2d 344, 345 n.2 (Fla. 1995). Prejudice must be demonstrated.

In the instant case, no prejudice has been shown. The two aggravating factors found were the same as those previously argued by the prosecutor before the judge and jury, in the presence of the defense. The existence of these aggravating factors was not disputed before the jury or judge, or on direct appeal, nor, indeed, in these post-conviction proceedings. Moreover, this Court, on direct appeal, found said aggravators to have been proven beyond a reasonable doubt. *Riechmann*, 581 So. 2d 133, 141 (Fla. 1991)("We find the evidence clearly sufficient to support the aggravating factors applied."). Furthermore, as noted above, the

sentencing judge independently concluded that the aggravating circumstances "far outweigh" the nonstatutory mitigating evidence. On direct appeal, this Court, affirmed and approved this conclusion. *Riechmann*, 581 So. 2d at 141 ("We find no error in the trial court's conclusion that '[t]he aggravating circumstances far outweigh the nonstatutory mitigating circumstances.'"). No prejudice has been demonstrated. The State thus respectfully submits that the lower court's grant of resentencing before a new judge and jury was erroneous and in violation of *Patterson*, *Armstrong*, and *Card*.

B. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRESENT THE INSUBSTANTIAL AMOUNT OF MITIGATION SHOWN AGAINST DEFENDANT'S WISHES.

With respect to the ineffective assistance of counsel at the penalty phase claim , Defendant apparently concedes that the only proper evidence at issue herein is the testimony of the witnesses who actually testified at the evidentiary hearing below. As noted in the State's initial brief, the affidavits presented in the court below cannot be relied upon because the parties did not stipulate to these and they were entered over the State's objection. *Routly v. State*, 590 So. 2d 397, 401 n.5 (Fla. 1991). Defendant has not disputed this. It is further undisputed that, at best, the testimony from the actual witnesses at the evidentiary hearing was to establish: 1) Defendant had a "good, loving relationship" with the victim, and, 2) Defendant was a "good person." The State, in

its initial brief, detailed the witnesses' lack of knowledge of the relationship between Defendant and victim, and the damaging information disclosed by some of them. Defendant, however, contends that the credibility and import of these witnesses' testimony was a matter for the sentencing jury to decide (Appellee/Cross-Appellant's Brief at p. 104) The State disagrees and respectfully submits that the lack of credibility and import of said testimony has a direct bearing on the determination of the alleged deficient conduct by trial defense counsel, not to mention the probability of a different outcome, as required in *Strickland v. Washington*, 466 U.S. 668 (1984); *see also Jones v. State*, 709 So. 2d 512, 521-22 (Fla. 1988); *Blanco v. State*, 702 So. 2d 1250, 1251 (Fla. 1997); *Parker v. State*, 641 So. 2d 369, 376 (Fla. 1994), *cert. denied*, 513 U.S. 1131 (1995).

First, with respect to the defendant and victim having had a "good relationship," defense counsel, during the guilt phase of the trial, presented such evidence and argued it during his closing argument. The jury rejected this and found Defendant guilty of the premeditated murder of the victim. The State respectfully submits that rearguing a "good, loving relationship" during the penalty phase, when the jury had obviously found Defendant murdered the victim for insurance money, is akin to arguing that a defendant who has murdered his parents deserved mercy because he is an orphan. Trial counsel cannot be deemed deficient for not having reargued a

good, loving relationship during the penalty phase.

Moreover, the post-conviction testimony presented reflects that none of the witnesses presented had a reasonable knowledge of the "relationship" between Defendant and victim. None of these witnesses knew that Defendant was the victim's pimp. The majority of the witnesses had never even spoken with the victim so as to be in a position to assess any relationship. As noted in the State's initial brief, two of these witnesses, Defendant's landladies, testified that the extent of their knowledge of Defendant was from conversations which occurred when he would pay his rent. Neither of these witnesses had even spoken with the victim. Likewise, Defendant's two ex-girlfriends (one of whom was a prostitute and had previously been convicted of committing perjury on Defendant's behalf), had never spoken with the victim nor even observed Defendant and victim together. Defendant's friend, Mr. Walitzki, testified that he did not know much about the victim and was unaware that she was a prostitute. Indeed, this witness testified that he had allowed Defendant to live with him when the victim and Defendant were separated due to unspecified difficulties in their relationship. Finally, the last two witnesses, Defendant's hairdresser and the latter's wife, testified that their knowledge of the relationship was based upon observing the victim and defendant together when the defendant would pick up the victim at the salon after she had her hair done; these observations were in

the context of also observing 2,500 other regular customers during the course of their business. The State respectfully submits that trial counsel's conduct in not presenting additional evidence of a "good relationship" through the above post-conviction witnesses was not deficient, and such testimony did not reasonably affect the outcome of sentencing as required in *Strickland*.

With respect to Defendant-was-a-"good person" testimony by the above post-conviction witnesses, the State again submits that the witnesses' lack of in-depth knowledge about Defendant's character demonstrates that trial counsel's conduct was not deficient. Moreover, as detailed in the State's initial brief, testimony as to Defendant's character opened the door to emphasis on the damaging information as to Defendant's prior extensive history of crime and fraud. Trial counsel's conduct must also be assessed in light of the circumstances of the 1988 sentencing. At the time, Defendant, who had actively participated in all aspects of his defense, was adamant in maintaining his innocence even after conviction and through the penalty phase. (D.A.R. 5288) Indeed, Defendant was willing to altogether waive the jury sentencing recommendation. (D.A.R. 570) Defense counsel nonetheless investigated Defendant's background prior to following his client's wishes not to present any evidence at the penalty phase. At the evidentiary hearing, trial counsel testified that he had contacted Defendant's family members. When asked if they had provided any helpful information,

trial counsel responded, "they were not really available to me." (T. 1652) Trial counsel's testimony below is borne out by the fact that, despite an opportunity for a period of several years after Defendant's conviction and sentence, post-conviction counsel was also unable to produce a single family member from Defendant's rather large family at the evidentiary hearing. Trial counsel also testified that Defendant had never expressed any desire to call the witnesses presented at the evidentiary hearing.[4] (T. 1653-54) Moreover, every one of the witnesses testified that, although they were in contact with Defendant during the 1988 trial, Defendant had never asked them to testify on his behalf. Trial counsel cannot be faulted for following his client's wishes after having investigated Defendant's background to the best of his ability under the circumstances created by the defendant. *Koon v. Dugger*, 619 So. 2d 246, 249 (Fla. 1993); *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985).

Most importantly, the "good person" testimony presented below does not demonstrate any probability of change in the outcome of the 1988 sentencing. The above witnesses' testimony as to Defendant being a "good person" was presented to the trial judge, through affidavits and minus the attendant damaging information

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[4] Defendant's argument that he "gave trial counsel a list of German witnesses to contact," *see* Appellee/Cross-Appellant's Brief at 103, is contrary to the only testimony presented on this issue.

elicited at the evidentiary hearing, at the 1988 sentencing. The trial judge accepted the "good person" evidence as a nonstatutory mitigating circumstance. As noted previously, however, the trial judge independently concluded that the aggravating circumstances "far outweigh" the "good person" mitigation. This Court, on direct appeal, also agreed with this conclusion. *Riechmann*, 581 So. 2d at 141. It is thus abundantly clear that no prejudice has been demonstrated.

The State recognizes that the lower court stated that the testimony at issue would have changed the outcome, as the sentencing jury was "ambivalent" about their recommendation based upon their numerical vote for the death penalty. The 1988 sentencing record, however, does not bear out any ambivalence; the jury recommended death by a vote of 9 to 3. Moreover, even in a jury override case, the mere presentation of "good person" testimony at a post-conviction hearing does not provide a reasonable basis for ordering a resentencing. *State v. Bolender*, 503 So. 2d 1247, 1249 (Fla. 1987) ("That the mere presentation of mitigating evidence [good person testimony that had not been presented at the original sentencing] precludes imposition of the death penalty is not and never has been a correct statement of this state's law."). The State thus respectfully submits that the lower court erroneously substituted its opinion for that of the original sentencer and this Court.

II.

THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIMS REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE.

Defendant asserts that the trial court erred in denying his claims of ineffective assistance of counsel at the guilt phase. In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court announced the standard under which claims of ineffective assistance must be evaluated. A defendant must demonstrate both that counsel's performance was deficient, and that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the defendant of a trial whose result is reliable.

Deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and a fair assessment of performance of a criminal defense attorney:

> requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that criminal defense counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 694-695.

