**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC01-1415**

**THE STATE OF FLORIDA,**

Appellant/Cross-Appellee,

vs.

**ASKARI ABDULLAH MUHAMMAD, f/n/a THOMAS KNIGHT,**

Appellee/Cross-Appellant.

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

# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF THE CASE AND FACTS

This is a State appeal from the court below's grant, after a Fla. R. Crim. P. 3.850 evidentiary hearing, of a new sentencing proceeding before a new judge and jury.

Defendant was charged by indictment filed on October 24, 1980, in the Eighth Judicial Circuit of Florida, case no. 80-341, with the first degree murder of Corrections Officer Richard James Burke, which was alleged to have been committed on October 12, 1980. (DAR. 1-2)[1] After a trial at which Defendant represented himself, the jury found him guilty as charged. (D.A.R. 442) After Defendant waived a penalty phase jury and the trial court considered the penalty phase evidence, it imposed a sentence of death, finding 3 aggravating circumstances[2] and no mitigating circumstances. (DAR. 455-63)

Defendant appealed to this court, raising the following 5 issues:

I.

THE COURT ERRED IN FINDING [DEFENDANT] COMPETENT TO

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[1] The terms "DAR." and "DAT." will be used to refer to the record and transcript prepared on direct appeal in *Muhammad v. State*, Florida Supreme Court case no. 63,343. The terms "PCR1." will refer to the record on appeal from the initial summary denial of the motion for post conviction relief, Florida Supreme Court case no. 75,055. The terms "R." and "T." refer to the record and transcript in the instant appeal.

[2] The aggravating factors were: Under a sentence of imprisonment, prior capital felonies, and HAC.

STAND TRIAL AS IT HAD INSUFFICIENT FACTS UPON WHICH TO FIND HIM COMPETENT.

II.

THE COURT ERRED IN ALLOWING [DEFENDANT] TO REPRESENT HIMSELF AT TRIAL WITHOUT FIRST DETERMINING HIS COMPETENCE TO WAIVE ASSISTANCE OF COUNSEL AND TO REPRESENT HIMSELF.

III.

THE COURT ERRED IN EXCLUDING [DEFENDANT] FROM PRESENTING ANY EVIDENCE OF HIS INSANITY AT TRIAL BECAUSE HE REFUSED TO BE EXAMINED BY COURT APPOINTED PSYCHIATRISTS IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

IV.

THE COURT ERRED IN FINDING AS AGGRAVATING FACTORS THAT

[DEFENDANT] WAS UNDER A SENTENCE OF IMPRISONMENT WHEN HE COMMITTED THE MURDER AND THAT HE HAD A CONVICTION FOR A PRIOR VIOLENT FELONY.

V.

THE COURT ERRED IN FAILING TO CONSIDER IN MITIGATION EVIDENCE OF [DEFENDANT'S] MENTAL STATUS.

This Court affirmed Defendant's conviction and sentence. *Muhammad v. State*, 494 So. 2d 969 (Fla. 1986). In doing so, this Court found the following facts:

> Muhammad, awaiting execution on death row, (FN1) fatally stabbed a prison guard in the late afternoon of October 12, 1980. The incident apparently arose out of Muhammad's frustration at being denied permission to see a visitor after he refused to shave his beard. In the past Muhammad had been issued a pass excusing him from shaving regulations for medical reasons. A guard checked with the medical department and determined that Muhammad had no current exemption

from the rule. At that time Muhammad was heard to say he would have to start "sticking people."

James Burke, a guard on a later shift who had not been involved with the shaving incident, was routinely taking death row inmates one at a time to be showered. When he unlocked Muhammad's cell, the defendant attacked Burke with a knife made from a sharpened serving spoon. Muhammad inflicted more than a dozen wounds on Burke, including a fatal wound to the heart. The weapon was bent during the attack, but Muhammad continued to stab Burke, who attempted to fend off the blows and yelled for help. The other guard on the prison wing saw the incident from a secure position and summoned help from other areas of the prison. When help arrived, Muhammad ceased his efforts and dropped the knife into a trash box.

Two lawyers were initially appointed to represent Muhammad. One, Susan Cary, had represented Muhammad in matters related to his prior murder case. The other was a public defender. The public defender withdrew after differences arose with Cary. For reasons undisclosed in the record, the original trial judge, Judge Green, ended Cary's appointment and appointed Stephen Bernstein to represent the defendant from the beginning of 1981.

The first indication in the record that Muhammad desired to proceed pro se is found in a transcript of a hearing that took place on January 12, 1981 before Judge Green. At the hearing, Bernstein moved to withdraw and, as the judge observed at the hearing, Muhammad argued "eloquently and obviously with much thought and consideration" to represent himself. Judge Green, advising Muhammad against proceeding pro se, noted Muhammad seemed competent to do so, but asked him to "sleep on it" and write the judge a letter with his final decision. Muhammad wrote the letter, electing to proceed pro se, but insisting, as he had at the hearing, that he wanted "assistance of counsel" in the sense of having a lawyer available to aid in preparation of the case. January 21, 1981, Judge Green recused himself for reasons not known by or raised before this Court, and also denied Muhammad's motion to proceed pro se. Judge Green's

order stated that Muhammad did not have the capacity to conduct his own defense either because of the difficulty of preparing while on death row, or because of incompetence, or both.

Muhammad's attorneys were concerned about his mental state from the start. Shortly after the murder, they had Dr. Amin appointed as a defense advisor pursuant to the newly adopted Florida Rule of Criminal Procedure 3.216(a). (FN2) Dr. Amin had examined Muhammad in matters relating to his prior conviction. February 25, 1981, attorney Bernstein filed a notice of intent to claim the defense of insanity. June 10, 1981, Judge Carlisle, who had been appointed to replace Judge Green, filed an order appointing Doctors Barnard and Carrera, psychiatrists, to examine Muhammad to determine his competency to stand trial and his sanity at the time of the offense. Fla. R. Crim. P. 3.210(b) and 3.216(d). Muhammad refused to meet the doctors when they tried to examine him July 4, 1981, and met them but refused to cooperate at a second attempt that November.

