IN THE SUPREME COURT OF FLORIDA

MICHAEL MORDENTI,

Appellant,

v. **CASE NO. SC02-1159**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

_____

ANSWER BRIEF OF APPELLEE

_____

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar I.D. No. 0134101
Concourse Center #4
3507 Frontage Road, Suite 200
Tampa, Florida 33607
Phone: (813) 287-7910
Fax: (813) 281-5501

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

References to the direct appeal record will be designated as (DAR p #). References to the instant post-conviction record will be designated as (R. Vol. #, p #). The exhibits that have been supplemented will be referred to as (SR Vol. #, p #).

STATEMENT OF THE CASE AND FACTS

(A) **Trial - Appeal**

The facts of the case at trial were cogently summarized by this Court's opinion affirming the judgment and sentence on direct appeal. Mordenti v. State, 630 So. 2d 1080, 1082-1083 (Fla. 1994):

> This case involves the murder of Thelma Royston. The victim's husband, Larry Royston (Royston), allegedly hired Mordenti to commit the murder. Royston and Mordenti were charged with the victim's murder after Royston's cellular phone records led detectives to Mordenti's former wife, Gail Mordenti, who subsequently confessed that she had acted as the contact person between Mordenti and Royston. After Royston and Mordenti were charged, Royston committed suicide. Consequently, his version of the events at issue was not available. At trial, Mordenti's defense was that he was some place else when the murder occurred.
>
> Testimony at trial revealed the following details regarding the murder. The victim, Thelma Royston, lived with her mother and her husband. On the night of the murder, Royston told the victim that the lights were off in the barn. Because the Roystons' horse business required the barn lights to be left on until 10:00 or 11:00 each night, the victim and her mother went outside to turn on the lights. When they went outside, they noticed an unidentified man off in the distance. The victim went to talk to him and called back to her mother that the man was there to discuss a horse Royston had for sale. The victim's mother went back inside to tell Royston that the man was there, but when her dog began barking she went back out to investigate. Upon doing so, she discovered the victim's body in the barn. The victim had suffered multiple gunshot and stab wounds. Because it was night and the man had been so far off in the distance, the victim's mother was unable to furnish a

description of him to the police.

Because the victim suffered multiple gunshot and stab wounds, the medical examiner was unable to determine from which wounds the victim had died or whether she had died instantaneously. However, there were no defensive wounds and no indication that anything had been taken or that the victim had been sexually assaulted.

Additional testimony revealed that the victim and Royston had been contemplating divorce, but that Royston thought the victim was asking for too much money. A former girlfriend of Royston's testified that Royston had asked her to kill his wife by either shooting or stabbing her to make it look like a burglary, but the former girlfriend had refused. Mordenti's former wife, Gail Mordenti, testified that Royston asked her if she knew of anyone who would "get rid of his wife" for $10,000. Gail Mordenti stated that she subsequently asked Mordenti if he knew of anyone who would kill Royston's wife and he responded: "Oh, hell, for that kind of money, I'll probably do it myself." Gail Mordenti explained that she acted as the middle person between Royston and Mordenti by conveying information about the best time and place for the murder and by supplying a photograph of the victim and a map of the ranch.

Gail Mordenti further testified that, when she first approached Mordenti about murdering the victim, he informed her that it would be impossible to commit the murder as Royston wanted and that he would not do it. However, Royston continued to insist to Gail Mordenti that he wanted the murder committed. Gail Mordenti finally placed Royston directly in touch with Mordenti. Royston's cellular phone records reflect that he made a thirteen-minute telephone call to Mordenti's number on the day of the murder. After the murder, Gail Mordenti delivered payments totaling $17,000 from Royston to Mordenti. According to her, the amount had risen from $10,000 to $17,000 because Mordenti had to get rid of a car. Mordenti gave Gail Mordenti between $5,000 and $6,000 of the $17,000 over time to help her pay her bills. Additionally, Gail Mordenti testified that Mordenti described the murder

to her, stating that the victim "put up quite a fight" and that he "shot her in the head with a .22." He also told Gail Mordenti that the victim had a lot of jewelry on and that he felt sorry that he couldn't take it. She also testified that Mordenti had a number of guns that he kept as "throw away" pieces and that she knew he was associated with some "shady" people. (A cellmate of Mordenti's also testified that Mordenti told him he was "in the mob.") For her testimony, Gail Mordenti was offered complete immunity.

No physical evidence was produced linking Mordenti to the crime, and Gail Mordenti was the only witness who was able to place him at the scene of the murder. However, her testimony was consistent with what police knew about the murder and some of her testimony matched information about the murder that had not been made public.

In his defense, Mordenti produced three witnesses who stated that he had attended an automobile auction on the night of the murder. Mordenti was a used car dealer and frequently attended auctions where he purchased used cars for resale. The prosecution, however, was able to point to a number of inconsistencies in the witnesses' testimony. Additionally, one of the three witnesses was one of Mordenti's girlfriends, and the other two witnesses had testified only after being contacted by the girlfriend over a year after the murder and after being reminded by the girlfriend that the night of the murder was the same night Mordenti had attended the auction.

On these facts, the jury found the defendant guilty of first-degree murder and conspiracy to commit murder.

At the penalty phase, the State relied on the testimony previously presented during the guilt phase and offered no evidence. Mordenti, however, presented fifteen witnesses who testified that Mordenti was of value to society, that he served honorably in the military, that he suffered from a deprived childhood, that he was a good friend, a good employer, a good

> employee, and a good parent to his girlfriend's children, and that he was fair, hardworking and of good character. The court gave three mitigating instructions to be considered by the jury if supported by the evidence: (1) that Mordenti was an accomplice in the offense for which he was to be sentenced but the offense was committed by another person and his participation was relatively minor; (2) that Mordenti was fifty years old; and (3) that Mordenti was of good character.
>
> The jury was instructed on three aggravating factors: (1) that the murder was committed for financial gain; (2) that the murder was particularly heinous, atrocious, or cruel; and (3) that the murder was cold, calculated and premeditated.
>
> The jury voted 11-1 for the death penalty. In sentencing Mordenti to death, the trial judge found that the murder had been committed for financial gain and was cold, calculated, and premeditated, but not that it was heinous, atrocious, and cruel. She also found the following factors in mitigation: (1) that Appellant was fifty at the time of the crime; (2) that Appellant had no significant history of prior criminal activity; (FN2)(3) that Appellant's father died while Appellant was young and that he was abandoned by his mother; (4) that Appellant was a good stepson to his stepparents; (5) that Appellant supported the woman who lived with him and her two children; (6) that Appellant was a thoughtful friend and employer and was fair in business dealings; (7) that Appellant received an honorable discharge from the Coast Guard; and (8) that Appellant behaved appropriately in court during the trial.

On appeal, this Court determined (1) that there was no error, much less fundamental error, created by the fact that the prosecutors were married to each other, Id. at 1084; (2) rejected the claim procedurally and substantively, that there was error in introducing morgue photographs and testimony as to

identity by the victim's mother; (3) that comments by Gail Mordenti were properly admitted to show appellant had access to the type of gun used in the murder and that a statement by Horace Barnes of a purported "mob" association was error and (even if not barred) constituted harmless error[1]; (4) the HAC introduction was valid under Espinosa v. Florida, 505 U.S. 1079 (1992) and (5) the death penalty was proportionate. Id. at 1085.

The record reflects that the defense elicited the testimony of about sixteen witnesses, primarily in support of an alibi defense (DAR 769 - 1060) and at penalty phase, sixteen witnesses testified including Mordenti himself (DAR 1375-1432).

(B) **Post Conviction Proceedings** -

Mordenti filed a motion for post-conviction relief and following a Huff hearing, the lower court entered an order granting in part and denying in part the amended motion. The court granted an evidentiary hearing on Claim I (ineffective

---

[1] Contrary to appellant's implication the jury did not hear Barnes testify about appellant being a hit man (DAR 745-751). The direct appeal record reflects that trial counsel confirmed that the jury never heard the assertion that appellant was a hit man (DAR 1556). Additionally, at the hearing on September 12, 1991, the court heard argument about the non-disclosure of the hotel name and the court determined it was unintentional and did not result in prejudice (DAR 1558-1562). The defense acknowledged that Barnes said Mordenti stated he was in the mob and that defense counsel Atti and Watts discussed requesting a mistrial but chose not to do so (DAR 1564).

assistance of counsel claim), Claim III (claim for relief under Brady v. Maryland, 373 U.S. 83), Claim XIII (ineffective assistance of counsel at the penalty phase) and Claim XXXI (cumulative error claim). The court denied relief on the remaining claims (R9, 1182-1222). On August 28, 2001, the court entered an order explaining that Mordenti could pursue his newly discovered evidence claim regarding Agent Malone's hair and fiber testimony under Claims I and III, but that he was still not entitled to a hearing on Claims II (expert in metallurgy, as newly-discovered evidence) or Claim XII (improper argument by prosecutor)(R9, 1250-1253). Following an evidentiary hearing the lower court entered a lengthy order denying relief (R10, 1384-1425).