Further, strategic choices made by a criminal defense counsel after thorough investigation of law and facts relevant to plausible options are "virtually unchallengeable." They may only be overturned if they were "so patently unreasonable that no competent attorney would have chosen it." *Haliburton v. State*, 691 So. 2d 466, 471 (Fla. 1997)(quoting *Palmes v. Wainwright*, 725 F.2d 1511, 1521 (11th Cir. 1984)(quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983))).

Even if a criminal defendant shows that particular errors of defense counsel were unreasonable, the defendant must show that they actually had an adverse effect on the defense in order to establish ineffective assistance of counsel. The test for prejudice requires the defendant to show that, but for counsel's unprofessional errors, the result of the proceeding would have been different, or, alternatively stated, whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. *Hill v. Lockhart*, 474 U.S. 52 (1985).

1. Trial counsel was not ineffective for failing to challenge the blood spatter and gunshot residue evidence.

Defendant asserts that the lower court erred in rejecting his claim that defense counsel was ineffective for failing to rebut the State’s experts. The lower court denied the claim that counsel should have called a blood spatter expert because the points that

Mr. James, Defendant's post conviction expert, testified to were elicited from Mr. Rhodes, the State's expert at trial, on cross. Additional testimony on these points would have not affected the outcome of the proceedings and Defendant failed to show that a defense expert would have been available at the time of trial. (R. 6034-48)

Defendant asserts that Mr. James' "flick test" corroborated Defendant's trial testimony that the blood on the driver's door came from flicking blood off his finger while driving. However, Mr. James was asked if his flick test would corroborate Defendant's testimony regarding flicking his fingers at the evidentiary hearing. (T. 525) He replied:

> I never inferred that he was -- anyone was sitting or that it was even [Defendant] that produced those blood stains. Don't forget the door can also have been opened. The flicking of the finger could have occurred at any point in time. I am not inferring it occurred when someone was in the driver's seat.

(T. 525) After Defendant's trial testimony on this point was read to Mr. James, he was asked if that was the flick he was referring to and responded:

> No, I didn't. We didn't make any specific references, just the flicking of the hand in general. You know, if [Defendant] said that, that is what he said.
> * * * *
> I believe we just got to the point where that was an example of flicking the blood. We didn't limit it to [Defendant's] flicking blood. It could be anybody who was in contact of the victim exiting or entering the vehicle

> after the victim was located. We don't know when that occurred, if it even occurred like that. I gave you an example of how small spots of blood can be produced. I am not trying to attach to any specific event. You can't.

(T. 526-27) Thus, it cannot be said that Mr. James' flick test corroborated Defendant's testimony.

Defendant next claims that Mr. James' testimony contradicted the trial testimony that the passenger's window of Defendant's car was opened 3 and 3/4 inches. Mr. James, however, agreed that at the time when this blood was deposited on the window it was no more than 3 and 3/4 inches open. (T. 528-31) He stated that this blood was either back spatter or exhaled blood. (T. 450-52) He also stated that the lack of exhaled blood on the right side of the victim's body indicated that her head was to the left at the time she exhaled. (T. 556-57) As such, Mr. James' testimony does not rebut the fact that the blood on the passenger's window was deposited at the time of the shooting or that the window was 3 and 3/4 inches open.

The only real areas of disagreement between Mr. Rhodes, the State's trial expert, and Mr. James concerned the blood on the driver's door and the blood on the blanket. However, these points were covered during the cross examination of Mr. Rhodes at trial by defense counsel.

Mr. James stated that the blood on the blanket and the driver's door could not be back spatter because it was in the wrong

direction. (T. 445-46) Mr. Rhodes had stated that he had no explanation of how back spatter went in that direction, that deflection was possible, but not probable, and that he did not know how it got there. (D.A.R. 3821, 3832) Mr. James stated that these stains did not prove that Defendant was not in the driver's seat at the time of the shooting. (T. 484) Mr. Rhodes had agreed during his trial testimony. (D.A.R. 3930)

Mr. James stated that the blood on the blanket may not have been the victim's blood. It could have been animal blood or any number of other substances and it could not be said when it got on the blanket. (T. 431-32) These areas were covered during the cross examination of Mr. Rhodes, who agreed with defense counsel. (D.A.R. 3866-68, 3881, 3938-39) Mr. James stated that the blood may have been smeared blood because the fibers in the blanket may have broken the blood into small spots. (T. 475) Mr. Rhodes had conceded this on cross. (D.A.R. 3860-62) Mr. James stated that the blood on the bottom of the blanket was unexplainable because high velocity blood spatter would not have penetrated through the blanket. (T. 475-76) Mr. Rhodes had agreed on cross. (D.A.R. 3877-78, 3898)

With regard to the driver's door, Mr. James testified it was not possible to state when these stains were made. Mr. Rhodes agreed. (D.A.R. 3832) While Mr. James stated that he did not think these stains could be related to a common point of origin, Mr. James never saw the stains. (T. 467-70) He merely relied on a

description of the stains from a report. (T. 518) However, he conceded that the description of the directionality of small stains was difficult to determine. (T. 518-21) Further, Mr. Rhodes acknowledged that the string test assumed that the blood traveled in a straight line and that he could not say that the blood had done so. (D.A.R. 3943)

As the points to which Mr. James would have testified were presented, the lower court properly found that counsel was not ineffective for not calling him. *See Rose v. State*, 617 So. 2d 291, 297 (Fla. 1993), *cert. denied*, 501 U.S. 903 (1993)(counsel not ineffective for failing to call defense expert where cross examination of State's expert elicited same material); *see also Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990).

Further, had Defendant called Mr. James at trial, he would have contradicted Defendant's testimony. Mr. James stated that he did not find exhaled blood on Ms. Kischnick's right side. (T. 556-57) He did find exhaled blood on her left leg, the center console of the car, Defendant's right leg and Ms. Kischnick's left shoulder. (T. 456-57, 480) Mr. James stated that Ms. Kischnick's head was toward the left when she was still seated upright and after she was reclined. (T. 539-46) At trial, Defendant testified that Ms. Kischnick's head was toward the right. (D.A.R. 4490-94, 4499) As this was part of Defendant's attempt to discredit the State's theory of how the blood got on the blanket and the driver's

door, it would not have been helpful. As calling Mr. James would have opened the door to this impeachment of Defendant, counsel could not be considered ineffective for failing to present it. *Breedlove v. State*, 692 So. 2d 874, 877-78 (Fla. 1997); *Valle v. State*, 581 So. 2d 40, 49 (Fla.), *cert. denied*, 502 U.S. 986 (1991); *Medina v. State*, 573 So. 2d 293, 298 (Fla. 1990).

The jury did not find the evidence relied upon by Defendant persuasive in that it depends on contamination of the driver's door and the blanket. Defendant's explanation of the contamination was the flicking of his fingers. However, Defendant's own post conviction expert did not support this thesis. Defendant's post conviction expert instead suggested that personnel at the crime scene contaminated the evidence. However, this assertion was never proven; no testimony or proffer to support such a conclusion was made in the court below.

Additionally, Mr. Rhodes first testified on deposition about the blanket on July 7, 1988. Prior to that he had testified on deposition about the blood specks on the driver's door on May 24, 1988 and June 29, 1988. (R.4783-4917, 6038-39) Trial in this matter commenced on July 13, 1988. (D.A.R. 1667) The rush to trial was at Defendant's insistence. (R. 4999) Further, Defendant had already taken a continuance after the State had its witnesses travel from Germany. (T. 1422-23) As such, it is highly unlikely that Defendant would have gotten another continuance this close to the trial date

in order to obtain an expert.

Mr. James testified that he believed experts would be available "depending upon scheduling." (T. 484) Given the limited time available to obtain an expert after the need for one appeared, the lower court properly also rejected the claim because Defendant did not prove that an expert would have been available. *Elledge v. Dugger*, 823 F.2d 1439, 1466 (11th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988).

Defendant next claims that his trial counsel was ineffective in failing to use authoritative literature to impeach the testimony of Gopinath Rao, the State's gunshot residue expert at trial. He claims that this impeachment would have shown that several conclusions could be drawn from the gunshot residue found on Defendant's hands: Defendant was near a gun when fired, handled a recently fired gun or fired a gun.[5]

Defendant also appears to be asserting that counsel was ineffective for not calling an expert to rebut Mr. Rao's testimony. However, counsel did call an expert to rebut Mr. Rao's testimony. As such, counsel cannot be deemed ineffective for failing to do what he in fact did.