Based on Muhammad's refusal to speak with the court-appointed experts, Judge Carlisle ruled in a hearing March 8, 1982, that Muhammad would not be allowed to present expert testimony regarding his insanity defense but that he would be allowed to raise the defense. Two weeks prior to the trial date of May 24, 1982, Bernstein filed a written proffer of the evidence and testimony he planned to present relating to the insanity defense.

The proffer included a summary of findings by a psychiatrist and psychologist who treated the defendant during a hospitalization at Northeast Florida State Hospital in 1971, suggesting he was suffering from early stages of schizophrenia. A clinical psychologist diagnosed the defendant a paranoid schizophrenic in 1975 after an examination for a competency hearing before the trial for the prior murders. The diagnosis was echoed by another psychologist in a 1979 evaluation. Finally, Dr. Amin's findings as a defense expert were summarized, including a diagnosis of "schizophreniaform illness" but recommending further testing to rule out epilepsy.

At a hearing May 17, 1982, a week before trial, Bernstein requested a competency hearing. The judge agreed to a final effort to have the two appointed psychiatrists evaluate Muhammad. At Bernstein's urging, the judge also appointed Dr. Amin as a third expert for the court evaluation. Bernstein also told the judge that Muhammad had refused to meet with him for several months, and that Dr. Amin had not spoken with Muhammad for almost one year, although Dr. Amin had made two attempts during that period.

A letter from Drs. Barnard and Carrera states they were again rebuffed May 18, 1982, and that they were unable to determine the defendant's competency to stand trial, despite "relevant case materials" provided by defense and prosecution attorneys. Dr. Amin was more successful, meeting with the defendant and determining that he was competent to stand trial. A letter to that effect was filed May 19.

May 20, 1982, Judge Carlisle, Bernstein, the state attorney and Muhammad were present at a competency hearing at Florida State Prison. The hearing was unrecorded, although the judge had requested a reporter when the hearing was set. The reconstructed record prepared by defendant's appellate counsel is sketchy, but states that "[b]ased upon Mohammad's [sic] refusal to cooperate with Drs. Barnard and Carrera, and Dr. Amin's report, the court found Mohammad [sic] competent to stand trial. What argument defense counsel made in opposition to the court's order is unknown." Muhammad also raised anew his request to proceed pro se.

Trial was begun May 24, 1982. In a hearing before voir dire began, Judge Carlisle ruled that no evidence of any kind could be presented concerning Muhammad's sanity at the time of the crime. Muhammad again moved to proceed pro se and was denied. The trial ended in mistrial the next day for reasons unknown and not raised to this Court. Two days later, Judge Carlisle filed a recusal and Judge Chance was assigned to the case. Judge Chance conducted a hearing on Muhammad's motion to proceed pro se June 7, 1982. The judge attempted to dissuade Muhammad, explaining in detail disadvantages and soliciting comment from Muhammad.

The hearing ended with the ruling that Muhammad could represent himself. Bernstein was appointed as "standby" counsel, to step in should Muhammad be unable to continue with trial. Muhammad also, for the first time, complained about the competency interview with Dr. Amin. He stated that he thought Amin was meeting with him in his capacity as a defense advisor, not as a court-appointed expert. He said he probably would not have spoken with Dr. Amin had he known the true circumstances of the interview, just as he had not spoken to the other two experts. Although objecting to the determination of competency based on the Amin report, Muhammad did not move to strike the report or suggest any other relief.

Muhammad renewed his objection to the Amin interview at a July 19, 1982 motion hearing.

Prior to trial the court allowed Bernstein to withdraw as standby counsel and appointed a public defender. September 3, 1982, Muhammad filed a motion withdrawing his notice of intent to use the insanity defense. In a pretrial conference, the state withdrew its motion to strike the insanity defense and the judge granted Muhammad's motion. At trial, Muhammad's defense consisted solely of holding the state to its burden of proof by pointing out inconsistencies in the testimony of the state's witnesses. The jury found Muhammad guilty as charged. He waived his right to a jury recommendation in the penalty phase and the trial judge sentenced him to death, finding nothing in mitigation and three aggravating circumstances: the defendant was under a sentence of imprisonment, he had been convicted of a prior capital felony, and the murder was heinous, atrocious or cruel.

* * * *

FN1. Muhammad had been sentenced to death for the murders of a Miami couple. *Knight v. State*, 338 So. 2d 201 (Fla. 1976). Muhammad's original name was Thomas Knight. While imprisoned, the defendant adopted his new name pursuant to his beliefs in Islam. He insisted on use of the new name throughout the proceedings below and, after initial resistance from the judges, succeeded in having the new name placed on the caption of the case.

FN2. The rule reads:

> (a) When in any criminal case counsel for a defendant adjudged to be indigent or partially indigent, whether public defender or court appointed, shall have reason to believe that the defendant may be incompetent to stand trial or that he may have been insane at the time of the offense, he may so inform the court who shall appoint one expert to examine the defendant in order to assist his attorney in the preparation of his defense. Such expert shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege.

*Id.* at 970-72.

Defendant sought certiorari review in the United States Supreme Court, which was denied on February 23, 1987. *Muhammad v. Florida*, 479 U.S. 1101 (1987).

On February 23, 1989, Defendant filed a motion for post conviction relief, raising the following issues:

> CLAIM I
>
> [DEFENDANT] WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNTIED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERTS RETAINED TO EVALUATE HIM BEFORE TRIAL FAILED TO CONDUCT A PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATION, AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE, RESULTING IN A TRIAL AT WHICH [DEFENDANT] WAS INCOMPETENT AND ENTITLED TO A COMPETENCY HEARING, IN THE FAILURE TO ESTABLISH AN AVAILABLE INSANITY DEFENSE, AND IN THE DEPRIVATION OF [DEFENDANT'S] RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION.
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> CLAIM II
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> [DEFENDANT'S] FIFTH, SIXTH, EIGHTH AND FOURTEENTH

AMENDMENT RIGHTS WERE ABROGATED BECAUSE HE WAS FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS ALTHOUGH HE WAS NOT LEGALLY COMPETENT.