Karen Cox testified below that she was a prosecutor in this case. She identified state's Exhibit 12 as case tracking and file tracking documents in the state attorney's office; her name does not appear as being associated with the prosecution of Horace Barnes (R16, 668-671). She learned that Barnes had information about the Mordenti case from law enforcement officers (R16, 683-84). She had no recollection of meeting Barnes at the county jail in January of 1991 or lifting a detainer or arranging a visit between Barnes and Leslie (R16, 685); she never suggested he say anything other than the truth

(R16, 686); she did not threaten him or promise him anything for his testimony (R16, 688). There was no effort on her part to deliberately hide the name of the hotel from the defense; her recollection was that initially the officers couldn't find it, but that subsequently they checked the registration cards (R16, 690). Cox did not give Gail Mordenti immunity; she understood that she had use immunity (R16, 691). The notes she made to herself she regarded as work product and did not provide her notes in discovery (R16, 692-693). As to Defense Exhibit 17 with the "Don't mention" notation, it was a note to remind herself or co-counsel; it was not a document to show the witness. She told Gail Mordenti the most important thing was to tell the truth (R16, 695-696). She had no reason to disbelieve Gail's statement about what appellant had told Gail. Cox testified she did not have any facts to refute Gail's maintaining there was no romantic relationship with Larry Royston (R16, 698-700).

She identified Defense Exhibit 59 as a hand written note by Nick Cox (R16, 706) which indicated to her that Tracy Leslie be allowed to have her state charges disposed of before being sent back to federal prison (R16, 709). As to state Exhibit 14 - a notation on speaking to Michael Milligan - it indicated Mordenti had called Milligan about a car in New Mexico used in a bank

robbery (R16, 712). Similarly Exhibit 17 contained notes while the trial was on going so she could find them (R16, 713). Exhibit 60 was a letter dated April 10, 1991 to Nick and Karen Cox signed by Tracy Leslie thanking for help on state charges (R16, 721). Leslie pled to every charge (except one barred by statute) and got an above the guidelines sentence. It was consistent with thanking them that charges were disposed of before return to federal prison (R16, 725).

Cox also testified that she did not give Gail Mordenti immunity but understood she had received use immunity prior to Cox's involvement in the case (R11, 26-27; 66). Exhibit 23 were handwritten notes of an interview on March 20 with attorney John Trevena by Nick Cox or herself. She recalled that Royston was discovered dead in his apartment the morning of trial and law enforcement was initially investigating whether it was suicide or something else. The investigation was concerned with whether or not Mordenti had any kind of involvement. Later, everyone was satisfied it was an apparent suicide (R11, 58-60).

Former prosecutor Lee Atkinson testified that Gail Mordenti received use immunity, not transactional immunity and she would not have received transactional immunity unless there were a written document with his signature on it (R13, 243-262).

Attorney John Trevena who had represented Larry Royston

(Mordenti's co-defendant) in the June 7, 1989 murder of Thelma Royston, testified that Royston committed suicide on the eve of trial scheduled for March 18, 1991 (R14, 316-317). He stated that the prosecutors obtained a court order (Defense Exhibit 22) to discuss Royston's defense after the suicide and he met with them and a detective (R14, 320-322). At the hearing, Judge Tharpe directed the witness to answer the question and his testimony was proffered (R14, 327). The court sustained the state's objection on hearsay grounds. Trevena stated on proffer that Royston indicated he believed Gail Mordenti had orchestrated everything, that Royston did not indicate he knew who the triggerman was, that Royston theorized Gail may have taken it upon herself to have someone kill the victim so that she could marry him (R14, 330-332). An alternative theory of defense Trevena was pursuing was that Royston had been blackmailed by the victim and her daughter, and perhaps the killing was a lesser degree offense (R14, 334). Trevena acknowledged the difficulty of pursuing a theory of victim-blackmail, since that would provide a motive to hire a hit man for the killing and he admitted that Royston did not pass a private polygraph exam (R14, 339). The witness was not anxious to try the case on the facts. Trevena agreed that Nick Cox's note of the interview with Trevena's admission indicated about

Royston: “He never said, I hired Gail and Michael to kill, but he pretty much made it clear” (R14, 340).

Trial counsel John Atti agreed to represent appellant for a fee of $50,000 most of which was to be paid from property of appellant (R15, 505). He had numerous files of an investigation done by prior counsel Mr. Cohen and his investigator (R15, 506). He anticipated monitoring the first scheduled trial of co-defendant Royston, prior to the suicide (R15, 509). He talked to Richard Watts and worked out an agreement for Watts to join the defense team in May of 1991 (R15, 512). He identified a number of exhibits that he had for trial and others that he did not (R15, 516-537). He knew that Mordenti had cooperated with FBI agent Carmody and that led to the arrest of Horace Barnes. When he heard Gail Mordenti mention investigation of a bank robbery in her testimony he did not think it was a problem (R15, 546-547). He had information gathered by prior counsel regarding an alibi defense (R15, 551-552). He and co-counsel Watts agreed not to present the testimony of Lynn Bouchard (R15, 554); they considered it would be better not to take the opportunity to present an alibi that looked untruthful (R15, 555). He was concerned with the possibility of the jury not believing the Bouchard alibi and creating a problem he originally didn’t have (R15, 559). He did not regard the

testimony of FBI agent Riley as a problem since appellant was not in possession of the gun at the time of the murder (R15, 570). Atti had a collection of financial records of Gail Mordenti (Defense Exhibits 52-56) and cross-examined about some of these matters (R15, 573-575).

On cross-examination Atti admitted receiving help in investigation from Tom Brockman and Sam Solone (R16, 589). He acknowledged that by the time he had retained Mr. Watts all the alibi witnesses had been discovered either by him or prior counsel's efforts (R16, 595). He remembered taking a number of depositions; there were several volumes of depositions taken of Gail Mordenti (R16, 596-598). Atti filed pretrial motions, visited the scene of the murder, talked to witnesses in Ft. Myers or Punta Gorda, and issued a witness subpoena for Lynn Bouchard (R16, 596-602). Atti reiterated being uncomfortable putting on a witness that might potentially not prove to be a solid alibi (R16, 603). He and Watts made a strategic decision not to call Ms. Bouchard (R16, 606). They did put on an alibi through other witnesses (R16, 606). If testimony on the stand didn't directly impact on appellant he left it alone on cross (R16, 606-07). He conceded Ms. Mordenti testified about the lawsuit with Automotion (R16, 607). Gartley did not receive a judgment because Gail Mordenti claimed bankruptcy and she

testified about bankruptcy (R16, 608). There was a decision making process that Marguerite Coleman not be called as a witness (R16, 608-609). He agreed with the principle that it is unnecessary to cross-examine a witness if the testimony is not damaging - he thought FBI agent Malone gave favorable testimony (R16, 610). He could not think of valuable cross for witnesses Flynn, Garberson, Jenkins, Wilkes, Riley, Kirk (R16, 610-613). He thought it a conscious decision not to cross-examine Det. King on the thirteen-minute phone call (R16, 614).

Appellant made the decision to go along with his counsel not to testify (R16, 614-615). There were only innuendos, not facts, about an alleged relationship between Gail and Royston (R16, 615). Atti was aware of Exhibit 37, the transcript on Gail's immunity (R16, 617), and recalled that she testified she could be an accessory during his cross-examination (R16, 619). He only asked her at trial questions about perjury (R16, 620). Atti could not add further reason to object to Cox's argument that Mordenti said he didn't know Royston (R16, 620). Defense Exhibit 5 indicated Mordenti had heard of but hadn't met Royston (R16, 620-621). He understood the FBI agent's testimony about bullet lead analysis to be reliable (R16, 623). Gail Mordenti was listed in Defense Exhibit 58 only as a witness, and it did not indicate that she committed theft (R16, 625).

Attorney Richard Watts indicated that his role expanded from merely handling the penalty phase to handling the alibi as well (R18, 891-892). The defense team had a fairly voluminous amount of material collected from Mordenti's previous counsel (R18, 894). They had the sworn statement taken by previous investigator Steve Millwee (R18, 919). Watts confirmed that they did not present Lynn Bouchard as an alibi witness - the paperwork on the car sale to her looked contrived and there was a problem with her employment time card (R18, 924-925). Watts offered the suggestion below that if Gail had the pistol before the homicide "well then how did Michael use it during the homicide?" (R18, 928)[2]

As for penalty phase, Watts had contacted a mental health expert Dr. Alfred Fireman and he could offer no mental health mitigation (R18, 934-35). On cross-examination, the witness admitted his familiarity with statutory and non-statutory mitigation (R19, 946-947). The problem was the aggravating circumstance - a murder for hire - was heavy (R19, 947). Watts put on a number of alibi witnesses, but he did not put on Lynn Bouchard (R19, 949-952). Her car purchase documents were

[2] As the evidence at trial established, however, neither gun - the one provided by Gail to the officers or appellant's which was seized pursuant to warrant - was the murder weapon. In short, he did not use it during the homicide.

"crummy" and seemingly contrived (R19, 952). The decision not to call her was a calculated strategic one (R19, 956-957), not the result of oversight. He wouldn't call Rotering unless he called Bouchard; there was a defense memo that Rotering didn't have an independent recollection of the date and was only backing up Bouchard (R19, 960). If appellant had wanted his daughter to testify, they would have made the effort to get her there (R19, 962). He felt they made a more than adequate presentation of mitigation (R19, 964). They made a conscious decision not to seek an instruction on the no significant history mitigator because the judge would have allowed rebuttal evidence by the state (R19, 966). The defense team decided that appellant should not testify in guilt phase (R19, 970). Mordenti agreed on that (R19, 971). Watts agreed that none of the guns found was the murder weapon (R19, 971). The defense had Exhibit 37, the document describing Gail's use immunity (972-973). Watts also agreed that Trevena's statements from Royston were inadmissible hearsay (R19, 974).