At trial, Mr. Rao admitted that gunshot residue could come

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[5] Defendant also claims that Mr. Cooper had never heard of unique particles affecting the level of certainty of gunshot residue analysis. However, Mr. Cooper testified that unique particles did affect the level of certainty of gunshot residue analysis. (T. 607)

from handling a recently fired gun. (D.A.R. 3615) He also conceded that having one's hand within one to three feet of a gun when it was fired would leave gunshot residue on one's hands. (D.A.R. 3617) He acknowledged that a gunshot fired through a passenger's window would leave gunshot residue throughout the car and would reach the driver's side. (D.A.R. 3617-22) Mr. Rao stated that having gunshot residue on one's hands could come from handling a gun, being near a gunshot or firing a weapon, and that it did not necessarily mean one was a shooter. (D.A.R. 3625)

In addition, defense counsel presented his own expert, Dr. Vincent Guinn, at trial.[6] He testified that gunshot residue would cover everything in a car if a bullet was fired into it. (D.A.R. 4812-14, 4829-30) He stated that gunshot residue would be found on the person seated in the driver's seat. (D.A.R. 4830) He stated that gunshot residue could not conclusively prove someone fired a gun. (D.A.R. 4838-39) He opined that Mr. Rao's conclusion, that he could say to a reasonable scientific probability that Defendant had shot a gun, had no scientific support. (D.A.R. 4851) He stated that the only thing that could be concluded was that one was near a gun being fired or had fired a gun. (D.A.R. 4850)

Thus, both of the experts agreed that gunshot residue could

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[6] Defendant claims that the use of documentation from the FBI would surely have influenced the jury. However, Dr. Guinn developed the method of gunshot residue analysis adopted by the FBI. (D.A.R. 4785)

have come from being in the vicinity of a gunshot. As such, there was no battle of the experts on this point to be resolved by resort to literature. The lower court, therefore, properly found that counsel was not ineffective for failing to present cumulative testimony. *Valle v. State*, 705 So. 2d 1331, 1334-35 (Fla. 1997); *Provenzano v. Dugger*, 561 So. 2d 541, 545-46 (Fla. 1990); *Glock v. Dugger*, 537 So. 2d 99, 102 (Fla. 1989); *Card v. State*, 497 So. 2d 1169, 1176-77 (Fla. 1986), *cert. denied*, 481 U.S. 1059 (1987).

The reason the jury did not accept these other alternatives was that Defendant had more gunshot residue on his hands than the victim had on hers. (D.A.R. 3533-3536, 3540-46) Ms. Kischnick, the passenger, was closer to the gunshot than anyone in the driver's seat could have been. Further, movement causes gunshot residue to be removed. (D.A.R. 3546-47) Ms. Kischnick died where she sat. Defendant moved considerably, including driving a car and touching Ms. Kischnick's head. (D.A.R. 4490-97) Even Defendant's post conviction expert could not offer an explanation for this difference, except to say that Ms. Kischnick's hands were too far from the gunshot. (T. 620) Thus, the jury did not credit these other possibilities, and accepted the State's expert's testimony that Defendant was the shooter to a reasonable scientific probability.

Defendant next assails his counsel for failing to present evidence that the bullets used were common and more than three

types of guns could have fired the fatal shot. However, Mr. Quirk testified at trial that the bullets were common. (D.A.R. 2971-72) As such, counsel cannot be deemed ineffective for failing to do what he did or for failing to present cumulative evidence. *Valle v. State*, 705 So. 2d at 1334-35; *Provenzano*, 561 So. 2d at 545-46; *Glock*, 537 So. 2d at 102; *Card*, 497 So. 2d at 1176-77.

With regard to the guns, Defendant alleges that counsel should have confronted Mr. Quirk with the fact the FBI database would have revealed 14 types of guns that could have fired the fatal shot of which 11 were common guns instead of the 3 types of gun Mr. Quirk found in the Miami database. However, Mr. Cooper, Defendant's post conviction expert, added an error factor onto the measurements taken by Mr. Quirk in developing his list of 14 guns. (T. 596) Mr. Quirk had already added an error factor to his measurement. (T. 1592) As such, Mr. Cooper's list included guns that did not truly fit the measurements. (T. 1562-67) Further, Mr. Cooper's list was not generated from a database from 1987-1988, and Mr. Quirk testified that not all of the guns on the list may have been available in 1987. (T. 1572) In fact, Mr. Cooper was unaware of whether he could have produced the same list in 1987 or 1988. (T. 625-26) As such, it is not possible to say from the evidence presented that Mr. Cooper's list could have been presented at the time of trial. Since Defendant failed to prove that this expert testimony would have been available at trial, the lower court

properly rejected the claim. *See Elledge v. Dugger*, 823 F.2d 1439, 1466 (11th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988).

Even if the testimony could have been obtained, the inclusion of this evidence does not demonstrate a reasonable probability that the results of the trial would have been different. Mr. Quirk's database was drawn from Miami, the site of the crime. Two of the guns Defendant possessed were still on the list. The fact that more possible guns could have fired the fatal shot has no effect on the gunshot residue, the blood spatter, Defendant's financial motive, the possession of the type of bullet used or Defendant's statements to Mr. Smykowski. Thus, the lower court properly denied this claim. *Strickland*.

2. Counsel was not ineffective for failing to investigate the facts of the case.

Defendant asserts that his trial counsel was ineffective for failing to investigate his version of the events, to locate the waiter who served Defendant and the victim shortly before the crime, and the newly found alleged eyewitnesses. The lower court rejected this claim finding that Defendant had failed to show deficiency or prejudice. (R. 6048-51)

With regard to the waiter, defense counsel did attempt to locate the waiter. He was simply unable to locate him because the waiter had moved. Thus, counsel cannot be deemed ineffective for failing to do what he in fact did. While Defendant claims that counsel should have investigated the waiter earlier, Defendant did

not show that an earlier investigation would have made the waiter available at trial. *See Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983), *cert. denied*, 467 U.S. 1220 (1984)(burden on defendant to prove claim).

Further, Defendant asserts that the waiter could have testified that Defendant and Ms. Kischnick were in a good mood at the restaurant and that they left there between 10 and 10:30 p.m. However, the videotape Defendant took of himself and Ms. Kischnick that evening was presented to the jury. Any testimony regarding their mood would have merely been cumulative to what the jury saw on the tape. Additionally, there was no dispute regarding when Defendant and Ms. Kischnick left the restaurant. As such, Mr. Carhart cannot be deemed ineffective for failing to present this cumulative evidence. *Valle v. State*, 705 So. 2d at 1334-35; *Provenzano*, 561 So. 2d at 545-46; *Glock*, 537 So. 2d at 102; *Card*, 497 So. 2d at 1176-77.

With regard to the newly found alleged eyewitnesses, Mr. Carhart testified that he had not investigated the alleged scene of the crime because Defendant was unable to say where the crime occurred. Mr. Carhart also stated that the Defendant's version of the events at the time was that he had gotten lost in the West Dixie Highway area near 163rd Street. (T. 1657-59, D.A.R. 3242-45) The alleged eyewitnesses now contend that the crime occurred just west of Biscayne Boulevard on 63rd Street, about 100 blocks away.

(T. 1173-78, 1201-07)

Additionally, Mr. Stitt testified that he actively hid the fact that he had allegedly witnessed a shooting. He stated that he avoided the area for a month after the crime. (T. 1178-79) Mr. Williams also stated that he did not wish to be involved in the investigation at the time. (T. 1238) Given this testimony, it cannot be said that had counsel investigated in the area of 63rd Street, around 100 blocks from where Defendant said the crime was committed, he would have been able to produce these witnesses at trial, as the lower court found. Thus, the lower court properly rejected this claim. *See Cave v. State*, 529 So. 2d 293 (Fla. 1988)(counsel not ineffective for failing to present witnesses unwilling to testify).

Even if counsel could have found these witnesses, their testimony was contradictory, and the witnesses were simply not credible. *See* Issue II(a). Defendant asserts that their testimony would not have been contradictory if they had been found in 1988. *See* Appellee/Cross-Appellant's Brief at 79. However, Mr. Williams did not claim any memory problems. He simply stated that the truth changed to suit his purposes. While Defendant contends that the witnesses' testimony would not have been contradictory at the time of trial, there is no evidence regarding how the witnesses' testimony would have been different. Thus, Defendant's claim that it would have been better for him is utter speculation. The lower

court, therefore, properly rejected this claim. *Strickland*.

3. Counsel was not ineffective for failing to investigate times and distances.

Defendant next asserts that the lower court improperly rejected his claim that counsel was ineffective for failing to present the waiter, for failing to show that Defendant had not driven a great distance after Ms. Kischnick was shot and for failing to present evidence regarding the likelihood of getting lost between 36th Street and 79th Street and Biscayne and regarding the character of this neighborhood.

With regard to the waiter, as was explained in the discussion of the last claim, counsel did attempt to find the waiter and the subject of his proposed testimony was presented. *See* Issue II(2) Thus, counsel was not ineffective for failing to present this testimony.