CLAIM III

[DEFENDANT'S] FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE ABROGATED BECAUSE HE WAS PERMITTED TO PROCEED WITHOUT COUNSEL ALTHOUGH HE WAS NOT LEGALLY COMPETENT TO EXECUTE A WAIVER OF COUNSEL.

CLAIM IV

THE DEATH SENTENCE IS NOT RELIABLE AND MUST BE VACATED BECAUSE [DEFENDANT] WAS NOT COMPETENT TO WAIVE HIS SENTENCING JURY, BECAUSE THE TRIAL COURT FAILED TO CONDUCT PENALTY PHASE PROCEEDINGS BEFORE AN ADVISORY JURY, AND BECAUSE [DEFENDANT] FAILED TO PRESENT THE WEALTH OF STATUTORY AND NONSTATUTORY EVIDENCE AVAILABLE CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM V

[DEFENDANT] WAS DENIED HIS FIFTH AMENDMENT PROTECTION OF DOUBLE JEOPARDY AS PROVIDED BY PRINCIPLES OF COLLATERAL ESTOPPEL IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM VI

[DEFENDANT] WAS DENIED EFFECTIVE, ADEQUATE AND MEANINGFUL ACCESS TO THE COURTS AND A FAIR OPPORTUNITY TO PRESENT HIS DEFENSES TO THE TRIAL COURT BY THE FAILURE OF THE STATE OF FLORIDA TO FULFILL ITS AFFIRMATIVE OBLIGATION OF PROVIDING A LAW LIBRARY WITH WHICH [DEFENDANT] COULD PREPARE DEFENSE IN VIOLATION OF [DEFENDANT'S] SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM VII

[DEFENDANT'S] SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE NO RELIABLE TRANSCRIPT OF HIS CAPITAL TRIAL EXISTS, RELIABLE APPELLATE REVIEW WAS AND IS NOT POSSIBLE, THERE IS NO WAY TO ENSURE THAT THAT WHICH OCCURRED IN THE TRIAL COURT WAS OR CAN BE REVIEWED ON APPEAL, AND THE JUDGMENT AND SENTENCE MUST BE VACATED.

CLAIM VIII

THE STATE'S DELIBERATE WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE CONSTITUTED PROSECUTORIAL MISCONDUCT AND VIOLATED [DEFENDANT'S] BRADY AND FLORIDA DISCOVERY RIGHTS CONTRARY TO THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM IX

THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN ADEQUATE FARETTA INQUIRY AS TO WHETHER [DEFENDANT] MADE A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER OF THE RIGHT TO COUNSEL.

CLAIM X

THE PROSECUTOR'S MISCONDUCT THROUGHOUT THE GUILT AND PENALTY PHASE DENIED [DEFENDANT'S] RIGHT TO A FUNDAMENTALLY FAIR AND RELIABLE CAPITAL TRIAL AND SENTENCING DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XI

[DEFENDANT] WAS INDICTED BY A BIASED GRAND JURY, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XII

THE TRIAL COURT ERRED BY FAILING TO CONSIDER [DEFENDANT'S] MENTAL DEFICIENCIES AS MITIGATING CIRCUMSTANCES, WHICH MUST BE CONSIDERED REGARDLESS OF WHETHER THE MENTAL DEFICIENCIES RISE TO THE LEVEL OF STATUTORY MITIGATING CIRCUMSTANCES, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XIII

THE TRIAL COURT UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF WITH REGARD TO THE APPROPRIATENESS OF A SENTENCE OF LIFE IMPRISONMENT TO [DEFENDANT], IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AND HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM XIV

[DEFENDANT'S] RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE DENIED BY IMPROPER CONSIDERATION OF THE VICTIM'S CHARACTER AND VICTIM IMPACT INFORMATION.

CLAIM XV

[DEFENDANT] WAS NOT PRESENT AT CRITICAL STAGES OF THE PROCEEDINGS AGAINST HIM RESULTING IN THE DEPRIVATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XVI

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH THE GUILT-INNOCENCE AND SENTENCING PHASES OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN THE COURT INSTRUCTED MR. REPLOGLE THAT HE WAS NOT TO PROVIDE ASSISTANCE OF COUNSEL.

(PCR1. 10-141) On April 24, 1989, Defendant filed a supplement to this motion, which reasserted claims I-IV and VI-XIV. (PCR1. 141-362) Claim V was restated as:

> [DEFENDANT] WAS DENIED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BECAUSE THE COURT INAPPROPRIATELY DECLINED TO APPLY LAW OF THE CASE AND COLLATERAL ESTOPPEL PRINCIPLES.

(PCR1. 211) Claim XV was restated as:

> [DEFENDANT] WAS NOT PRESENT AT CRITICAL STAGES OF THE PROCEEDINGS AGAINST HIM AND THE COURT ENGAGED IN EX PARTE COMMUNICATIONS WITH THE STATE RESULTING IN THE DEPRIVATION OF [DEFENDANT'S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

(PCR1. 313) Claim XVI was restated as:

> [DEFENDANT] WAS DENIED HIS RIGHT TO COMPULSORY PROCESS, THE RIGHT TO PRESENT A DEFENSE AND THE EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH THE GUILT/INNOCENCE AND SENTENCING PHASES OF HIS TRIAL, BY ERRONEOUS PRETRIAL RULINGS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

(PCR1. 320) Additionally, the amended motion asserted the following additional claims:

CLAIM XVII

THE TRIAL COURT'S FAILURE TO GRANT [DEFENDANT'S] MOTION FOR CHANGE OF VENUE AND FOR INDIVIDUAL VOIR DIRE DEPRIVED HIM OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XIX [sic]

THE "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING CIRCUMSTANCE WAS APPLIED TO PETITIONER'S CASE WITHOUT ARTICULATION OR APPLICATION OF A MEANINGFUL NARROWING PRINCIPLE, IN VIOLATION OF MAYNARD V. CARTWRIGHT AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

(PCR1. 352, 359) The lower court summarily denied this motion on August 30, 1989, without requesting a response from the State. (PCR1. 1378-84) The lower court found that all of the claims were or could have been raised on direct appeal and were, thus, procedurally barred. *Id.*