Gail Mordenti Milligan testified at the evidentiary hearing. She recognized defense Exhibit 37, the sworn statement to Mr. Atkinson wherein she was given use immunity. She understood that if she didn't tell the truth she could be prosecuted for murder and conspiracy (R19, 995-997). She was not told she had

been granted transactional immunity nor did she sign any agreement with Atkinson conferring transactional immunity. She was told that what she said couldn't be used against her. She denied having an affair with or sleeping with Royston (R19, 998). The witness testified that she asked Royston to come to her house for lunch in April to see if he was interested in getting into the wholesale automobile business (R19, 1002-03). Her calendar book, defense Exhibit 11 had a notation of Royston - lunch on April 11. That was the only time he came to her house for lunch and it was at that lunch that he asked her if she knew anyone who could help him get rid of his wife (R19, 1004-05). She eventually put appellant into contact with Royston. Royston came to her place of employment, she dialed appellant on Royston's cell phone, the thirteen minute phone call of Royston on June 7 (R19, 1006). She testified that while employed at Automotion, Mr. Gartley took funds from the business for non-business purposes to buy personal things (R19, 1014) and she left Automotion in February of 1989 (R19, 1016).

A lawsuit was filed by the bank against Automotion and Gartley and her. When she left Automotion, Gartley gave her two cars and promised to pay the rest of her investment but she did not receive it (R19, 1016-17).

Karen Cox did not attempt to influence her testimony; she

did not give her defense Exhibit 17 (R19, 1018-19). Cox told her just to tell the truth (R19, 1020). She testified that eventually she claimed bankruptcy because she couldn't pay the mortgage on a house. Exhibit 54 was a mortgage foreclosure complaint dated December 12, 1989, months after the June 7 murder. The date of the final judgment was June 25, 1990 (R19, 1024). The date of the failure to make the payment was July 15, 1989, after the time frame of the conspiracy and murder (R19, 1025). Glen Donnell received a settlement regarding a motorcycle accident in which he sustained injuries. The settlement checks of $15,000 and $35,000 were made payable to her with Donnell's consent and authorization. They were deposited into her account and she gave it to Donnell (R19, 1027-29). The lawsuit filed by Mulholland ended in a stipulation for dismissal on January 30, 1989 (R19, 1030; see also SR7, 1294).

The witness also testified that her father Milton Coleman, paralyzed from the neck down, came to live with her while she worked at Automotion. A check in the amount of $28,000 was made payable to Milton and Marguerite Coleman; it was to repay him for money they had lent her and her father told her to keep the money (R19, 1031-35). As to Defense Exhibit 55, a lawsuit by Frank and Mary Lou Cannino, a judgment of about $1300 was

entered against her on September 6, 1989, after the murder; she did not recall having been served with the lawsuit (R19, 1036-37). Defense Exhibit 58 reflects the state attorney investigation decided it was a civil not criminal matter (R19, 1039).

Defense Exhibit 56 was a complaint from Fortune Savings against Automotion, Gartley and herself and the answers were filed in July 1989 (after the murder). A judgment was not obtained against her by Fortune or Gartley. She filed bankruptcy in October of 1989 (R19, 1040-41).[3]

Gail Mordenti Milligan testified that now years later she did not have a clear recollection of when she received the gun from appellant, whether before or after the murder but it was her intention to testify truthfully (R19, 1043-44). After the divorce from appellant, they were able to be friendly and civil to each other (R19, 1047-48); it wasn't bitter or acrimonious (R19, 1049). She thought he might know people for Royston's problem (R19, 1049). After she gave a sworn statement to Mr. Atkinson, she made a taped phone conversation to appellant in the presence of law enforcement officers. Initially he told her the FBI agent was present and to call back (R19, 1050). The

---

[3] She also testified at trial regarding having to file bankruptcy (DAR 694, 641).

taped phone call was played below. Appellant advised her to stay cool, that she didn't know anything about the murder and not to worry about it. He told her she didn't have to take a lie detector and she shouldn't call Larry. He also told her "Don't talk nothing on the phone" (R19, 1053-60). He indicated his awareness that he knew she didn't have a romantic relationship with Royston (R19, 1061). The note on the date book in Defense Exhibit 12 regarding a ticket related to a speeding ticket of Michael Milligan and she had no idea what the entry about calls to bus company was about (R19, 1062-1063).

The defense called Erik Randich and William Tobin to offer their criticism of the testimony of FBI metallurgist expert John Riley (R15, 455-500; R14, 384-448) and the state called Agent Riley who explained and adhered to his prior trial testimony (R17, 803-855).[4]

---

[4] The trial testimony of FBI agent Wilkes and Detective King established that state trial exhibit 3 are bullets taken from the victim and exhibit 13 are bullets from the gun Gail Mordenti provided to the police in March of 1990 (DAR 442, 500, 507). FBI agent John Riley testified at trial that bullets with the same elemental composition (of such elements as antimony, copper, arsenic, silver, bismuth and tin) if they are analytically indistinguishable typically come from the same box of cartridges. Two of the bullets (from the victim) were analytically indistinguishable from four of the cartridges in exhibit 13. Two of the bullets among the cartridges did not match the others or each other. Riley opined that the bullets which were analytically indistinguishable came from the same box of ammunition with the caveat that if the bullets from the crime scene didn't come from the same box as the four that matched

Following the evidentiary hearing and submission of post-hearing memoranda, the lower court entered its order denying relief (R10, 1384-1425). With respect to the claim of ineffective assistance of trial counsel at the guilt/innocence phase (Claim I below), the lower court found (1) counsel was not ineffective in failing to properly impeach Gail Mordenti regarding her grant of immunity - Atti did cross-examine her and the jury could evaluate her credibility (R10, 1386-87); (2) counsel effectively brought before jury the fact Gail Mordenti had financial troubles and the jury had the ability to weigh this testimony and evaluate her financial motive for the murder of Thelma Royston. The failure to bring lawsuits to the jury's attention was not deficient since many occurred after the conspiracy and murder (R10, 1388-90); (3) counsel was not

---

analytically, they came from another box manufactured at the same place on or about the same date (DAR 463-481).

At the evidentiary hearing Riley reiterated that bullets with the same elemental composition meeting the criteria he discussed are typical bullets that come from the same box of ammunition or from another box of ammunition that was made at the same factory and packaged on or about the same date. It is typical, i.e., that's where he would expect that source to most likely be (R17, 809). Riley repeated that as to the six unfired cartridges, four of them had five elements present: antimony, arsenic, copper, silver and bismuth [tin was missing from all the items examined - R17, 837-837]; as to the bullet and fragment from the body, the bullet and fragment were analytically indistinguishable and the other two were different from each other and from the others that were analytically indistinguishable (R17, 837). He stood by his prior testimony (R17, 842).

deficient in failing to call Marguerite Coleman since Milton Coleman intended to give money to Gail Mordenti and counsel made conscious decision not to call Marguerite (R10, 1391); (4) the claim that counsel was generally unprepared for trial was meritless - counsel had acquired the voluminous files by former counsel Cohen and his investigator, Atti felt he was prepared to the best of his ability and Mordenti did not want a continuance (R10, 1392-94); (5) there was no merit to an ineffectiveness claim on failing to investigate whether Gail Mordenti's divorce was amicable (R10, 1395); (6) counsel was not ineffective in failing to explore a possible romantic relationship between Gail Mordenti and Larry Royston since there was no credible evidence of such (R10, 1396); (7) counsel was not deficient in failing to investigate hotel registration cards at the Days Inn (R10, 1396-98); (8) counsel made considered, deliberate decision not to call questionable witness Lynn Bouchard as an alibi witness (R10, 1398-1401); (9) counsel was not ineffective in making tactical choice not to cross-examine certain witnesses whose testimony was not deemed harmful (R10, 1404-05); (10) there was no deficiency or prejudice in failing to retain a metallurgy expert, the failure to object to statements by Gail Mordenti on the basis of marital privilege and the claim that appellant was not advised of his right to testify were meritless (R10, 1406-

07).

The lower court also denied relief on Claim III below predicated on claims of violations of Giglio v. United States, 405 U.S. 150 (1972) and Brady v. Maryland, 373 U.S. 83 (1963) (R10, 1408-19). The court found no prosecutorial misconduct in Karen Cox's personal handwritten notes taken in preparation of trial and typically not shown to witnesses. The testimony of Royston's former attorney, John Trevena constituted inadmissible hearsay and was of questionable reliability as to statements made by a client facing first degree murder charges. Gail Mordenti admitted her involvement in helping Royston look for someone to murder his wife. The allegation she wanted to marry Royston was meritless (R10, 1410-11). The claim that prosecutor Cox's notes indicated she presented false testimony regarding when Gail started working at T&D Auto Marine Repair (whether May or June 1, 1989) was rejected for the failure to establish its materiality or that the state knew the statement was false when it was said (R10, 1412). The court rejected a contention that the state presented false and misleading testimony about the gun and in John Riley's testimony and the court repeated that Horace Barnes' testimony about Mordenti's alleged mob connections was deemed inconsequential and harmless by this Court on direct appeal (R10, 1412-15). Judge Tharpe determined that the

testimony of when Gail Mordenti received the gun from the defendant was not "material" since that gun was not the murder weapon; that Gail Mordenti's testimony that defendant "was involved in some kind of investigation of bank robbery" was not false and indeed confirmed by the testimony of Agent Carmody; that the failure to provide Gail's date book did not rise to the level of a Brady violation or satisfy the newly-discovered evidence standard (R10, 1416-19).