Further, the testimony does not support a claim that Defendant could not have driven for an extended distance. Defendant's present claim, that he only had enough time to drive directly to his new crime scene and directly therefrom to the spot where the car stopped, is based on an investigation conducted during the post conviction proceedings. As previously noted, this new crime scene was not supported by the evidence. However, at the time of trial, the State had evidence that Defendant could have reached the scene where the car stopped through any number of ways, some of which require a great deal of driving. (T. 1457-58) In fact, the State

had evidence that at that time on a Sunday night in 1987, one could drive up Biscayne to 163rd Street, down West Dixie Highway (as Defendant claimed at the time), over any of four different causeways, and arrive at the scene in the allotted time. (T. 1457-58, D.A.R. 3242-45) Defense counsel was informed that the State had this evidence. (T. 1458) Thus, the lower court properly rejected this claim.

With regard to the neighborhood between 36th Street and 79th Street, defense counsel had no reason to present any evidence regarding this neighborhood. At the time, Defendant's story was that he had driven to 163rd Street on Biscayne and turned down West Dixie Highway and gotten lost in that area. (T. 1657-59, D.A.R. 3242-45) As West Dixie Highway ends around 119th Street (D.A.R. 409), counsel would have had no reason to present evidence regarding an entirely unrelated portion of Miami. Thus, the lower court properly rejected this claim.

Finally, Defendant claims that the lower court improperly rejected his claim that counsel should have presented testimony that he was distraught at the crime scene and that he had been drinking. However, as the lower court properly found, defense counsel did present this evidence at trial. (R. 6048-51)

Officer Kelly Reid, the first officer on the scene, described Defendant as having a very strained expression and appearing upset. (D.A.R. 2458, 2481-82) Officer Charles Serayder, who arrived

shortly after Officer Reid, described Defendant as distraught and asking the officers to help Ms. Kischnick. (D.A.R. 2681-82) Detective Hanlon testified that Defendant had stated that he had been drinking. (D.A.R. 3417) Dr. Vila testified that the victim had a blood alcohol level around .07. (D.A.R. 2933) A videotape of Defendant and the victim taken while they were at Bayside was played for the jury. (D.A.R. 4258-69) Thus, counsel cannot be deemed ineffective for failing to present that which in fact was presented. *Valle*, 705 So. 2d at 1334-35; *Provenzano*, 561 So. 2d at 545-46; *Glock*, 537 So. 2d at 102; *Card*, 497 So. 2d at 1176-77.

4. Counsel was not ineffective for failing to present evidence regarding Defendant and Ms. Kischnick's relationship.

Defendant next asserts that his counsel was ineffective for failing to present evidence regarding the relationship between Ms. Kischnick and Defendant, and regarding Defendant's employment.[7]

Defendant asserts that counsel should have presented the "37 suppressed German witness statements." However, if the statements were indeed suppressed, counsel could not have had access to this information and cannot be ineffective for failing to present them.

Further, Defendant does not assert what the 37 witness statements said. At the evidentiary hearing and on this appeal, he claimed that these statements had been lost. Further, he was only

[7] Defendant also discusses the victim's physical condition. Defendant raised this claim independently in Issue II(10). As such, the State will rely on its argument in Issue II(10).

able to present 7 witnesses at the evidentiary hearing. None of these witnesses knew what Defendant did for a living or where his money came from. Additionally, while several of the witnesses claimed that the relationship appeared good, they admitted on cross examination that the opinion was based on casual observation; most of the witnesses had never spoken with the victim. Further none of these witnesses were familiar with the circumstances of Defendant's employment.

Defendant also relies upon the affidavit of Ernst Steffen, stating that the relationship was good. However, Mr. Steffen did not appear at the evidentiary hearing. Thus, the lower court should not have considered the affidavits. *Routly v. State*, 590 So. 2d 397, 401 n.5 (Fla. 1991)("absent stipulation or some other legal basis, we cannot see how the affidavits [presented at a post-conviction hearing] can be argued as substantive evidence"). Further, Mr. Steffen testified at trial that Defendant was the victim's pimp and that he lived off of her. (D.A.R. 2695-96) Thus, his definition of a "good relationship" is skewed.

At trial, the State presented the testimony of Regina Kischnick, the victim's sister, who stated that she observed Defendant criticizing the victim and that the victim was content but not happy in her relationship with Defendant. (D.A.R. 2766, 2770) Dina Mohler, the victim's co-worker, testified that the victim loved Defendant, but that they did not get along well.

(D.A.R. 3194) Additionally, Defendant himself admitted that he had written a letter, claiming that the victim supported him financially. (D.A.R. 4680)

Given the weight of this testimony, new witnesses who only saw the victim with the Defendant when they were walking their dogs or when they left a hair salon cannot be said to have rebutted this testimony. Further, the State also presented evidence of gunshot residue on Defendant's hands, of blood spatter patterns, of Defendant's statements to Mr. Smykowski and of a financial motive. As such, it cannot be said that but for the failure to present these witnesses, there is a reasonable probability that the outcome would have been different. Thus, the lower court properly found that defense counsel was not ineffective for failing to do so. *Strickland.*

5. Counsel was not ineffective for failing to investigate Mr. Smykowski.

Defendant next asserts that his counsel was ineffective for failing to investigate the background of Mr. Smykowski. Defendant asserts that had he done so, counsel would have learned that Mr. Smykowski had a bad reputation for truthfulness at MCC. He also asserts that the lower court improperly determined that the failure to call witnesses in this regard was a tactical decision.

However, Mr. Carhart testified at the evidentiary hearing that he had received the letter from Mr. Lohse prior to trial. (T. 1637-38) He also stated that he discussed Mr. Lohse and other witnesses

regarding Mr. Smykowski's reputation with Defendant. (T. 1637-39, 1690) As Mr. Carhart was aware of the availability of this testimony, he cannot be faulted for failing to investigate it. *Burger v. Kemp*, 483 U.S. 776, 794 (1987).

Mr. Carhart stated that he then made the decision not to call any such witnesses because of their criminal history and because the reason why Mr. Smykowski was testifying was clear. (T. 1637-39, 1711) Further, Mr. Smykowski was Defendant's cellmate and stated that his conversations with Defendant occurred when they were alone in the cell. As such, Mr. Carhart did not feel that these witnesses could directly refute Mr. Smykowski's testimony. (T. 1711) Thus, the lower court's determination that the failure to call these witnesses was a strategic decision is directly supported by Mr. Carhart's testimony that it was. (R. 6049-50)

Further, strategic decisions of counsel are virtually unchallengeable via a claim of ineffective assistance of counsel. See *Haliburton*, 691 So. 2d at 471; *Palmes*, 725 F.2d at 1521; *Adams*, 709 F.2d at 1445. As the lower court properly found that this was a strategic decision, it properly denied the motion on this basis.

Defendant also alleges that the State suppressed evidence of a deal between it and Mr. Smykowski that has recently been discovered. Defendant does not explain how this rendered counsel ineffective. Further, at trial, testimony was elicited that Mr. Smykowski hoped that the prosecutor would write a letter on his

behalf and defense counsel argued that he was incredible because of the desire for this letter. As such, counsel cannot be deemed ineffective for failing to do what he did.[8]

6. Counsel was not ineffective for failing to introduce Defendant's exculpatory statement.

Defendant next alleges that his counsel was ineffective for failing to introduce Defendant's October 29, 1987 statement to Detective Matthews. Defendant asserts that this statement would have assisted the jury in determining his credibility and in evaluating police tactics.

In making this argument, Defendant ignores the fact that his counsel moved to suppress this statement prior to trial. (D.A.R. 95-96) Since counsel was asserting that the tapes were inadmissible, he could not have been expected to introduce them. *See Melendez v. State*, 23 Fla. L Weekly S350 (Fla. Jun. 11, 1998)(counsel not ineffective for failing to present contradictory positions).

Further, Defendant contends that the tapes would have permitted the jury to hear his sincerity and provided evidence of bad faith on the part of the police. However, the State had presented the tape of the statement Defendant gave the police in the early morning hours of October 28, 1987, which was played for

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[8] This newly discovered evidence issue has been independently raised and will be discussed in Issue III, *infra*. The alleged *Brady* violation has been independently raised will be discussed in Issue IV, *infra*.

the jury. (D.A.R. 411-434, 3295) Additionally, counsel elicited the fact that Detective Matthews used a fictitious story about the death of his own girlfriend to attempt to elicit a confession from Defendant and that the officers in the next room were commenting on this in a less than flattering manner. (D.A.R. 3375-79) As such, counsel cannot be faulted for failing to introduce this cumulative evidence. *Valle*, 705 So. 2d at 1334-35; *Provenzano*, 561 So. 2d at 545-46; *Glock*, 537 So. 2d at 102; *Card*, 497 So. 2d at 1176-77.