Defendant appealed the summary denial of his motion for post conviction relief to this Court, raising the following issues:

> 1) that summary denial was erroneous and the trial court erred in failing to either identify or attach the portion of the record that refutes each claim; 2) that [Defendant's] rights were violated because no reliable transcript of the trial exists and critical records were not included in the record on direct appeal; 3) that [Defendant] was denied effective assistance of counsel in violation of *Faretta*; (FN2) 4) that [Defendant] was denied due process and equal protection because the appointed mental health expert failed to conduct a professionally competent evaluation and this in turn caused counsel to render ineffective assistance; 5) that [Defendant] was denied effective assistance of counsel by the court's order that defense counsel not present an insanity defense; 6) that [Defendant's] rights were abrogated because he was forced to undergo criminal judicial

> proceedings although he was not legally competent; 7) that the death sentence was unreliable because [Defendant] was not competent to waive his sentencing jury yet the penalty proceedings were not conducted before an advisory jury; 8) that [Defendant] was denied his rights as a pro se defendant at both the guilt and penalty phases of the trial; 9) that state misconduct throughout the guilt and penalty phases denied [Defendant's] right to a fundamentally fair and reliable capital trial and sentencing determination; 10) that the trial court's denial of [Defendant's] motions for change of venue and for individual, sequestered voir dire deprived him of his right to a fair and impartial jury; 11) that [Defendant] was indicted by a biased grand jury; 12) that the trial court erred in failing to consider [Defendant's] mental deficiencies as nonstatutory mitigating circumstances and in considering nonstatutory aggravating factors; 13) that the trial court unconstitutionally shifted the burden of proof with regard to the appropriateness of a sentence of life imprisonment; 14) that the jury and judge improperly considered the victim's character and "victim impact" information; and 15) that the "heinous, atrocious, or cruel" aggravating circumstance was applied without articulation or application of a meaningful narrowing principle in violation of *Maynard*. (FN3)
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> * * * *
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> FN2. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).
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> FN3. *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988).

*Muhammad v. State*, 603 So. 2d 488, 488-89 (Fla. 1992). This Court affirmed the summarily denial of Claims 2-8, 10-15 and the portion of Claim 9 not raising a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), finding that these claims were procedurally barred. *Id.* at 489. However, this Court ordered an evidentiary

hearing regarding the portion of claim 9 that alleged the State violated *Brady* by suppressing allegedly "exculpatory statements of prison employees who witnessed the offense." *Id.* at 489.

On remand, Defendant proceeded to request additional public records, regarding both this case and his Miami murder convictions. (R. 12-321, 325-83, 389-98, 402-25, 433-74, 481-89, 507-10, 517-33, 548-51, 554-55, 558-59, 571-72) When the post conviction court attempted to schedule the evidentiary hearing in January 1999, Defendant moved for a determination of competency pursuant to *Carter v. State*, 706 So. 2d 873 (Fla. 1998). (R. 322-24) As a result, the post conviction court appointed experts to evaluate Defendant's competency on February 10, 1999. (R. 384-88) Both experts issued reports, finding Defendant competent. (R. 426-32)

Prior to the evidentiary hearing, Defendant sought to videotape a cell in the disciplinary wing of death row, claiming that such a videotape was necessary to prove his *Brady* claim. (R. 490-503) The post conviction court permitted the videotaping of the cell. (R. 556-57)

At the beginning of the evidentiary hearing, the State indicated that the scope of the hearing was limited to the *Brady* claim and that it would object to evidence on other issues. (T. 4-5) Defendant responded that he would link the evidence he was

presenting to that issue. (T. 5)

Defendant then presented the testimony of Louis Turner, who had been a prison inspector at the time of the murder. (T. 7) As part of his duties, Turner conducted an investigation regarding the murder, interviewed witnesses and prepared a report. (T. 7-8) Turner identified several typed statements and handwritten notes as documents from his investigation. (T. 8-11) Turner did not know the origin of the documents shown to him, except for certain handwritten notes in his hand writing. (T. 11-13) During the investigation, Turner would have kept the case file in a filing cabinet in his office, where they would have remained until they were sent to a warehouse. (T. 11-13) Turner also stated that he was deposed in connection with this case pretrial. (T. 11-13) The State objected to the introduction of the documents because Turner could not say that they were from the case file for this matter and certain documents were not included in the Department of Corrections (DOC) file. (T. 14-17) The lower court admitted the documents, subject to the State's objection to individual documents as to which the origin was not established. (T. 16-17) Turner also identified a note from the State Attorney to him asking him to obtain certain information. (T. 17-18) Turner did not know the location of any other documents, photographs or tapes from the

case. (T. 18-19)

Leonard Ball testified that he was an institutional investigator at the time of the murder, who assisted in the investigation. (T. 22) Ball did not possess any documents, photographs or tapes regarding the investigation and would have turned any such materials over to DOC. (T. 22-23) Ball was deposed twice about this matter pretrial. (T. 23)

Edward Sands testified that he was a prison inspector and investigator at the time of the murder. (T. 25) He went to the prison shortly after the murder and advised Defendant of his rights. (T. 25-26) He had no documents, photographs or tapes regarding this case and would have turned anything he had over to Turner. (T. 26) He did not know where the records of the investigation were kept but assumed that such materials would be in the Chief Inspector's Office, the State Attorney's office or in a DOC records warehouse. (T. 26-27) Sands was also deposed pretrial. (T. 27)

Ed Sobach, Chief of Investigations for DOC, testified that he is the custodian for the file on the investigation of the murder. (T. 29) The file does not include original photographs or audiotapes. (T. 30) After search his fileroom and warehouse, no other files regarding this matter exist. (T. 30-31) He did not know where the original photographs would be after 20 years.