The lower court also rejected the assertion of ineffective assistance of counsel at penalty phase (Claim XIII below), noting that extensive background of Mordenti's family life was presented and that conscious decisions were made on whom to call. Counsel did not request a jury instruction on lack of significant criminal activity since the trial judge would have allowed the state to rebut with uncharged bad acts, and the jury understood that Mordenti was crime free up to that point of trial. Counsel made a more than adequate presentation of mitigation evidence (R10, 1419-22). The court rejected a claim of cumulative error since no individual error was found (R10, 1423).

This appeal follows.

SUMMARY OF THE ARGUMENT

I. Appellant was not denied due process of law by the state's alleged withholding of material and exculpatory evidence or alleged presenting of false and misleading evidence or argument. After a full evidentiary hearing the lower court determined that the defendant had failed to demonstrate that the prosecutor knowingly used false testimony that was material, in violation of Giglio v. United States, 405 U.S. 150 (1972) or that the precepts of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny had been violated. Additionally, the prosecutor's closing argument was not improper; it was based on the testimony adduced at trial.

II. The lower court correctly denied the claim that appellant received ineffective assistance of counsel at the guilt/innocence phase. Trial counsel made reasonable, tactical choices regarding what witnesses to call and which not to call to testify, reasonably decided that some witnesses who did not offer damaging testimony need not be cross-examined, and adequately examined Gail Mordenti regarding her finances and immunity agreement.

III. The lower court did not abuse its discretion in allowing the testimony of trial defense counsel Watts' former paralegal to testify. Appellant had the opportunity to depose her prior to her testimony. Mordenti's filing of a post-

conviction motion attacking the effectiveness of trial counsel constituted a waiver of the attorney-client privilege, permitting counsel and his employees to testify about the matters asserted. See, generally, Turner v. State, 530 So. 2d 45 (Fla. 1987); Reed v. State, 640 So. 2d 1094 (Fla. 1994); LeCroy v. State, 641 So. 2d 853 (Fla. 1994); Trepal v. State, 754 So. 2d 702 (Fla. 2000); Arbelaez v. State, 775 So. 2d 909 (Fla. 2000).

IV. The lower court correctly denied relief on the claim that trial counsel rendered ineffective assistance at the penalty phase. The record reflects that counsel called over a dozen witnesses to describe appellant's good qualities, as well as appellant himself. Counsel even sought the services of a mental health expert who could provide nothing useful. Appellant only submitted insubstantial or cumulative evidence at the hearing. This claim is meritless.

V. The lower court correctly summarily denied relief on several claims. The claims relating to admission of hearsay evidence and the failure of the trial court to replace jurors were procedurally barred as questions to be asserted on direct appeal, not collaterally. Moreover, appellant did raise on direct appeal the issue of the court's failure to replace juror Haight. It is inappropriate to use the post-conviction vehicle

as a second appeal or to cloak direct appeal issues under the ineffective counsel garb. Similarly, questions relating to the admissibility of evidence, challenges to juror peremptory excusal, and jury instructions are questions for direct appeal, not collateral challenge.

VI. The lower court correctly denied the claim of newly-discovered evidence. Horace Barnes' trial testimony was harmless and inconsequential, and remained so. Agent Malone provided helpful testimony to the defense, and Jack Riley maintained his opinion on metallurgy and the bullets. No relief is warranted.

ISSUE I

WHETHER APPELLANT WAS DENIED HIS RIGHT TO DUE PROCESS WHEN THE STATE ALLEGEDLY WITHHELD MATERIAL AND EXCULPATORY EVIDENCE AND/OR ALLEGEDLY PRESENTED FALSE OR MISLEADING EVIDENCE AND/OR ARGUMENT.

(1) Giglio Claim -

(A) Legal standard - To establish a violation of Giglio v. United States, 405 U.S. 150 (1972) a defendant must show (1) that the testimony was false, (2) that the prosecutor knew the testimony was false and (3) that the statement was material. See Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001); Maharaj v. State, 778 So. 2d 944, 956 (Fla. 2000) (to show perjury defendant must show more than mere inconsistencies, mere memory lapse, unintentional error or oversight [citation omitted]); Rose v. State, 774 So. 2d 629, 635 (Fla. 2000). See also Tompkins v. Moore, 193 F.3d 1327, 1339 (11th Cir. 1999); United States v. Dickerson, 248 F.3d 1036, 1041 (11th Cir. 2001). The trial court correctly cited and applied the appropriate test for Giglio relief (R10, 1409).

The appropriate standard of appellate review is that the reviewing court defers to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence but reviews de novo the application of those facts to the law. Stephens v. State, 748 So. 2d 1028 (Fla. 1999);

Lightbourne v. State, 841 So. 2d 431 (Fla. 2003).

Appellant alludes to a number of exhibits in this sub-issue. It is important to note that while it is true that defense counsel Atti did not receive Karen Cox's pre-trial or trial handwritten notes (Defense Exhibits 14, 17, 21), he did receive or have others such as police reports (Defense Exhibits 5, 6, 10), a photo of the victim (Defense Exhibit 57) and Defense Exhibit 68 (Watts' memorandum regarding the motel name). (R15, 517-518, 522, 543, Atti acknowledging receipt of Exhibit 57). Additionally, Atti was aware that appellant had cooperated with Carmody and that the cooperation led to Horace Barnes' arrest from his client. (R15, 547). Obviously, there can be no Giglio violation where the defense had the exhibits or information ostensibly demonstrating the violation. See Routly v. Singletary, 33 F.3d 1279, 1286 (11th Cir. 1994).

1. **Argument Regarding Mordenti's Knowledge of Larry Royston**

Appellant contends that Ms. Cox provided a false closing argument regarding Mordenti's assertion when questioned in 1989 and 1990 that he didn't know Royston (DAR 1195, 1201) when a police report (Defense Exhibit 5) recites that Mordenti stated he never met Royston but had heard of him through Gail. Appellee denies that there was any prosecutorial misconduct or

a denial of due process.

Detective John King testified at trial that he interviewed appellant Michael Mordenti on July 13, 1989 at his business on Haines Road in St. Petersburg (DAR 497) and:

> Q. And did you question him?
> A. Asked him about the phone call, and if he knew the Roystons.
> Q. What did he tell you?
> A. He said he had never heard of the Roystons and didn't know anything about it. (DAR 498)(emphasis supplied)

King re-interviewed appellant in February 1990 (DAR 500), and also testified that when Royston and Mordenti were being booked into the jail on March 8:

> Q. And at the time, did...were you present when Mr. Mordenti made a statement about his knowledge of Larry Royston?
> A. I believe he said he didn't know him.
> The Court: Would you just answer the question, yes or no.
> The Witness: I was there, but I don't recall the exact words.

Detective Rosalyn Kroll testified at trial that there was a point in time on March 8, 1990 when there was contact made between Royston and appellant (DAR 573). Mordenti did not acknowledge in any way that he knew Royston (DAR 581). In light of the trial testimony of King and Kroll, there was no improper misleading argument by prosecutor Cox mandating the granting of post-conviction collateral relief. Certainly, none of the three elements of Giglio (false testimony, known by the prosecutor to

be false, and materiality) are present in this instance. Relief must be denied. The defense could have used Defense Exhibit 5 if deemed important. See Routly, *supra*.

2. **Regarding Gail's Immunity** -

The lower court rejected the claim that counsel was ineffective in failing to properly impeach Gail Mordenti regarding her grant of immunity. The court found that defense counsel Atti cross-examined her at trial and brought out the fact that if she testified falsely then she could be prosecuted for perjury. Mordenti on her own testified she could also be prosecuted as an accessory, implying an accessory to murder; she had earlier testified on direct examination that appellant kept telling her that she was an accessory, as guilty as he was to the murder and if he got the chair so would she (R10, 1386-87; DAR 656-657, 701-705). The jury heard her testimony and could evaluate her credibility.

At the evidentiary hearing former prosecutor Atkinson identified Exhibit 37, the transcript of statement Gail Mordenti gave on March 8, 1990 (R13, 243-244); and explained that she received use immunity when she gave the sworn statement. She did not receive transactional immunity and she would not have transactional immunity unless he had signed such a document (R13, 252-255, 261-262). Defense counsel had received a copy of

this Exhibit 37 transcript which included Atkinson's explanation of use immunity to Gail Mordenti (R16, 617). Neither Karen nor Nick Cox gave her immunity (R11, 27, 75-76).

At the evidentiary hearing Gail Mordenti Mulligan identified Defense Exhibit 37 where prosecutor Atkinson explained she had been granted use immunity. She understood that if she didn't tell the truth she could be prosecuted for the crime of first degree murder. She was not told that she had been granted transactional immunity. She was told that what she said couldn't be used against her (R19, 995-998). Moreover, the defense had Exhibit 6 and indeed called Detective Baker to testify at trial that Gail asked about immunity (DAR 790-801).