7. Counsel was not ineffective for calling Defendant as a witness.

Defendant next asserts that his counsel was ineffective for "forcing" him to testify. However, the lower court found to the contrary. (R. 6051-53)("The Defendant, who did not testify at the post conviction proceeding, argues that his counsel's decision requiring him to testify was sudden unilateral, and patently unreasonable. The testimony presented by Mr. Carhart supports a contrary conclusion.")

Further, the record does not support Defendant's conclusion. Mr. Klugh testified that Defendant was initially resistant to the idea of testifying. (T. 768-70) However, he never stated that Defendant did not eventually agree to do so; Ms. Brophy stated that she did not believe that Defendant wanted to testify but could not recall if Defendant had stated that he was testifying because defense counsel told him he should or he had to. (T. 887-88) Further, Ms. Brophy was not privy to the discussion between defense

counsel, Defendant and Mr. Klugh. (T. 900) While Mr. Carhart stated that he made the decision to encourage Defendant to testify, he did not state that he forced Defendant to do so. (T. 1634-36) Defendant elected not to testify at the evidentiary hearing. As such, Defendant did not show that he was forced to testify. *See Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983), *cert. denied*, 467 U.S. 1120 (1984)(burden on defendant).

Defendant also claims that counsel could not have made a reasoned strategic decision to encourage him to testify because he had not considered the fact that Defendant's prior convictions would be elicited before the jury. However, the record supports the lower court's finding that this was a strategic decision. (R. 6051-53)

The record does support the lower court's conclusion that the decision that Defendant should testify was a strategic one. Mr. Carhart stated that he decided to encourage Defendant to testify because one of the jurors had told a journalism student that the other jurors were prepared to convict Defendant. (T. 1634-35) He also considered the atmosphere in the courtroom and how he felt the trial was going. (T. 1635-36) Based on this information and his many years of experience, Mr. Carhart felt that calling Defendant was necessary "if we hoped to win the case." (T. 1634) Thus, the record supports the lower court's finding that this was a strategic decision and rejecting the claim on this basis.

Defendant claims that Mr. Carhart did not consider the fact that his prior criminal record would be elicited. However, the record reflects that Mr. Carhart made a motion in limine to preclude the State from using his prior criminal history. (D.A.R. 4270-86) As such, it is clear that he did consider this.

Defendant also assails the lower court for placing the burden of proof on him to show that he was never prepared to testify or that any preparation would have affected the content of his testimony. However, in making this argument Defendant ignores the fact that the burden of proof was on him. *See Cave v. State*, 529 So. 2d 293 (Fla. 1988). Thus, the lower court properly held the failure to meet this burden against Defendant.

8. Counsel was not ineffective for failing to request a second chair.

Defendant next alleges that the lower court improperly determined that his trial counsel was not ineffective for failing to request the appointment of a second chair. Defendant acknowledged that the lower court relied on this Court decisions in *Larkins v. State*, 655 So. 2d 95 (Fla. 1995) and *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994), *cert. denied*, 514 U.S. 1085 (1995). In both *Larkins* and *Armstrong*, this Court held that a defendant is not denied effective assistance of counsel by not having two attorneys.

Defendant attempts to distinguish these cases by stating that there has been a trend since 1994 to appoint two attorneys. However, Defendant was not tried after 1994; he was tried in 1988.

In evaluating ineffectiveness claims, courts are supposed to "eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 694-695. As such, Defendant's resort to such hindsight should not be countenanced.

9. Counsel was not ineffective for failing to present evidence of cultural differences.

Defendant next contends that the lower court erred in finding that his counsel was not ineffective for failing to explore cultural differences. He contends that Defendant did not have an adequate command of English and that counsel should have presented additional testimony regarding the fact that prostitution was legal in Germany.

Defendant faults his counsel because there was an alleged language barrier. The record does not reflect that there was a language barrier. Ms. Georgi, Defendant's former counsel, stated that Defendant spoke and understood English without an interpreter. (T. 804) Further, defense counsel did not create this language barrier. It is not defense counsel's fault that Defendant elected to commit his crime in Miami. As such, counsel cannot be considered deficient for something that was beyond his control.

Further, Defendant does not even allege what counsel should have done differently because of this alleged language barrier. As such, the lower court properly rejected this claim. *See Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983), *cert. denied*, 467 U.S. 1220 (1984).

With regard to the claim that counsel failed to show that prostitution was legal, testimony was presented at trial that prostitution was legal. Dina Mohler testified that prostitution was legal where she and Ms. Kischnick worked. (D.A.R. 3148-51) As such, counsel cannot be deemed ineffective for failing to present cumulative evidence on this issue.[9] *Valle*, 705 So. 2d at 1334-35; *Provenzano*, 561 So. 2d at 545-46; *Glock*, 537 So. 2d at 102; *Card*, 497 So. 2d at 1176-77.

Even if counsel could be considered deficient for failing to present additional testimony that prostitution was legal, Defendant has still not shown any prejudice. The mere fact that prostitution is legal does not mean that Defendant was not her pimp. Thus, the lower court properly rejected this claim.

10. Counsel was not ineffective for failing to rebut evidence of the victim's physical condition.

Defendant next asserts that trial counsel was ineffective for failing to investigate Ms. Kischnick's medical history and for failing to call an expert to rebut the State's description of the degree of her medical problem. Defendant contends that this would have rebutted the State's claim that Ms. Kischnick wanted to quit prostitution. However, the evidence Defendant contends should have

[9] Further, Doris Dessauser, whom Defendant proposes should have been called, was convicted of committing perjury on Defendant's behalf over a traffic ticket. (T. 252)

been elicited was in fact elicited at trial.

At trial, Dr. Vila, the medical examiner, testified that he observed cervical erosion in the victim, which he described as "small superficial lacertion[s]." (D.A.R. 2923) He also stated that Ms. Kischnick did not have serious medical conditions and that cervical erosion was not life-threatening. (D.A.R. 2925-26, 2934) He also testified that cervical erosion was normal in sexually active women, women who had been pregnant or women who had had infections. (D.A.R. 2934)

This testimony corresponds with the testimony of Dr. Brickler, which Defendant faults his counsel for failing to investigate and present. (T. 366-73) Further, Dr. Brickler conceded that the State's comments in closing were supported by this evidence. (T. 380-81) As such, counsel cannot be deemed ineffective for failing to present this cumulative evidence. *Valle v. State*, 705 So. 2d 1331,1334-35 (Fla. 1997); *Provenzano v. Dugger*, 561 So. 2d 541, 545-46 (Fla. 1990); *Glock v. Dugger*, 537 So. 2d 99, 102 (Fla. 1989); *Card v. State*, 497 So. 2d 1169, 1176-77 (Fla. 1986), *cert. denied*, 481 U.S. 1059 (1987).

Further, the State also presented evidence at trial regarding the effects of the condition on Ms. Kischnick. Dina Mohler, Ms. Kischnick's co-worker, testified that shortly before her death, the victim was doubled over in pain. (D.A.R. 3163-64) Ms. Mohler stated that Ms. Kischnick was unable to have sex with her customers

because of this pain for two weeks. (D.A.R. 3162) Even after she was able to resume her work, Ms. Kischnick continued to suffer. (D.A.R. 3163) The pain continued even after she received medical treatment. (D.A.R. 3166) Additionally, the medication caused Ms. Kischnick to develop a rash. (D.A.R. 3166) Dr. Brickler admitted that Ms. Kischnick's condition would have caused pain and that he could not state how much pain she experienced. (T. 381-82) As such, Dr. Brickler's testimony would not have rebutted this evidence in the State's case.

III.

THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIMS BASED ON NEWLY DISCOVERED EVIDENCE.

Defendant next asserts that the lower court erred in denying his newly discovered evidence claims. He claims that the lower court improperly considered the lack of credibility of the newly discovered "eyewitnesses" in denying the claim. He alleges that the court also improperly considered the testimony regarding the circumstances of Mr. Smykowski's testimony as impeachment evidence and that it did not properly consider the testimony of Dr. McElrath. However, the lower court's findings and conclusions regarding these matters were fully supported by the record and case law.

A. THE LOWER COURT PROPERLY REJECTED DEFENDANT'S NEWLY DISCOVERED "EYEWITNESSES" TESTIMONY.

At the evidentiary hearing, Defendant presented the testimony of two newly discovered "eyewitnesses," Early Stitt and Hilton Williams. The lower court rejected this testimony because the witnesses were not credible and their testimony was inconsistent with Defendant's statements and the physical evidence. (R. 6063)("The Court finds the testimony of Mr. Stitt and Mr. Williams to be less than credible and 'rife with inconsistencies' with the Defendant's own testimony at trial.")