(T. 31) At the present time, a copy of the file is maintained in the local inspector's office and another copy is maintained at the chief inspector's office. (T. 31-33) However, Sobach was unaware of what the policy regarding the maintenance of files was 20 years ago. (T. 32) Sobach stated that all of the places were investigation file were kept had been checked and no other documentation exists. (T. 34-36)

Darrell Brewer testified that he was a corrections officer on Q wing at the time of the murder. (T. 38) Through this employment, he had been in contact with Defendant. (T. 38-39) Brewer saw Defendant after the murder and stated that Defendant had a different look than he did before the murder. (T. 39) Brewer stated that Defendant's "eyes were big and to me he looked scary." (T. 39)

Arthur Jones, a prisoner, testified that he was housed on the east unit of V wing at Florida State Prison (FSP) at the time of the crime. (T. 42) Jones knew Defendant because he worked in the clothing room at FSP and had seen him on the streets before he was imprisoned. (T. 42-43) Jones testified, over the State's relevancy objection, that on the day of the murder, he had brought clothes to Defendant, who appeared angry. (T. 43) Jones believed that Defendant appeared different than normal because Defendant was usually friendly and talkative and

would not talk to anyone that day. (T. 44) Jones, who first claimed to have only been convicted of two felonies, later stated three and finally admitted to five prior felony convictions, stated that he observed Defendant four to five hours before the murder. (T. 45)

Linson Hargrave, another inmate, testified that he had twice been convicted of a felony and became acquainted with Defendant when they were both incarcerated on death row. (T. 47) In 1980, he had the cell next to Defendant. (T. 47) Hargrave testified, over the State's objection, that he believed that the guards gave Defendant a hard time because he spoke his mind. (T. 48-49)

Hargrave stated that Defendant spent the afternoon before the murder pacing back and forth in his cell and talking to himself. (T. 49) This was abnormal as Defendant was usually quiet, did his work in his cell, said his prayers and responded when spoken to. (T. 49-50) Hargrave stated that after stabbing Officer Burke, Defendant appeared to be in "left field." (T. 50) Hargrave asserted that when Sergeant Owens approached Defendant, Defendant did not immediately respond. (T. 51) After Owens called Defendant's name a second time, Defendant frowned, looked at his hand, dropped the knife and walked off with Owens. (T. 51)

Hargrave stated that he was interviewed by an Inspector Briarton after the murder but did not make the statements that he was now making. (T. 51-52) He claimed not to have provided the information because he was scared. (T. 52) Hargrave stated that he was scared because Lt. Long had been sitting on his desk, swinging his legs, during the interview with Hargrave and because he thought he might be taken to Q wing and beated. (T. 53) Hargraved averred that he had never told anyone about his alleged observations until he was contacted by CCR three weeks before the evidentiary hearing and that he would not have made this statement while on death row. (T. 54-55)

Boyd McCaskill, another inmate, testified he had seen Defendant when they were both incarcerated at FSP. (T. 56) McCaskill stated that on the day of the crime, he saw Defendant as Defendant was being taken to the lieutenant's office. He described Defendant as "looking all wild and crazy. . . . like he was having a seizure or something" (T. 57) McCaskill claimed that Defendant was groaning and did not respond. (T. 57)

McCaskill did not recall being interviewed about this matter and did not recall tell Turner that he did not know anything and did not want to be involved. (T. 58) However, McCaskill admitted that he had never mentioned his alleged observations of Defendant to anyone until the Thursday before the evidentiary

hearing. (T. 58-59)

Next, Defendant presented the testimony of Brad Fisher, over the State's objection that his testimony was not relevant to the alleged *Brady* violations. (T. 61-67) Dr. Fisher had evaluated Defendant in 1979, 1989, 1996 and 2000. (T. 67) Dr. Fisher then testified that he had reviewed background materials regarding Defendant that did not include the alleged *Brady* materials. (T. 68-71) The lower court admitted testimony about these materials over the State's objection that this was irrelevant to *Brady* claim. (T. 69)

Dr. Fisher next testified that Defendant had been placed on Q wing numerous time before the murder of Officer Burke. (T. 73) When Dr. Fisher was asked to describe the events leading up to the murder, the lower court granted the State a continuing objection to testimony that was not relevant to the alleged *Brady* violation but overruled the objection. (T. 73-74) Dr. Fisher then testified that the denial of the visit with Defendant's mother because of his refusal to shave and the consequent disciplinary report that Defendant anticipated causing his transfer to Q wing were "precipitating stresses" to the murder of Officer Burke. (T. 74-75) Dr. Fisher was then permitted, over the State's objection, to describe his observations of Q wing on the day before the evidentiary hearing

and to narrate a videotape of Q wing taken at that time. (T. 75-83) Dr. Fisher then testified, again over the State's objection, regarding his review of information about solitary confinement. (T. 85-86)

Dr. Fisher stated that the letter from Turner to the prosecutor and the attached statements would have be important to a mental health professional in attempting to explain why Defendant killed Officer Burke. (T. 86-90) Dr. Fisher felt that the descriptions of Defendant as looking dazed, having "his eyes stretched," and having a blank look indicated that "something's going on there that wasn't typical." (T. 90) He also indicated that the description of Defendant as calm, in control and uncaring meant that "something's not right."

Again over the State's objection, Dr. Fisher was permitted to opine that Defendant was not competent at the time of trial and did not knowingly waive his right to counsel because Dr. Fisher believed that Defendant was paranoid and delusional. (T. 91-95) Dr. Fisher also opined that Defendant suffered from paranoia and was probably a paranoid schizophrenic. (T. 96-97) Dr. Fisher believed that this condition, coupled with Defendant's alleged delusions, prevented Defendant from understanding the wrongfulness of his action but did know what he was doing. (T. 97-98) However, Dr. Fisher admitted that he

had never asked Defendant if he thought that what he was doing was right. (T. 98) Dr. Fisher also believed that Defendant did not have the ability to waive an insanity defense, mitigation or a penalty phase jury because Defendant thought his lawyers were involved in a conspiracy against him. (T. 99) Dr. Fisher also stated that it was his opinion that the murder was committed while Defendant was under the influence of extreme mental or emotional disturbance and that the murder was committed under duress. (T. 99-100) Dr. Fisher also stated that Defendant's family background qualified as nonstatutory mitigation. (T. 100-01)