This Court has previously rejected claims similar to the instant one. See Rose v. State, 774 So. 2d 629, 635 (Fla. 2000) (rejecting Giglio claim, noting that even if allegations were true that state misled defendants and jurors about motives of witnesses for testifying, the materiality requirement was not satisfied since such evidence did not put the case in such a different light as to undermine confidence in the verdict); White v. State, 729 So. 2d 909, 913 (Fla. 1999)(affirming trial court's denial of Brady and Giglio claims holding the additional evidence of a deal between the state and its key witness

immaterial where the defense was able to expose the major components of the deal during cross); Routly v. State, 590 So. 2d 397, 400 (Fla. 1991) (holding that additional evidence of a deal between state and defendant immaterial where cross-examination exposed that witness was granted immunity by the state but not every provision of her immunity agreement). This claim is likewise meritless. The defense knew she had been given use immunity.[5]

Appellant argues that the prosecutor gave false argument to the jury because of asserted discrepancies in the testimony between Detective Baker and Gail Mordenti about initiating immunity discussion. Corporal Baker testified at trial that Gail Mordenti mentioned in the car trip to the state attorney's office how the victim died. The word immunity was mentioned and he made no promises. She was trying to get information on what immunity meant (DAR 790-801). Gail Mordenti testified at trial and recalled they mentioned immunity and she responded that if they could grant immunity she would tell them what she knew (DAR 701). Thus, the jury heard and could resolve whatever minor

[5] Even if it could be said that jury should have been told it was use immunity, it would not change anything. The jury was apprised of the benefit afforded to Gail Mordenti and could evaluate the credibility of her testimony in light of the benefit she was receiving; if anything, any misstatement would redound to defendant's benefit.

discrepancies may have existed regarding the witnesses' recollections. Any discrepancy in the recollections of Baker and Gail Mordenti was typical grist for the jury mill.

Unlike the situation in Alcorta v. Texas, 355 U.S. 28 (1957), the instant case does not involve a situation where a witness knowingly gave false testimony known by the prosecutor to be false which was material; instead, appellee merely submits that different witnesses had differing perceptions about an event and described the event as best they could recall it. Certainly there has been no suggestion by prosecutors Karen Cox or Nick Cox in their testimony they knew or condoned the giving of perjured testimony. Appellant cannot legitimately contend that defense exhibit 37 demonstrates that Gail Mordenti was lying about immunity (or that defense exhibit 5 proves Ms. Cox's argument was false in subsection 1, *supra*) when trial defense counsel had both of those documents, which he could use as he saw fit. See Routly v. Singletary, 33 F.3d 1279, 1286 (11th Cir. 1994) ("There is no violation of due process resulting from prosecutorial nondisclosure of false testimony if defense counsel is aware of it and fails to object.").[6]

---

[6] Appellant's reliance on Alcorta v. Texas, 355 U.S. 28 (1957) is misplaced and is clearly distinguishable from the instant case. There, the Court found a due process violation in the petitioner's murder conviction. Alcorta had admitted the killing but claimed it had occurred in a fit of passion when he

3. **Regarding Gail's Employment at T&D Auto Repair**

The lower court addressed Mordenti's claim that prosecutor Cox presented false testimony regarding when Gail Mordenti started working at T&D. Appellant argued that Gail Mordenti testified at the evidentiary hearing that she began working there on June 1, 1989, that Cox in closing argument had argued Royston kept calling her at work in May and Defense Exhibit 17 had a notation to look at a statement to law enforcement officer. Judge Tharpe ruled:

> Under Giglio, Defendant has failed to demonstrate that the statement of when Gail Mordenti started working at T&D was material. Additionally, Defendant has failed to demonstrate that the State knew the statement was false when it was said. As such, Defendant is not entitled to relief upon this allegation. (R10, 1412)

At trial, Glen Donnell testified he opened a business, T&D Auto

---

discovered his wife kissing one Castilleja late at night in a parked car. The only witness to the killing, Castilleja, testified for the state that he had merely driven the victim home and only had a casual friendship with her. Subsequently, the witness gave a sworn statement admitting he had given false testimony and at an evidentiary hearing he admitted having sexual intercourse with the victim five or six times shortly before her death and that he told the prosecutor about it who told him not to volunteer the information. The prosecutor admitted these statements were true and that he had not given the statement to the defense. The Court concluded there was a due process violation in the prosecutor's eliciting testimony that gave a false impression to the jury that the relationship was nothing more than that of a casual friendship when a truthful portrayal would not only have impeached the witness's credibility but tended to corroborate the petitioner's contention that he found his wife embracing the witness and could have reduced the degree of the offense.

Marine, about May of 1989, that he offered Gail Mordenti a job which she accepted, and that Larry Royston came by a few times in May and June and called for Gail Mordenti a half dozen times (DAR 553-555). Gail Mordenti testified at trial that she got a job (the offer was extended by Glen Donnell) at T&D Auto and Marine when they started the business and Royston became aware she worked there and called her at T&D (DAR 628-629).

Trial State Exhibit 16 is the business card of Ted's Auto and Body Repair listing the phone number (813) 585-0875 (DAR 1871) and the cell phone records of Larry Royston - state's Exhibits 6A-E - confirm that calls were made to that number in May and June (DAR 1841-60). Prosecutor Cox in closing argument argued that the phone records showed Royston made numerous phone calls to T&D and that Donnell and Gail Mordenti testified about starting in May or shortly thereafter (DAR 1251-54).

Based on the testimony adduced at trial there was nothing improper about prosecutor's argument. Ms. Cox's testimony at the evidentiary hearing does not establish any prosecutorial misconduct or Giglio violation on this issue, nor does the testimony of Gail Mordenti Milligan[7]. The lower court did not overlook the testimony or the records. The handwritten notation

[7] Her statement of joining T&D on June 1 was based on her recollection of looking over her trial testimony, not on personal recollection now (R19, 1022).

of prosecutor Cox does not alter the result; they were notes during trial to remember or tell co-counsel (R11, 49; R16, 713).

4. **When Gail Received the Gun and Bullets**

The lower court's order recites:

> Defendant also alleges that the testimony presented by Gail Mordenti in reference to the time of when she received the gun from Defendant was false and misleading testimony as she indicated at the trial that she received the gun after the murder, while Karen Cox's notes indicate otherwise. FN33
>
> Here, Defendant has failed to prove that this was a 'material' fact as it is not alleged that 'the gun' was the murder weapon. FN34 In the State's closing argument, it argues that this gun was not the murder weapon. This may have provided impeachable material for the defense, but it would not rise to the level of a Giglio violation as Defendant has failed to demonstrate that such a fact was material.
>
> FN33. This allegation was not raised before the evidentiary hearing; rather, it was raised during the evidentiary hearing and again argued in Defendant's Closing Argument, P. 13, filed January 25, 2002.
>
> FN34. This is found on page 21 of the State's Closing Argument Memorandum, filed January 25, 2002. (R10, 1415-1416)

At trial Gail Mordenti testified that appellant while in Florida had purchased two .22 guns with sequential serial numbers (DAR 586-587)[8]. In March of 1990 after talking to the authorities she agreed to go back to the house and give them the

[8] Pawnbroker Fred Long identified Exhibit 8, the two page record of the firearms sold from his pawn shop to appellant (DAR 711-713).

gun appellant had bought here in Florida. She had left the gun with appellant after their divorce but Mordenti gave it back to her which she wanted for protection. She did not use it or buy bullets, just kept it in a drawer in her bureau (DAR 661-663, see also deposition testimony in Defense Exhibit 25, at SR1, Tr. pp. 29-30). Detective Karen Kirk escorted Gail Mordenti back to her home on March 8, 1990 and retrieved the .22 caliber Jennings automatic with serial number 054100 from the bedroom dresser (Exhibit 12) (DAR 708-709). FBI Agent Gerald Wilkes received two .22 semi-automatic pistols with sequential serial numbers 054100 and 054101 in 1990 (Exhibits 10 and 12) and determined that none of the bullets from victim Thelma Royston could have been fired from either of those weapons (DAR 448-451). Detective King received the Exhibit 10 gun in appellant's briefcase pursuant to warrant on March 8, 1990 (DAR 507).

Appellant argues that defense Exhibit 17 with a handwritten note stating "got gun back accord to STMT in Jan., Feb., March 89" proves Cox kept from the jury proof that Gail Mordenti had told an untruth. It does not. At the evidentiary hearing Gail Mordenti Milligan testified that she did not have a clear recollection of when she got the gun from the appellant - she could not positively state now whether he gave her the gun before or after the murder - but she did not deliberately lie at

trial and when testifying she intended to tell the truth (R19, 1043-1044). Karen Cox testified regarding Defense Exhibit 17 notations would be notes to herself or perhaps co-counsel either during a break or the examination of something that might be relevant (R16, 694-697; R 713).

Mordenti contends that the lower court failed to appreciate that the bullets in the gun were a compositional match to a fatal bullet taken from the victim. However, it matters not whether Mordenti provided the gun to Gail before or after the homicide; it was not the murder weapon. The bullet characterization makes no difference. See Gail Mordenti's testimony in Defense Exhibit 25 deposition regarding appellant's putting bullets into gun when he gave it to her. Cox was not obfuscating the truth at closing argument - only insisting that the defense could not properly argue as evidence that which had not been introduced into evidence through testimony or exhibits. (DAR 1224-1234) Appellant has failed to establish that witness's testimony was knowingly false or that the prosecutor knew it to be false, or that it was material.