In order to prevail on a claim of newly discovered evidence, a defendant must show that the evidence was unknown to defendant, his counsel or the court at the time of trial, that it could not have been learned through the exercise of due diligence, and that it would probably produce an acquittal on retrial. *Jones v. State*, 591 So. 2d 911, 915-16 (Fla. 1991). In determining whether the evidence would produce probably produce an acquittal on retrial, the court must consider whether the evidence is credible. *See Jones v. State*, 709 So. 2d 512, 521-22 (Fla. 1998); *Blanco v. State*, 702 So. 2d 1250, 1251 (Fla. 1997); *Parker v. State*, 641 So. 2d 369, 376 (Fla. 1994), *cert. denied*, 513 U.S. 1131 (1995). A lower court's findings in this regard will not be overturned so long as they are supported by competent substantial evidence. *Melendez v. State*, 23 Fla. L. Weekly S350 (Fla. Jun. 11, 1998); *Blanco*, 702 So. 2d at 1252.

Here, Mr. Stitt, a person with 38 prior convictions, testified that the crime occurred 3 to 4 years before it actually did. (T. 1173-75) He stated that the crime occurred around 10 p.m. but admitted that he had previously stated that the crime occurred after midnight. (T. 1175-76, 1191-93) He initially stated that both of the occupants in the car when the murder occurred were male. (T. 1176-77) He was unable to remember any details of the crime but stated that he was not with Mr. Williams. (T. 1173-82) He admitted that Defendant's investigator had to refresh his recollection regarding the limited information he was able to recall. (T. 1185-86)

Mr. Williams, who had 10 prior convictions, testified that he was with Mr. Stitt and a group of other people. (T. 1204-06) He admitted that he had altered the other members of the group from his previous affidavit and that he did so because his testimony depended on his purpose at the time he was giving it. (T. 1220-22) He stated that the car was approached by two groups of people and that the shot was fired through the driver's window. (T. 1204-06, 1225, 1231) He also stated that he was not compensated by Defendant for his testimony but later admitted that Defendant had paid for a hotel for him. (T. 1239-40, 1243)

Defendant's version was that he approached a lone man on the street. (D.A.R. 4485-88) The shot entered the right side of Ms. Kischnick's head and could not have been fired from the driver's

side. Thus, competent substantial evidence supports the finding that the newly found alleged eyewitnesses' testimony was incredible. As such, that finding must be upheld. *Melendez*; *Blanco*.

Defendant also contends that if counsel had found these alleged witnesses in 1988, their testimony would have been consistent and credible. However, if counsel could have found the testimony in 1988, through the exercise of due diligence, it would not qualify as newly discovered evidence.[10] *Jones*, 591 So. 2d at 915-16. As such, the lower court properly rejected this claim.

B. THE LOWER COURT PROPERLY DETERMINED THAT THE IMPEACHMENT EVIDENCE REGARDING SMYKOWSKI DID NOT QUALIFY AS NEWLY DISCOVERED EVIDENCE.

Defendant next asserts that the lower court erred in determining that Mr. Klopf's testimony, regarding the circumstances of Mr. Smykowski's testimony, did not constitute newly discovered evidence. Defendant claims that Mr. Smykowski repeatedly testified that he was getting no benefit from testifying and that this was false testimony.

At trial, Mr. Smykowski acknowledged that he was hoping that the State would write a letter to the judge who was sentencing him. (D.A.R. 4097) He stated that he had not asked for such a letter and that it was up to the prosecutor if he decided to write one. (D.A.R. 4135-37) Defense counsel argued in closing that Mr.

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[10] For a discussion of why the trial court properly determined that counsel was not ineffective for failing to discover this evidence, see Issue II(4).

Smykowski's testimony was motivated by his desire for such a letter. (D.A.R. 5070) At the evidentiary hearing, Mr. Digregory confirmed that Mr. Smykowski had not asked for a letter and that he had not promised to write one. (T. 1803) The fact that a letter was eventually written does not demonstrate that there was an undisclosed promise. *See Haliburton v. State*, 691 So. 2d 466, 470 (Fla. 1997)(no undisclosed deal, where prosecutor wrote letter to corrections authorities without having promised witness that she would do so). As such, Defendant did not demonstrate that anything Mr. Smykowski stated was false.

As Mr. Klopf's testimony was properly considered impeachment evidence, the lower court properly denied the motion on this basis. Impeachment evidence, particularly cumulative impeachment evidence, does not serve as a basis for granting a motion for post conviction relief. *Willimson v. Dugger*, 651 So. 2d 84, 88-89 (Fla. 1994), *cert. denied*, 516 U.S. 850 (1995); *see also Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998); *Buenoano v. State*, 708 So. 2d 941, 951 (Fla. 1998). At trial, Mr. Smykowski was impeached with the fact that he regularly acted as an informant, that he hoped he might receive a favorable letter from the State, that he had been convicted of 17 counts of fraud, as well as 3 state convictions for writing bad checks, and that he had previously earned a living selling things to people. (D.A.R. 4096-97, 4124, 4133) As Mr. Klopf's testimony was cumulative to this impeachment evidence, the

lower court properly denied the motion on this basis. *See Williamson*, 651 So. 2d at 88-89.

C. THE TRIAL COURT CORRECTLY FOUND THAT EVIDENCE OF SUBSEQUENT MURDERS DID NOT QUALIFY AS NEWLY DISCOVERED EVIDENCE.

Defendant also claims that the lower court erred in finding that evidence regarding subsequent tourist crimes in Florida was not newly discovered evidence. The lower court rejected this claim, finding that Dr. McElrath's testimony was based on little more than a review of newspaper articles. (R. 6064-65) Defendant asserts that this finding was incorrect and that this testimony shows that his version of the events matches the common characteristics of tourist crime.

However, Dr. McElrath testified that the only research she did in determining that the pattern of tourist crimes predated official recognition of this type of crime, was from newspaper articles in the *Miami Herald*. (T. 659-70) She specifically stated that she had not considered official records regarding tourist crimes. (T. 659-70) Further, she admitted that she had not even read all of the articles and that she did not know how the crimes were perpetrated. (T. 688-91) As such, the lower court's characterization of her testimony is entirely supported by the record, and Defendant's contention that her testimony showed that Defendant's account fit the pattern was not.

Further, in order to qualify as newly discovered evidence, the

evidence must be admissible. *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998); *Johnson v. Singletary*, 647 So. 2d 106, 110-11 (Fla. 1994). Here, Defendant's newly discovered evidence first consists of crime statistics regarding a different neighborhood than that in which Defendant stated the crime occurred at the time of trial. As previously noted, the newly found alleged eyewitnesses, who place the crime in this different neighborhood, were found to be incredible. Moreover, Defendant is essentially attempting to show that the alleged new crime location is in a bad neighborhood. However, such evidence is irrelevant and inadmissible. *See Lowder v. State*, 589 So.2d 933, 935 (Fla. 3d DCA 1991), *dismissed*, 598 So.2d 78 (Fla. 1992);

With regard to the similar crime evidence, this Court, in *State v. Savino*, 567 So. 2d 892 (Fla. 1990), held that when a defendant wishes to present evidence of similar crimes to demonstrate another person committed the crime, he is bound by the same similarity requirements that would bind the State if the other individual was on trial. Here, the only alleged similarity between this crime and the crimes the Defendant sought to admit was that tourists were victims. The crimes, locations and methods of perpetration varied considerably and also occurred after the instant crime. (T. 670-80) As such, this evidence would not be admissible and cannot be considered newly discovered evidence.

IV.

THE LOWER COURT PROPERLY DENIED DEFENDANT'S *BRADY*[11] CLAIMS.

Defendant asserts that the lower court erred in rejecting his *Brady* claims. In order to show a *Brady* violation, Defendant must prove:

> (1) that the State possessed evidence favorable to him; (2) that he did not possess the favorable evidence nor could he obtain it with any reasonable diligence; (3) that the State suppressed the favorable evidence; and (4) that had the evidence been disclosed to [defendant], a reasonable probability exists that the outcome of the proceedings would have been different.

Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla.), *cert. denied*, 516 U.S. 965 (1995). Here, the lower court properly rejected these claims because Defendant either failed to show that the State possessed the evidence, that he could not have found it, or that it would have affected the outcome. (R. 6065-71)

First, Defendant asserts that the State suppressed certain police reports. However, Defendant failed to carry his burden of showing that a *Brady* violation occurred.