On cross, Dr. Fisher admitted that Defendant was of above average intelligence and capable of manipulation. (T. 105) He acknowledged that Defendant had only been in a mental hospital once for a brief period of time and had escaped from the hospital. (T. 105-06) The only time Defendant was given medications for mental illness was when he was in the mental hospital in 1971. (T. 106)

Dr. Fisher admitted that Defendant had been given a number of brain scans, skull x-rays and electroencephalograms over the years, which were all normal. (T. 107) He acknowledged that Defendant was capable of planning and drafting legal pleadings. (T. 107)

Dr. Fisher admitted that the descriptions of Defendant as having a blank look and being calm and collected that he felt were important in the *Brady* material was basically the same as information disclosed during pretrial depositions. (T. 108-18)

Dr. Fisher refused to consider Defendant's statement at his 1979 clemency hearing in which Defendant stated that he originally believed that the corrections officers were harassing him but had come to understand that they were actually trying to help him. (T. 120-24) However, he acknowledged that such statements were relied upon by mental health experts. (T. 124)

Dr. Fisher admitted that other doctors had found Defendant to be competent, including Dr. Amin who saw Defendant at the time of trial. (T. 128) Dr. Fisher also acknowledged that Defendant made a volitional choice not to see other doctors at that time. (T. 128-29) Dr. Fisher insisted that his opinion that Defendant was a paranoid schizophrenic was the same as other doctors opinions that Defendant had a paranoid personality. (T. 129-32)

Dr. Fisher stated that he believed that Defendant chose to waive the sentencing jury because there were a number of corrections officers in uniform in the courtroom. (T. 132) However, Dr. Fisher admitted that his belief regarding the number of uniformed corrections officers in the courtroom was

based on a videotape of the hearing at which sentence was pronounced. (T. 132-33) He acknowledged that if the videotape did not accurately reflect the time at which Defendant waived the penalty phase jury, he would be in error. (T. 133) Finally, Dr. Fisher admitted that Defendant was not the type of person to be intimidated by the presence of uniformed officers and that he was not intimidated by the lower court, who had also presided over Defendant's trial. (T. 133-35)

Frederick Replogle testified that he was appointed a standby counsel at the time of trial and ordered not to have contact with Defendant. (T. 157-59) Replogle stated that the videotape of sentencing was of the hearing at which sentence was pronounced. (T. 159-60) He had no recollection of the audience at trial but believed that there were uniformed corrections officers in the courtroom at other points during trial. (T. 160-61)

Steven Bernstein testified that he represented Defendant prior to trial. (T. 165-66) He was aware that the State was planning to present its case through the testimony of eyewitnesses that the murder was premeditated. (T. 166-67) He was aware that Defendant had been denied a visit with his mother because he refused to shave, which led to the murder. (T. 166-67) He planned to present an insanity defense based on

Defendant's previously diagnosed mental condition and the events of the day of the crime. (T. 167)

Bernstein stated that he filed a demand for discovery and that after he was removed from the case, Defendant filed two such demands. (T. 169-71) He did not recall being provided with the letter from Tuner to Elwell. (T. 171) He also did not recall having seen the seven typed, unsigned, unidentified and undated documents. (T. 172) He would have been interested in the documents that stated that Defendant's eyes were wide open and that Defendant had a blank expression on his face. (T. 172-73) He also did not recall having been provided with the handwritten notes of the interviews. (T. 173-74) Bernstein felt that information would have been useful to have provided to experts for consideration of issues of competence, insanity and mental mitigation. (T. 175-77) However, he admitted that his notice of insanity defense had been stricken because Defendant would not cooperate with mental health evaluations. (T. 175)

On cross, Bernstein admitted that he had reviewed copies of the information that he had turned over to Defendant at the time of trial but could not be sure the file was complete. (T. 180-82) When confronted with his statement during the deposition of Leonard Ball that he had taken pretrial, Bernstein admitted that he did have some handwritten information regarding the guards

that he did not remember having. (T. 182-83) He acknowledged that he may have forgotten receiving certain documents at the time of trial and that he could not say for sure that he did not receive reports from the guards. (T. 183-85)

Bernstein admitted that Defendant was adamant that an insanity defense not be presented. (T. 187-88) He acknowledged that Defendant's position regarding the insanity defense would not have been altered by the possession of any document. (T. 188) Bernstein stated that the only thing that he thought the statements could have changed was the trial court's decision to allow Defendant to represent himself. (T. 188-89)

Bernstein acknowledged that he did request copies of the transcripts of the taped interviews during the Ball deposition. (T. 189) He also admitted that the record reflected that he was given those transcripts. (T. 189-92)

Bernstein stated that his notes for opening statement indicated that he was aware of a statement that Defendant's eyes were wide open from a deposition. (T. 192-93) The notes did not include the phrase blank expression. (T. 193) However, Bernstein admitted that he had been informed about blank looks and Defendant being calm during the deposition but did not include them in the notes. (T. 196-99) Bernstein admitted that he had not conveyed the information from the depositions to the

experts because Defendant had already refused to cooperate with an insanity defense and the notice of insanity defense had already been stricken. (T. 199)

Bernstein then claimed that the unsigned, undated and unattributed written statements could have been used to impeach witnesses at trial. (T. 199-200) However, he later admitted that they were consistent with the deposition testimony and that they could not have been used as impeachment because they were unsigned and unattributed. (T. 200-01)

Finally, Defendant presented, over the State's objection, the testimony of Bill Salmon, as an expert in Florida criminal defense. (T. 203-04) Salmon stated that he reviewed a number of documents, which included the alleged *Brady* material and other documents. (T. 205-06) Salmon opined that Officer Padgett's incident report would have assisted in impeaching him. (T. 208-12) Salmon felt that Duane Phipps' handwritten statement of his impressions of Defendant would have been useful to provide to a mental health professional because of his description of Defendant. (T. 214-15) Salmon also felt that Phipps' statement was inconsistent with his trial testimony regarding the finding of the weapon used to kill Officer Burke. (T. 220)