5. **Mordenti's "Involvement" with Bank Robbers**

The lower court correctly denied relief and determined there was no Giglio error in prosecutor Cox eliciting testimony from Gail Mordenti at trial about involvement with bank robbers,

since her testimony was not false as required by Giglio. FBI Agent Carmody testified at the evidentiary hearing that appellant helped in the investigation of a burglary and thus it was true he was involved in the investigation. The court found the claim to be without merit. (R10, 1416-17)

At trial, the state questioned Gail Mordenti about the means of contacting appellant after the homicide occurred:

> Q. Would he ever talk to you on the phone?
> A. Not really. He wouldn't talk about it; he would just say, "meet me someplace".
> Q. Did he express any concerns to you about the phones?
> A. Well, he—just some concerns, but not really. Because of the murder, he was involved in some kind of investigation with bank robbery, and that was – so he didn't want any conversation over the phone because he didn't know if anyone was listening in because of the bank robbery. (DAR 657-658)

The prosecutor could properly argue to the jury that the evidence showed when Gail Mordenti phoned appellant on March 8, 1990, with the encouragement of law enforcement officers that he didn't want to talk on the phone (DAR 1195). Indeed the tape of the conversation, played at the evidentiary hearing, confirms his reluctance. Appellant tells her he is not some place where he can talk, that the FBI is talking to him on the case, and that they should talk later. On the next call appellant declares he is still talking with a visitor and asks her to come to lunch, and he talks to her from another phone and reiterates

that he doesn't want to say too much on his phone there (R19, 1052-1060)[9].

The prosecutor in closing argument did not tell the jury Mordenti was a bank robber or even imply such. The lower court was correct that the claim is meritless. Additionally, trial defense counsel was aware of the cooperation to Carmody, from information from his client. (R15, 547).

6. **Horace Barnes and Tracey Leslie**

The lower court concluded that it was unnecessary to examine the contention that the state improperly induced the testimony of Horace Barnes who subsequently stated that Mordenti had mob connections, by providing undisclosed benefits to Barnes and Leslie since this Court on direct appeal had found Barnes' testimony to be inconsequential (R10, 1415).

At trial, Barnes testified he was at the Lewisburg federal prison following a federal prosecution in Tampa and that when he met appellant in October or November 1989 he let him know he was in the mob (DAR 747). The trial court sustained a defense objection to the mob reference (DAR 749). On cross-examination Barnes stated he had more than five prior convictions (DAR 751). On direct appeal this Court determined that the mob reference

---

[9] At one point appellant advises her – "Don't talk nothing on the phone....you don't talk nothing on the phone." (R19, 1058)

was error but elimination of the testimony "would not have changed the outcome of the proceedings and otherwise constituted harmless error." Mordenti v. State, 630 So. 2d 1080, 1085 (Fla. 1994). The jury did not hear that Mordenti was a hit man (DAR 745-751).

Horace Barnes' subsequent testimony at the evidentiary hearing that Cox met with him at the county jail in January of 1991 prior to being sent back to prison in 1991 and promised him a contact visit with his girlfriend Tracey Leslie and the releasing of a detainer in return for his giving false testimony is belied by the fact that Barnes made the same Mordenti-mob allegation in a letter to Tom Cunningham in February 1990, almost a year prior to Cox's alleged visit (R13, 301-303; State's Exhibit 3 at SR3, 484-492) and the same allegations to detectives in a March 1990 interview (R13, 307-308; R17, 779-780) Cox didn't even know of Barnes' existence at the time of Corporal Baker's interview (R17, 779). Cox testified she became aware of Barnes through Corporal Baker or Detective King, did not recall even talking to Barnes at the jail, nor having a detainer lifted for him or arranging a visit with Ms. Leslie (R16, 683-686). She did not threaten him or promise him anything for his testimony (R16, 688).

Trial defense counsel admitted having Defense Exhibit 10

which contained Corporal Baker's impression of Horace Barnes. (R17, 789). There is no Giglio violation; the state did not knowingly allow false testimony. Nor is there any due process violation in the prosecutor's closing argument. Ms. Cox could rely on the information Barnes had given to law enforcement officers and others. Finally, the "inconsequential" testimony provided to the jury at trial has not become more so now with his current, refuted version.

7. **"Don't Mention Rings"**

Appellant did not list this among his Giglio claims in his post-hearing memorandum (R9, 1294-1300). The lower court found "no prosecutorial misconduct in reference to Ms. Cox's handwritten notes". The court credited the testimony of Ms. Cox that the "don't mention" notation in her handwriting were her personal notes taken in preparation for trial and typically not shown to witnesses and the testimony of Gail Mordenti that she did not recall ever seeing those notes or notations. The court concluded: "In sum, Defendant has failed to prove that a Giglio or Brady violation occurred. As such, this allegation is without merit." (R10, 1410)

At the evidentiary hearing Cox testified that defense Exhibit 17 were her handwritten notes in preparation for the direct examination of Gail Mordenti - a note to herself or co-

counsel; it was not a document to show the witness. Cox did not tell Ms. Mordenti not to use the term rings (R16, 694-696). Gail Mordenti Milligan also testified that Cox did not instruct her what to say or influence her testimony, nor did Cox show her the note (R19, 1018-1019).

There is no Giglio violation. There is neither false testimony known by the prosecutor to be false nor has the materiality element of Giglio been established.

8. **Hotel Name**

Appellee notes that Mordenti did not urge this ground as one of his Giglio claims in his post-evidentiary hearing memorandum (R9, 1294-1300). The lower court alluded to Detective King's evidentiary hearing testimony wherein he testified that he had gone to a hotel in March or April of 1990 and could not find any registration cards in the names of Michael or Gail Mordenti or Larry Royston or Michael Milligan (R10, 1397)[10]. The state did not possess favorable evidence in the form of hotel registration cards (R10, 1398). Prosecutor Karen Cox's recollection at the evidentiary hearing was that initially the officers couldn't find the hotel, but subsequently they did and checked the

[10] Detective King similarly testified at trial that he checked the registration cards at the Days Inn in Tarpon Springs on U.S. 19 and was unable to find any registrations with the name Mordenti (DAR 509-510). See also Motion for New Trial Hearing Transcript (DAR 1556-61).

registration cards. She did not deliberately hide the name of the motel from the defense (R16, 689-690).

In any event, none of the criteria for demonstrating a Giglio violation is present - there was no false testimony, known to be false by the prosecutor, or which is material. Ventura, *supra*.

All of Mordenti's claims of a Giglio violation are meritless. See Gorby v. State, 819 So. 2d 664, 678-679 (Fla. 2002)(Defense assertions were wholly conclusory and required improper layers of inference. There is no showing that witness Dr. Sybers gave any false testimony or that the state knew it had presented any false testimony). Appellant's peculiar penchant for declaring that every lapse of memory, every perception of any witness that varies with that of any other, or every inconsistency discovered or imagined by collateral counsel constitutes perjury and additionally perjury known to and endorsed by the prosecutor fortunately is not a correct reflection of the law. Maharaj v. State, 778 So. 2d 944, 956 (Fla. 2000)(perjured testimony claim without merit where allegation based on minor inconsistencies in a civil lawsuit conducted after the criminal trial); United States v. Bailey, 123 F.3d 1381, 1395-96 (11th Cir. 1997)("Instead of showing perjury, we conclude that Bailey has demonstrated nothing more

than a memory lapse, unintentional error, or oversight by Agent Hudson."); United States v. Payne, 940 F.2d 286, 291 (8th Cir. 1991)("We recognize, however, that it is not enough that the testimony is challenged by another witness or is inconsistent with prior statements, and not every contradiction in fact or argument is material."); United States v. Michael, 17 F.3d 1383, 1385 (11th Cir. 1994)(fact that one agent's testimony was contrary to another's does not amount to a showing that the government knowingly presented false testimony since it is entirely plausible that the other's recollection was incorrect; the fact that witnesses' recollections varied falls far short of establishing that the government knowingly presented false testimony to the jury); United States v. Lopez, 985 F.2d 520, 524 (11th Cir. 1993)(However, knowledge of falsity of testimony is not imputed to the prosecutor when a key government witness' testimony is in conflict with another's statement).[11] See also

[11] Appellant's present complaint in footnote 50 of his brief that the lower court refused to allow relevant evidence regarding Cox is not well-founded, unsupported by the record and appears to be an appellate after-thought to receipt of an adverse ruling. While it is true the court noted that Karen Cox after the Mordenti trial had her license suspended, and that fact did not require further analysis (R10, 1408-09 and n. 24), the record reflects that after Cox had admitted her suspension Mordenti offered this Court's decision on the suspension "for record purposes...other courts will be looking at it for completeness of the records purposes". The court received it (R11, 5-6). When appellant offered a copy of the decision in Ruiz v. State, 743 So. 2d 1 (Fla. 1999), the lower court

Phillips v. State, 608 So. 2d 778 (Fla. 1992)(State did not have obligation to correct witness' misstatement that tape started immediately when he gave his tape-recorded statement to police when a pre-interview was actually conducted, as misstatement was immaterial and defense could have corrected it at trial since defense was aware of pre-interview from detective's pre-trial deposition).

(2) **Brady Claim**

(A) Legal Standard - The appropriate standard of appellate review is that the reviewing court defers to the factual findings made by the trial court to the extent that they are supported by competent, substantial evidence but reviews de novo the application of those facts to the law. Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Lightbourne v. State, 841 So. 2d 431, 437 (Fla. 2003).

The lower court understood that to demonstrate a Brady violation, a defendant must prove (1) that the government

---

sustained an objection and asked the defense to explain its relevance. Offering none, appellant simply submitted it for purposes of the record (R11, 7-8). The failure to proffer its supposed relevance precludes appellate complaint now. See Lucas v. State, 376 So. 2d 1149, 1152 (Fla. 1979) (This Court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law); Morrison v. State, 818 So. 2d 432, 447-448 (Fla. 2002) (No abuse of discretion in trial court sustaining objection where counsel failed to advise court of relevancy of answer he was seeking).

possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it with reasonable diligence; (3) that the prosecution suppressed favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different (R10, 1409).