With regard to the whited out line from Trujillo's report, he did not testify at either trial or the post conviction hearing. As such, the statement could not be used to impeach him. Further, the report simply states that the crime lab said the window was down

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[11] *Brady v. Maryland*, 373 U.S. 83 (1963).

all the way. (R. 2353) It does not identify who from the crime lab. Since Trujillo never testified who the person from the crime lab was, it is impossible to determine if that person testified at trial and could have been impeached with this statement. Thus, the lower court finding that "[t]he Defendant did not establish at the post conviction hearing whether the statement was a mistake of the crime lab or Trujillo's report. . . . that the results of the trial would have been different had the additional evidence been disclosed, or that its omission had undermined confidence in the outcome of the trial," was proper. (R. 6068)

With regard to the reports by Hanlon regarding the window height, Defendant admitted them as things he found in the State Attorney's file. (T. 1284-85) However, he never asked defense counsel if he ever received the reports. As such, Defendant failed to prove that the State suppressed them.

Further, these reports would have contradicted Defendant's own statement. Defendant stated that he only opened the window halfway. (D.A.R. 3290) Additionally, Defendant's own blood spatter expert agreed that the window was only 3 and 3/4 inches open at the time the blood was deposited on it. (T. 528-31) He stated that this blood was either back spatter or exhaled blood and that there was no other exhaled blood on the victim's right side. (T. 450-52, 556-57) When these facts are considered in the light of all the other evidence the State presented, it cannot be said that there is a

reasonable probability that this minor bit of possible impeachment would have affected the outcome of the case.

With regard to the missing page from Officer Psaltides' report, Defendant failed to show that had he had the report, he could have used it at trial. The report contained a statement by the victim's father, stating that he had nothing bad to say about Defendant. (R. 2677) However, Defendant never showed that the victim's father would have testified at trial. In fact, the record reflects that he would not have. (T. 1477) As such, the statement would not have been admissible. Thus, the lower court properly rejected this claim.

Defendant next asserts that the State suppressed a police report detailing the interview with his waiter from that evening. However, Defendant surely knew where he had eaten that night and who had waited on him. Further, defense counsel deposed the officers who conducted the interview, who informed him of the content of the interview. (R. 2599, 2604-06, 2613-15) Thus, the lower court properly rejected this claim because Defendant failed to prove that he could not have found the evidence or that the State suppressed it. *See Roberts v. State*, 568 So. 2d 1255 (Fla.1990)(finding no *Brady* violation where prosecution and defense have same access to alleged exculpatory evidence); *James v. State*, 453 So. 2d 786 (Fla.)(same), *cert. denied*, 469 U.S. 1098 (1984).

Next, Defendant alleges that the State suppressed evidence

regarding his employment, business ventures, independent sources of income and lottery winnings. Again, Defendant surely knew what his own sources of income were. As such, the lower court properly rejected this claim. *Roberts*; *James*.

Defendant next asserts that the State suppressed statements from 27 German witnesses. However, Defendant was aware that the State had not provided these witness statements prior to trial. (D.A.R. 658-64) As such, this issue could have and should have been raised on direct appeal. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991).

Further, defense counsel was provided with a complete list of the above witnesses and was permitted to question Detective Bernd Schleith regarding the content of the statements. (R. 3165-85) Thus, counsel could have contacted them himself and no *Brady* violation occurred. *Roberts*; *James*.

Further, Defendant was given the opportunity to present the witnesses or the statements at the evidentiary hearing. Yet, Defendant was able to present only 7 witnesses. As such, any claim that the remaining witnesses would have provided relevant evidence at the guilt phase is purely speculation.

With regard to the 7 witnesses who did testify, their testimony had limited relevance to the guilt phase. The only issue that Monika and Marlene Seeger could testify to regarding the guilt phase was that Defendant and Ms. Kischnick seemed to have a good

relationship. (T. 220-24, 266) However, they had never spoken to the victim and based their opinion on seeing them in the neighborhood. (T. 234-37, 275-76) Ulrike and Martin Karpischek offered similar testimony. (T. 344, 387) However, they only knew Defendant and Ms. Kischnick from coming to their salon to have their hair done. (T. 351, 355, 391-93) Wolfgang Walitzki also offered this testimony, but admitted that he had not had much contact with them since 1985. (T. 290, 311, 312)

Doris Dessauer would have testified that prostitution was legal in Germany. (T. 243-44) However, this evidence was already presented at trial, and presenting her testimony would have permitted the State to elicit the fact that she had perjured herself on Defendant's behalf over a traffic ticket. (T. 252, 254, D.A.R. 3148-51)

When the limited weight of this testimony is counterpoised against the State's evidence at trial, it cannot be said that but for this evidence, the outcome of the trial would have been different. At trial, the State presented the testimony of Regina Kischnick, the victim's sister, who stated that she observed Defendant criticizing the victim and that the victim was content but not happy in her relationship with Defendant. (D.A.R. 2766, 2770) Dina Mohler, the victim's co-worker, testified that Defendant and the victim loved one another but did not get along well. (D.A.R. 3194) Additionally, Defendant himself admitted that he had

written a letter to Mercedes, claiming that the victim supported him. (D.A.R. 4680) Further, the State presented evidence that Defendant had gunshot residue on his hands, that the blood spatter evidence was inconsistent with Defendant's testimony, that Defendant possessed the type of ammunition used in the shooting, that he made inculpatory statements to Mr. Smykowski and that Defendant had a substantial financial motive for wanting Ms. Kischnick dead. Presentation of the testimony of a few people that they had a good relationship did not create a reasonable probability that the result of the trial would have been different, and the lower court properly denied the claim on this basis.

Defendant also asserts that the State suppressed evidence of an alleged deal between the State and Mr. Smykowski. He claims that the State had to have a deal with Mr. Smykowski because one of the prosecutors wrote a post trial letter to the parole board on his behalf. However, both Mr. Smykowski's trial testimony and the testimony of Mr. Digregory at the evidentiary hearing reflect that Mr. Smykowski never requested a letter from the State and that the State never promised to write a letter on his behalf. Further, Mr. Smykowski testified at trial that he was hoping the State would write such a letter. The mere fact that Mr. Smykowski's hope was fulfilled does not demonstrate an undisclosed deal. *See Haliburton v. State*, 691 So. 2d 466, 470 (Fla. 1997)(no *Brady* violation for failing to disclose a deal, where prosecutor wrote letter to

corrections authorities without having promised witness that she would do so); *Phillips v. State*, 608 So. 2d 778 (Fla. 1992), *cert. denied*, 509 U.S. 908 (1993).

Defendant also asserts that a handwritten note stated that the State Attorney was to communicate with a federal magistrate to have Mr. Smykowski rewarded. However, Mr. Digregory, the author of the note, testified that notation was a request by Mr. Smykowski's intermediary that he be permitted to remain. (T. 1801-02) He also stated that the request was not honored. (T. 1802) Defendant presented no evidence to contradict this explanation. As such, this note does not evidence any secret deal.

Defendant also asserts that the lower court erred in denying his claim that the State withheld crime scene photographs. To the extent that this claim depends on the trial record, it is barred. The claim could have and should have been raised on direct appeal. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991).

Further, Defendant presented no evidence that any crime scene photographs were withheld. Mr. Ecott testified that he took 32 photographs. He explained that the notation in the crime scene report only referred to the number of exposures on the rolls of film he used and not the number of photographs actually taken. Fleata Douglas and Lydia Shows did not know how many pictures they took and explained that their prior testimony also referred only to

the number of exposures.

While Defendant claims that he examined the negatives and that photographs were missing, Defendant elected not to testify at the evidentiary hearing. As such, no evidence was presented that any photographs were missing, and the trial court properly denied the motion on this basis. *See Haliburton v. State*, 691 So. 2d 466, 470 (Fla. 1997)(Where defendant did not prove that alleged statement was taken or transcribed, no *Brady* violation).

Defendant next asserts that the State suppressed the notes of its forensic experts. However, this issue was litigated before trial (D.A.R. 1314-26) and could and should have been raised on direct appeal. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). Further, the record reflects that the defense counsel did get the notes from Gopinath Rao. (D.A.R. 1318, 4839, 4844) As the State provided these notes, this claim does not provide a basis for relief.

With regard to Mr. Rhodes, the trial court ruled that his notes were not subject to discovery. (D.A.R. 1320-26) As such, this issue could and should have been raised on appeal. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). Further, the trial court had reviewed the notes and found that the information contained therein had already been provided in the typed reports and photographs and that Defendant had access to the car. Thus, it cannot be said that the State suppressed evidence.