He believed that the descriptions of Defendant has being "very disturbed" on the morning of the day the murder took place

and having his eyes wide opened and a blank expression after the murder contained in the unsigned, undated, unattributed statements would have been important to the mental health experts. (T. 215-17) Salmon stated that the statement about the blank expression appeared in a statement by someone who seemed to have been in the same place and performed the same functions that Officer Henderson described in his deposition. (T. 216-18) Salmon admitted that Henderson had used the word blank in describing Defendant's appearance and demeanor in his deposition. (T. 218-19)

On cross, Salmon admitted that there was no way to be sure of the integrity of Bernstein's files because they had been transferred through the custody of several people. (T. 235-36) Salmon admitted that Padgett referred to his incident report during his deposition but claimed that Bernstein may still have been unaware that the report existed or have had a copy of the report. (T. 236-40) He also acknowledged that Phipps had given the same description of Defendant's demeanor that was contained in his statement during deposition. (T. 241-42) Phipps also described Defendant's blank expression during his deposition. (T. 242) Salmon admitted that the State had listed all of the officers involved as witnesses and had indicated that it had oral and written statement from them in its initial discovery

response. (T. 249-50)

In his post hearing memorandum, Defendant asserted that he had not only proved the alleged *Brady* violation but that he had also proved that Defendant was denied his right to counsel because his standby counsel was ordered not to communicate with him, that he was denied his right to a fair trial by the location of the trial and the presence of guards at trial, and that he had been denied public records.(R. 770-98) Defendant also moved the post conviction court to amend the pleadings to conform to the evidence to include all claims that he raised in his post hearing memorandum. (R. 765-69)

The State responded in its post hearing memorandum that the statements relied upon by Defendant had been provided pretrial, that Defendant did not prove that the State did not do so, that the information from the statements was also disclosed during the depositions of the officers who made the statements, that the expanded statements by the inmates at the evidentiary hearing was never in the possession of the State and that the allegedly undisclosed evidence was not material to the issue of Defendant's mental state at the time the crime were committed. (R. 799-838) The State also asserted that Defendant's other claims were not properly before the court because they were not within the scope of this Court's mandate on remand and had been

previously raised and rejected. (R. 838-40) The State also contended that the claims were procedurally barred and without merit. (R. 840-45)

On May 8, 2001, the lower court issued its order denying relief with regarding to the guilt phase but granting relief with regard to the penalty phase. (R. 904-11) In this order, the court found that the only issue properly before it was Defendant's *Brady* claim. *Id.* In analyzing the *Brady* claim, the lower court assumed that the State possessed the evidence and that it suppressed that evidence without ever deciding if this was true. (R. 909) The lower court stated that the evidence it was considering in conducting its materiality analysis were found in "depositions, incident reports, and interviews." (R. 910) The lower court found that this evidence was material because the trial court did not review this information to find potential mitigation that was not presented by Defendant at trial because Defendant had waived mitigation and that this evidence might support a finding of statutory or nonstatutory mental mitigation. (R. 909-11)

This appeal follows.

## SUMMARY OF THE ARGUMENT

The lower court erred in granting Defendant a new penalty phase based on an alleged *Brady* violation. The lower court abdicated its role in determining whether Defendant had proven all of the elements of the *Brady* claim by assuming that the State possessed the evidence and that the State did not disclose the evidence. The record from both the trial and post conviction proceedings show that the State did not possess some of the evidence and disclosed the rest, and Defendant did not prove that this was untrue. Further, the lower court improperly considered the impact of evidence that was disclosed in determining that the allegedly withheld evidence was material. In fact, the disclosed information shows that the allegedly undisclosed information was cumulative and not material.

## ARGUMENT

**THE LOWER COURT ERRED IN FINDING THAT THE STATE HAD COMMITTED A BRADY VIOLATION BECAUSE THE LOWER COURT ASSUMED, CONTRARY TO THE EVIDENCE, THAT THE STATE SUPPRESSED THE EVIDENCE AND THE LOWER COURT RELIED UPON EVIDENCE THAT WAS DISCLOSED IN FINDING MATERIALITY.**

The lower court erred in granting an new sentencing hearing based on the alleged *Brady* violation. The lower court assumed that the documents and information were in the possession of the State and were suppressed. However, it is undisputed in the record that certain information was not in the possession of the State. Further, the record from trial indicates that the information was disclosed to Defendant. Moreover, in determining materiality, the lower court considered information, such as deposition, that were clearly in Defendant's possession as having been suppressed and failed to determine the impact that the allegedly suppressed information in light of the information that was disclosed.

In order to establish that the State violated *Brady*, a defendant must show:

> [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.

*Way v. State*, 760 So. 2d 903, 910 (Fla. 2000)(quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Inherent in the requirement that the State suppressed the evidence is a requirement that the State actually possess the evidence and that the defendant could not have obtained it. *See United States v. Grintjes*, 237 F.3d 876, 880 (7th Cir. 2001) (holding *Brady* does not apply where evidence could have been discovered by defense with use of diligence); *United States v. Corrado*, 227 F.3d 528, 538 (6th Cir. 2000)(same); *High v. Head*, 209 F.3d 1257, 1265 (11th Cir. 2000) (finding *Strickler* has not abandoned due diligence requirement of *Brady*); *United States v. Maloof*, 205 F.3d 819, 827 (5th Cir. 2000)(same); *Johns v. Bowersox*, 203 F.3d 538, 545 (8th Cir. 2000)(defining "state suppression" component of *Brady* as "[t]here is no suppression of evidence if the defendant could have learned of the information through 'reasonable diligence'"); *United States v. Hotte*, 189 F.3d 462 (2d Cir. 1999)(same). In fact, this Court has acknowledged that a defendant cannot show that a *Brady* violation occurred if the defendant knew of the existence of the evidence or in fact had the evidence. *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000)(“Although the "due diligence" requirement is absent from the Supreme Court's most recent formulation of the *Brady* test,

it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.")(quoting *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000)). In reviewing a trial court's decision concerning a *Brady* violation, this Court makes an independent review of the trial court's legal conclusions but gives deference to the trial court's findings of fact. *Rogers v. State*, 782 So. 2d 373, 376-77 (Fla. 2001);

Here, Defendant claimed that the State had committed a *Brady* violation by failing to disclose the testimony of inmates McCaskill, Hargrave and Jones, certain incident reports, certain taped statements and certain typed, unsigned, undated and unattributed statements. In analyzing whether Defendant had proved that the State, in fact, suppressed these statements, the lower court "assum[ed] the evidence cited by Defendant" had been suppressed. (R. 909) In doing so, the lower court abdicated its duty to determine whether Defendant had proved that the State had in fact suppressed this evidence. Further, such assumption was unsupported by the evidence.