In Occhicone v. State, 768 So. 2d 1037, 1041-1042 (Fla. 2000) this Court restated that three components are required under Brady v. Maryland, 373 U.S. 83 (1963) - evidence must be favorable, must have been suppressed by state (either willfully or inadvertently), and prejudice must have ensured - but noted that relief was properly denied where the record affirmatively reflected that Occhicone was aware of the witnesses and more importantly he knew about the information they would testify to. Id. at 1041. The Court explained:

> 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. (Id. at 1042)[12]

---

[12] This Court has at various times described Brady as involving a three prong test, see, e.g., Stewart v. State, 801 So. 2d 59, 70 (Fla. 2001); Ventura v. State, 794 So. 2d 553, 561 (Fla. 2001); Rose v. State, 774 So. 2d 629, 634 (Fla. 2000); Sireci v. State, 773 So. 2d 34, 41 (Fla. 2000), and at other times

Accord, Walton v. State/Crosby, 847 So. 2d 438 (Fla. 2003)(Brady claim cannot stand where defendant knew of relationship between himself and Fridella and Fridella's troubles with her husband); Jones v. State, 845 So. 2d 55 (Fla. 2003)(rejecting Brady claim that state failed to disclose its knowledge of Jones's possible substance abuse because no one was in a better position to know if he had a substance abuse problem than Jones himself).

(a)(I) **Gail's date book entry for April 11, 1989**

The lower court determined that appellant was not prejudiced by the state's failure to provide the defense with a copy of the date book.

---

characterized as four prongs including an element of due diligence by the defendant, see, e.g., Freeman v. State, 761 So. 2d 1055, 1061-1062 (Fla. 2000); Bryan v. State, 748 So. 2d 1003, 1008 n 3 (Fla. 1999) and Downs v. State, 740 So. 2d 506, 513 (Fla. 1999); Melendez v. State, 718 So. 2d 746, 748 (Fla. 1998). Similarly, the federal courts occasionally restate the standard under either the three prong rubric, see, e.g., Williamson v. Moore, 221 F.3d 1177, 1183 (11th Cir. 2000) or the four pronged one, see, e.g., Chandler v. Moore, 240 F.3d 907, 915 (11th Cir. 2001); Routly v. Singletary, 33 F.3d 1279, 1285 (11th Cir. 1994); Sims v. Singletary, 155 F.3d 1297, 1311 (11th Cir. 1998); U.S. v. Bailey, 123 F.3d 1381, 1397 (11th Cir. 1997). Perhaps confusion has resulted because the Supreme Court in Strickler v. Greene, 527 U.S. 263 (1999) observed that it did not reach, since not raised in the case "the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them." 527 U.S. at 288, n 33. But whether the test is deemed three-fold or four-fold or whether the distinction is termed a semantic difference makes no difference. As explained in the text, appellant is not entitled to relief. The lower court analysis did not improperly turn on defense "diligence."

> The Court finds that Gail Mordenti testified that she had one lunch date with Larry Royston, and the fact that she was slightly inaccurate as to when the lunch occurred is inconsequential. Even if the state withheld the date book, the court finds that the outcome was not prejudiced. Prejudice must ensue to support a finding of a Brady violation. See Rogers v. State, 782 So. 2d 373, 378 (Fla. 2001). As such, the allegation that the state withheld Gail Mordenti's date book is denied. (R10, 1418)

The court also denied relief on a theory of newly-discovered evidence:

> Similarly, Gail Mordenti testified at trial that it was probably in February or March when she invited Larry Royston over for lunch, when the date book reflects April 11, 1989 [transcript citation omitted]. Again the Court does not find that Gail Mordenti recanted her testimony. As such, these statements as testified to by Gail Mordenti do not rise to the level of warranting a new trial. (R10, 1418-1419)

Gail Mordenti Milligan testified that she did not recall testifying at trial that it was probably in February or March that she invited Royston over to lunch ("I remember - - I don't remember exactly what month it was. I knew I left Automotion in February, and then I thought it might have been in March" - R19, 1004). Her appointment book, Defense Exhibit 11, indicated that she had lunch with Royston on April 11, and he asked her if she knew anyone who could help him get rid of his wife (R19, 1005). That was the only lunch they had at her house (R19, 1006). She acknowledged that if the book said April 11, then her trial testimony was inaccurate.

There was no Brady violation. As required by Strickler v. Greene, 527 U.S. 263 (1999) and other cases, a defendant must establish that information not provided satisfy the materiality requirement, e.g., a showing that there is a reasonable probability of a different outcome had the "suppressed" information be given.

The calendar or date book listing the lunch with Royston on April 11, 1989 does not yield a reasonable probability of a different outcome. It changes nothing as to appellant's commission of the murder and his subsequent telephonic advice to Gail Mordenti to tell the law enforcement authorities nothing when questioned.

Appellant argues that one day after the lunch with Royston she was invited to give a statement to law enforcement regarding an investigation into a dispute about $200,000 (Defense Exhibit 58). But this exhibit demonstrates that the prosecutor's office determined on August 31, 1989 it to be a civil dispute (the bank hadn't received money for the cars repossessed) and Gail Mordenti had given a witness's statement (R19, 1038-39). It also listed Mr. Gartley as a suspect (SR8, 1402). Moreover, trial defense counsel had Defense Exhibit 58 and could have examined her all he wanted about that irrespective of whether Gail had lunch with Royston in March or on April 11. In any

event, Ms. Mordenti testified at trial on cross-examination that she wanted to get back into the automobile business "and was getting a little desperate because of losing as much money as she had" (DAR 675), and that she had asked appellant for money because she had bills to pay and "ending up having to claim bankruptcy." (DAR 694; DAR 641)[13]

(a)(II) **Gail's entry for June 7, 1989** -

Appellant's next alludes to an entry in the date book on June 7, 1989 in Defense Exhibit 12 pertaining to a ticket ("call on ticket for Michael"). When asked about this at the evidentiary hearing, Gail Mordenti Milligan explained that it was in regard to a traffic or speeding ticket that Michael Milligan had received (R19, 1062-1063, 1089). She didn't have any idea what the entry "made calls again to bus company" was about, but it had nothing to do with purchasing a bus ticket for Michael Milligan (R19, 1063).

---

[13] Gail Mordenti also testified that while at Automotion Gartley took funds from the business for non-business purposes and he led her to believe he would repay it to the business but he didn't (R19, 1014-1017). There was some tension with Gartley in April of 1989 because he wasn't taking care of his business but "he said he was going to as soon as he got the money from Bay Walk" (R19, 1068); see also lower court's order at R10, 1391 finding counsel effectively painted a picture of her financial difficulties and her profit from the Thelma Royston murder.

Gartley had a judgment entered against him in August of 1988 for twenty thousand dollars for civil theft (R18, 874; State Exhibit 19 at SR8, 1492-1497).

The lower court rejected appellant's Brady argument:

> Here, the Court does not find as [sic] Brady violation, as prejudice must ensue. Defendant has not alleged any prejudice, only speculation that this entry from Gail Mordenti's date book would have helped for the sake of investigatory purposes. (R10, 1418)

The trial court ruled correctly. Nothing in the record establishes that this entry in the date book was favorable to the defendant (either exculpatory or for impeachment), that it was suppressed or that it was material, i.e. that there is a reasonable probability of a different result had it been disclosed to the defense.

In Strickler v. Greene, *supra*, the Court reminded the Bench and Bar that while the term Brady violation is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence -

> ...strictly speaking, there is never a real "Brady violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different result (emphasis supplied) (Id. at 281).

See also Joel Dale Wright v. State/Crosby, ___ So. 2d ___, 28 Fla. L. Weekly S 517 (Fla., July 3, 2003)(noting that prejudice under Strickler is measured by determining whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict and observing that the mere possibility that undisclosed items of

information may have been helpful to the defense in its own investigation does not establish constitutional materiality, citing U.S. v. Agurs, 427 U.S. 97, 109-110 (1976) and Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988).

Appellant makes no attempt even to demonstrate that the undisclosed June 7 notation if provided to the defense creates a reasonable probability of a different result. All that appellant asserts here is that the lower court utilized the wrong standard. It did not. The court cited Rogers v. State, 782 So. 2d 373, 378 (Fla. 2001) which in turn cited Strickler, as well as earlier Supreme Court precedents. Whether trial or collateral counsel choose to speculate that the real killer is Michael Milligan, the June 7 entry in the calendar book does not add sustenance to such whimsical flights of fantasy. The lower court correctly found the materiality element unproven.

(b) **Undisclosed interview of Michael Milligan** -

Appellant next complains about handwritten notes prosecutor Karen Cox made of an interview or office meeting on February 10, 1991, with Michael Milligan, Defense Exhibit 14.