(D.A.R. 1320-26)

Defendant contends that the State suppressed telexes between the Miami Beach Police and the German police. He claims that if these telexes had been provided, they would have shown that the German searches were invalid. However, Defendant never proved that he was not provided with the telexes. At the evidentiary hearing, Defendant introduced these telexes as documents from the State Attorney's file but never asked trial counsel if he had ever seen them. (T. 999-1000) Further, it appears that Defendant had the telexes as he introduced some of them at the suppression hearing. (D.A.R. 100-114) As such, Defendant failed to prove a *Brady* violation.

Defendant also asserts that the State misled the court regarding the legality of the German searches. However, Ms. Sreenan testified that she was unaware that a German court had invalidated the January search until after the 3.850 motion was filed. (T. 1479) Further, the State did not seek to enter the fruits of that search. As such, Defendant has failed to show that the State suppressed evidence or that it would have affected the outcome of the proceedings.

V.

THE LOWER COURT PROPERLY REFUSED TO PERMIT DEFENDANT TO RELITIGATE THE SUPPRESSION ISSUE.

Defendant's next contention is that his trial counsel was ineffective for failing to investigate the legality of the German

searches and to suppress the fruit of those searches. However, the legality of the German searches was litigated prior to trial and the issue was raised on appeal. Because a claim of ineffective assistance of counsel may not be used to claim that a different argument should have been used to raise the same issue, the lower court properly rejected this claim. *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990).

Defendant asserts that this bar should be lifted because he was unaware that the Miami Beach Police had allegedly overstated the status of their investigation to the German authorities. However, Defendant raised this very claim in his supplemental brief on direct appeal. *See* Supplemental Brief dated January 21, 1991, at 9-10. Thus, the issue was before the court and does not provide a basis for relitigating this claim.

Finally, Defendant asserts that because this Court was unaware of the fact that a German court invalidated the January 1988 search of Defendant's apartment, he should be permitted to relitigate the suppression issue. However, the State elected not to introduce the fruit of this search. Further, a copy of the very order Defendant relies upon was attached to his supplemental brief. Thus, this order does not present a basis for reopening this claim.

VI.

THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIM THAT HIS COUNSEL WAS INEFFECTIVE FOR FAILING TO ELICIT THE FACTS SURROUNDING HIS FEDERAL GUN CHARGES.

Defendant next asserts that his counsel should have elicited additional testimony regarding his prosecution on federal gun charges. Defendant claims that this prejudiced him because he was unable to show that his statements to Mr. Smykowski and his attempt to assign the insurance benefits to Ms. Kischnick's family were made at a time when he did not know he would be charged with murder.

However, Richard Klugh, Defendant's attorney in the federal case, stated that he and Defendant discussed the likelihood of his being charged with murder as soon as the federal case was completed. (T. 723-35) In fact, Mr. Klugh litigated a claim regarding an INS hold because he fully expected that Defendant would be arrested for murder as soon as all other methods of holding him were removed. (T. 739-43)

Thus, Defendant was aware that he was suspected in the murder case at the time and that his arrest on these charges was imminent. Any testimony that he was acquitted of the federal charges would not have negated the fact that the attempted assignment of the insurance benefits was a ruse. Thus, Defendant's claims of prejudice must fail, and the lower court properly rejected this claim. (R. 6054-55)

VII.

THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIM THAT HIS COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE STATE'S CLOSING ARGUMENT.

Defendant next asserts that his counsel was ineffective for failing to object to comments made during the State's closing argument. However, Defendant contended on direct appeal that the State's comments in closing denied him a fair trial. This Court found that the comments did not do so, either independently or cumulatively. *Riechmann*, 581 So. 2d at 138-39. As the merits of this issue were already decided, the lower court properly refused to permit Defendant to relitigate this issue. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

Defendant cites to a number of instances during closing argument in which the State asserted that the Defendant lied. However, there is no impropriety in the State calling a defendant a liar if the State has proved that the defendant has lied. *Craig v. State*, 510 So. 2d 857 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988); *Shellito v. State*, 701 So. 2d 837 (Fla. 1997), *cert. denied*, 118 S. Ct. 1537 (1998). Such comments are merely considered comments on the evidence. *Id.*

Here, the State proved at trial that Defendant had been convicted for solicitation of perjury over a traffic ticket. (D.A.R. 4654) He was also convicted for forgery. (D.A.R. 4710)

Defendant claimed that he had lied to Mercedes Benz to get out of a contract. (D.A.R. 4680) He conceded that he lied on loan applications. (D.A.R. 4669-70)

Given that the State proved Defendant lied on many occasions, the State's comments were proper. *Craig*, 510 So. 2d at 865. Thus, counsel cannot be deemed ineffective for failing to raise a meritless objection. *See Groover v. Singletary*, 656 So.2d 424 (Fla. 1995); *see also Card v. Dugger*, 911 F. 2d 1494 (11th Cir. 1990).

VIII.

THE LOWER COURT PROPERLY DENIED THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO SEAT AFRICAN AMERICAN JURORS.

Defendant next asserts the lower court erred in rejecting his claim that his counsel was ineffective for failing to accede to his wish to seat African American jurors. The lower court rejected this claim as unproven. (R. 6054-55)

Defendant asserts that he has a right to a fair cross section of the community on his jury. However, this is simply not true. The United States Supreme Court has repeatedly stated that the right to a fair cross section does not extend to a petit jury and that "[d]efendants are not entitled to a jury of any particular composition." *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *see also Holland v. Illinois*, 493 U.S. 474, 482-84 (1990); *Lockhart v. McCree*, 476 U.S. 162 (1986); *Duren v. Missouri*, 439 U.S. 357

(1976).

Even if Defendant's claim was cognizable,[12] the lower court would still have properly denied it. The only evidence presented on this claim at the evidentiary hearing was Ms. Brophy's statement that Defendant and counsel argued over the seating of an African American juror, and Mr. Carhart's testimony that he made the final decision on which jurors to seat after consultation with Defendant. (T. 871, 1623) However, Ms. Brophy was unable to name any specific jurors over whom there was a disagreement and did not know who struck the subject jurors. (T. 898) As such, Defendant failed to show that counsel challenged any juror whom Defendant insisted should be on his jury.

Finally, while Defendant asserts that he was denied minority representation on the jury, the record reflects that African Americans were seated as jurors. (T. 1641, D.A.R. 3973) No prejudice has been shown. As such, the lower court properly found that Defendant had failed to prove this claim.

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[12] In *United States v. Teague*, 953 F.2d 1525 (11th Cir.), *cert. denied*, 506 U.S. 842 (1992), the Court stated that there are certain decisions that counsel is permitted to make after consultation with the defendant. The only decisions that must be made by the defendant are those that are of a fundamental constitutional nature, such as whether to enter a plea, whether to testify and whether to waive a jury trial. Peremptory challenges themselves are not a constitutional right. *See Ross v. Oklahoma*, 487 U.S. 81 (1988). As such, the decision regarding whom to exercise these challenges against cannot be a decision that ultimately rested with Defendant.

IX.

THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIM THAT HIS COUNSEL WAS INEFFECTIVE FOR FAILING TO EFFECTIVELY CROSS EXAMINE STATE WITNESSES.

In his final claim, Defendant asserts that his counsel was ineffective for the way he cross examined the State's witnesses. In this claim, Defendant rehashes his claim of ineffectiveness regarding Mr. Smykowski and the State's blood and gunshot experts. The State relies on its arguments under Issue II (1) and (5).

Defendant also asserts that counsel should have cross examined insurance company witnesses about the financial stake of the insurance companies in Defendant's conviction and the fire rescue personnel and crime scene technicians about the possibility that blood was transferred. However, Defendant presented no witnesses on this issue at the evidentiary hearing.

No fire rescue personnel or insurance executives testified at the evidentiary hearing. The testimony of the crime scene technicians was limited to the number of pictures they took. The only evidence presented was the affidavit of Ernest Steffen, stating that he was forced to testify by an insurance company to save 400,000 Deutschmarks. However, this affidavit does not qualify as substantive evidence. *Routly v. State*, 590 So. 2d 397, 401 n.5 (Fla. 1991)("absent stipulation or some other legal basis, we cannot see how the affidavits [presented at a post-conviction hearing] can be argued as substantive evidence"). As such,

Defendant failed to carry his burden of showing ineffectiveness and the lower court properly rejected this claim. *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983), *cert. denied*, 467 U.S. 1220 (1984).

CONCLUSION

For the foregoing reasons, that portion of the trial court's Rule 3.850 order granting a new sentencing proceeding should be reversed, and Defendant's sentence reinstated. The remainder of the order should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **TERRI L. BACKHUS**, Counsel for Defendant, P.O. Box 3294, Tampa, Florida 33601-3294, this 23rd day of November, 1998.

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