With regard to the inmates testimony, both Hargrave and McCaskill testified that they had never revealed this

information to the State and would not have done so. (T. 51-54, 58-59) Defendant presented no evidence that these statements were untrue or that the State possessed the statements in any other manner. The last inmate Jones, who had seen Defendant 5 hours before the murder, was not mentioned in the alleged *Brady* material and in fact, Defendant never presented any evidence that he had been interviewed by the State. (T. 42-45) Given that these inmates never revealed the statements that they made at the evidentiary hearing to the State, it cannot be said that the State suppressed them. *Maharaj*, 778 So. 2d at 954 ("There can be no *Brady* violation when the allegedly suppressed evidence is not in the possession of the State.") As such, the lower court erred in assuming that the State violated *Brady* with regard to the inmates. The order granting Defendant a new penalty phase should be reversed.

With regard to the incident reports, Defendant acknowledged having received copies of the incident reports during the pretrial deposition of Leonard Ball. State's Exhibit 5, Deposition of Leonard Ball at 5. (T. 182) Defendant was told by Officer Padgett during his pretial deposition that he had made an incident report. Defense Exhibit 17, Deposition of Dana Padgett at 13. Bernstein was unable to state that there were additional incident reports that he had not received. (T. 182-

83) Since Defendant did not prove that the incident reports that he claimed had been suppressed were not the incident reports that Bernstein had acknowledged having, Defendant did not prove that the State suppressed any reports. *Maharaj*, 778 So. 2d at 954; *Occhicone*, 768 So. 2d at 1042. As such, the lower court erred in assuming that the State suppressed these reports and the order granting a new penalty phase should be reversed.

With regard to the taped statements, Defendant learned of the existence of these statements during the deposition of Leonard Ball and requested copies of them. (T. 189) Bernstein acknowledged at the evidentiary hearing that the records from the time of trial indicated that he was given transcripts of these statements. (T. 189-92) As the evidence showed that Defendant was given these statements, the lower court erred in assuming that the State suppressed them. *Maharaj*, 778 So. 2d at 954; *Occhicone*, 768 So. 2d at 1042. The order granting Defendant a new penalty phase should be reversed.

Finally, in analyzing the materiality of the suppressed information, the lower court based its finding on the fact that the information was only contained in "depositions, incident reports and interviews." (R. 910) The lower court then concluded that this information would have assisted the trial court in examining the record for mitigation since Defendant had

chosen not to present any. Again, in basing its finding on depositions and other information that was in the possession of Defendant, the lower court erred. A *Brady* violation is proven by showing that Defendant did not receive the information; not by showing that information that Defendant had was not presented to the trial court.[3] *See Maharaj*, 778 So. 2d at 954; *Occhicone*, 768 So. 2d at 1042. As such, the lower court erred by relying upon information that had been disclosed in determining that the allegedly withheld information was material.

Moreover, when the allegedly withheld information is compared to the information that was disclosed, the allegedly withheld information was not material, as it was cumulative to the disclosed information. Defendant claimed that the important information that was contained in the allegedly withheld information was the description of Defendant as being "very disturbed (upset)" when he was denied a visit with his mother and the descriptions of Defendant as having a blank expression, wide opened eyes, being calm and collected, and having an uncaring attitude after the murder. However, these very same descriptions were contained in the depositions taken by

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[3] In this case, Defendant chose to represent himself at trial. As such, there can be no claim of ineffective assistance of counsel. *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975).

Defendant of the State's witnesses. Defense Exhibit 17, deposition of Dana Padgett at 14, 19-20 (upset about denial of visit); Defense Exhibit 17, deposition of K.O. Crawford at 40 (collected); Defense Exhibit 17, deposition of Harry Owens at 8-9 (just standing staring at body, scared); State's Exhibit 5, deposition of Leonard Ball at 48 (calm and collected); State's Exhibit 5, deposition of L.E. Turner at 7 (cool and calm); Defense Exhibit 17, Deposition of L.E. Turner at 36 (calm and composed); Defense Exhibit 17, Deposition of C.G. Strickland at 21 (mighty calm); Defense Exhibit 17, deposition of Edward Sands at 11 (apathetic attitude); State's Exhibit 5, deposition of D.E. Brewer at 7-8 (looked like nothing was going on); State's Exhibit 5, deposition of Dwayne Phipps at 16-17 (uncaring attitude, blank expression); Defense Exhibit 17, deposition of Thomas Henderson at 6-7 (blank face); Deposition of Roger Browne at 9 (angry facial expression). Further, the attorney who represented Defendant prior to trial admitted that he was aware that Defendant's eyes had been described as being wide opened. (T. 192-93) This Court has repeatedly held that where the allegedly undisclosed information was merely cumulative to the information that was disclosed, no *Brady* violation has been proven. *E.g.*, *State v. Riechmann*, 777 So. 2d 342, 363 (Fla. 2000); *Ragsdale v. State*, 720 So. 2d 203, 208 (Fla. 1998);

*Routly v. State*, 590 So. 2d 397, 399-400 (Fla. 1991); *Cruse v. State*, 588 So. 2d 983, 988 (Fla. 1991). As the evidence that Defendant alleges was not disclosed was cumulative to the evidence that was, the lower court erred in finding that State had violated *Brady*. The portion of the order that grants Defendant a new penalty phase should be reversed.

## 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.

Respectfully submitted,
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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **INITIAL BRIEF OF APPELLANT** was furnished by U.S. mail to Heidi Brewer, Assistant CCRC-North, P.O. Drawer 5498, Tallahassee, Florida 32314, this _____ day of January, 2002.

_____

SANDRA S. JAGGARD
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-

point font.

_____
SANDRA S. JAGGARD
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