Mordenti alludes to the notation "6/89 - Mordenti called him + had car picked up w was used in bank robbery from New Mexico" and extrapolates that this demonstrates that Michael Milligan is the true killer. Obviously, it does not. When Ms. Cox was

initially examined, she testified she took notes of what Michael Milligan and Gail Mordenti Milligan told her during the meeting but added “sometimes I find that they didn’t make sense because I summarized too much” (R11, 41-42). Collateral counsel did not ask her anything about that notation. Subsequently, when Ms. Cox was recalled to testify, on cross-examination collateral counsel inquired:

> Q. Okay. And I just sort of want to call to you, this line here, this indicates, if I’m reading this correctly, 6/89 Mordenti called him, apparently referring to Milligan?
>
> A. Right.
>
> Q. And had him -- had car picked up that was used in the bank robbery from New Mexico?
>
> A. Right, in bank robbery from New Mexico. That’s what that says.
>
> Q. That was your understanding of what Mr. Milligan was indicating, is that he had gone to pick up that car?
>
> A. I don’t -- no, no, I don’t know if it means he went to pick up the car.
>
> Q. But he was trying to get the car picked up in New Mexico?
>
> A. At least made -- called in and had car picked up -- I don’t know what -- since I don’t have any specific recollection, really, of this statement, it doesn’t really tell you who the actor is. So I don’t know.
>
> Q. But there was something about New

Mexico?

> A. Mordenti called him about a car in New Mexico that was used in a bank robbery from New Mexico, a bank robbery from New Mexico -- I don't know if the car was in New Mexico or the bank robbery occurred in New Mexico, just very unclear at this point. (R16, 711-712).

Contrary to appellant's assertion, Milligan did not tell Ms. Cox he went to New Mexico in June of 1989. Appellant then points to the notation "Michael knew Larry's name b/c she told him it" (Defense Exhibit 14, p. 2). However, it is clear from the context on that entire page that Gail is referring to Michael Mordenti, not Michael Milligan, because she is describing the picture of Thelma he had that Royston had given to her as well as Michael (Mordenti) having given her the .22 gun which he reloaded in his office. There is no Brady violation. There is nothing exculpatory in the notation, nor has appellant satisfied the materiality requirement, i.e., a reasonable probability of a different result had the note been provided.

(c) **Undisclosed notes of interviews of Gail Mordenti** -

Appellant next complains that the defense was not furnished prosecutor Karen Cox's notes of interview with Gail Mordenti, Defense Exhibits 14 and 15. One of the notations in Defense Exhibit 14 recites:

> He invited her to Tenn.

> He said that he did ‡ want to date until divorce was over + had time to get head together.
> 3 or 4 months had a confiding type friendship.

There is nothing new in this notation and is consistent with information previously furnished in discovery by deposition or police reports. See, e.g., Defense Exhibit 24, Gail Mordenti's deposition of February 19, 1991, by attorney Trevena for Larry Royston (which Atti had), at Tr. 72 ("Q. You said there was no sexual relations or anything like that, Larry didn't come on to you or anything of that nature. A. Well, he made offers but, I mean, he had a house in Gatlinburg and he asked me if I wanted to go up there with him. But I hear, he was never -- it was never, let's get it on or -- I mean, you know, it was just --"); p. 73 ("Q. You said [to detectives] that you thought about dating Larry due to the fact that he has a lot of money, but the situation never came up. A. Yes."). This notation does not alter her trial testimony that the relationship with Royston was strictly a business one (DAR 671) or her testimony at the hearing below that she was not having an affair with him, nor take trips with him to Tennessee (R19, 998, 1011).

The lower court rejected a claim that trial counsel was ineffective for failing to explore a possible romantic relationship between Gail Mordenti and Larry Royston, finding

the claim meritless since "the defense has provided no credible evidence that Gail Mordenti and Larry Royston were involved romantically" (R10, 1384). In the lower court's Brady discussion, the court noted that Gail had not denied her involvement in the death of Thelma Royston - she had maintained she helped Royston look for someone to murder his wife. The court observed that she had testified both at trial and at the evidentiary hearing that she and Royston had only a business relationship. The only defense witness to come close to establishing proof of an affair was John Gartley, but his reliability was questionable since he was heavily sedated and on narcotics for back pain. The affair allegation was meritless (R10, 1411).

Mr. Atti admitted that the information that Larry Royston was trying to sell a boat "backed up what Mike told me" (R15, 527). Atti already had Ray Cabral's statement (R15, 528). Cabral testified below that in the latter part of April or early May he had a conversation with appellant about the sale of a high-powered speed boat, but that was not the kind of boat he would purchase; it was not his "cup of tea" (R13, 274-278).

Appellant alludes to the February 10, 1991 note in Defense Exhibit 14:

> Larry had a boat w she was trying to sell it for him $20,000. Larry had rebuilt engines.

> Took Mike Flynn (~~Mordenti's~~ ~~Milligan's~~ Mordenti's boss) to a/c garage to show him engines.
>
> This was after murder

In the undated note, Defense Exhibit 15, he also alludes to the remark:

> Michael made no efforts to sell boat + car. Doesn't think that ever looked for buyers. Larry's boat was a replica of the boat used 'on golden pond' not a high powered speed boat

The nondisclosure of Defense Exhibits 14 and 15 does not satisfy the materiality requirement of Strickler. If, as he claims, the thirteen minute phone call involved an innocent explanation of a potential boat sale, Mordenti who talked to Royston would have that information and could testify about it if he desired. Even if the note had been provided and used by the defense it appears that Royston's boat was not a high-powered speed boat (and Cabral claimed he was not interested in a high-powered speed boat) so if anything these were two different matters. In any event, the taped phone call Gail made to appellant after the homicide pursuant to the encouragement of law enforcement officers demonstrates appellant's desire that Gail not be cooperative with police and that she not contact Royston. There is no reasonable probability of a different result had appellant been provided the exhibits.

(d) **The interview with Royston attorney Mr. Trevena** -

Appellant next contends that a Brady violation occurred for the failure to provide the defense notes by prosecutor Nick Cox regarding the post-Royston suicide interview with Royston attorney John Trevena. The lower court's order recites:

> The only evidence Defendant offers in support of these allegations is the testimony of John Trevena, Larry Royston's former counsel. The court, however, ruled at the evidentiary hearing on November 5, 2001, that such testimony was hearsay, and therefore, inadmissible evidence. (See Transcript from November 5, 2001, pp. 85-89, attached). Such evidence is not only hearsay, but of questionable credibility as the notes were taken during the course of preparation by an attorney, Mr. Trevena, in anticipation of representing his client, Larry Royston, who was facing first degree murder charges. See Robinson v. State, 707 So. 2d 688 (Fla. 1998). Nothing else during the evidentiary hearing was presented to support the allegations that Gail Mordenti was the chief orchestrator of the crime and that she wanted to marry Larry Royston. (R10, 1410)[14]

The handwritten notes of Nick Cox are his recollection and interpretation of his interview with Trevena regarding Trevena's recollection of conversations he had with his client during his representation for first degree murder and conspiracy charges. They are not verbatim transcripts of a conversation that Trevena

---

[14] The notes in Defense Exhibit 23 are handwritten notes taken by Nick Cox attempting to summarize Trevena's recollection of Royston's version of what might have happened in the Thelma Royston homicide. The lower court's elliptical description however correctly recites that Trevena was representing Royston and preparing for trial for conspiracy and the first degree murder of Thelma Royston.

had with Royston, nor of a conversation that Mr. Cox had with Trevena.

The lower court properly ruled that Trevena's testimony concerning what he was told by his deceased client in preparation for his murder trial constituted inadmissible hearsay. See Robinson v. State, 707 So. 2d 688, 691 (Fla. 1998) ("...we note that Fields' new version of events has never been subjected to adversarial testing since he has pointedly refused on several occasions to expose himself to cross-examination. The absence of direct testimony by the alleged recanting witness is fatal to this claim. In the end, therefore, Fields' unauthenticated, untested affidavit proffered by Robinson is nothing more than hearsay, i.e., an out-of-court statement offered to prove the truth of the matter asserted, which is inadmissible because Robinson does not claim, nor do we find, that it comes within any hearsay exception."); see also Lightbourne v. State, 644 So. 2d 54, 56-57 (Fla. 1994); F.S. 90.804; Jones v. State, 678 So. 2d 309, 313-314 (Fla. 1996) (To show admissibility as a declaration against penal interest under Section 90.804(2), defendant must show the statement tended to subject the declarant to liability and must present corroborating circumstances demonstrating the trustworthiness of the alleged confession).

Royston's statements to attorney Trevena would not qualify as admissible evidence; they are merely self-serving, non-inculpatory or against penal interest, blame-shifting remarks of a criminal defendant awaiting trial for conspiracy and murder who hoped that a jury might adopt a view that perhaps some participation in the killing of a victim engaged in the crime of blackmail (which incidently is consistent with the prosecution theory of the case) might merit a reduced verdict.[15] Even trial defense attorney Watts admitted that there was no exception to the hearsay rule which would render them admissible:

Q Wouldn't any statements that Larry

---

[15] On a proffer, Trevena testified that Royston told him he was being blackmailed by his wife, that Trevena was concerned that a "blackmail" defense would seem to corroborate a motive to hire a hit man, that Royston took but did not pass a private polygraph and Trevena acknowledged not wanting to argue a factual defense in the case (R14, 339, 342).

Unfortunately, because of Mr. Royston's suicide, his alleged protestations to attorney Trevena that he was not involved in the Thelma Royston homicide could not be delivered to a jury in his prosecution for conspiracy and murder. Nor was Trevena afforded the daunting, albeit enviable, opportunity to face witness Marge Garberson and explain to a jury why his "innocent" client would solicit her to kill Mrs. Royston in January and February of 1989 (DAR 390-394) and further demonstrate his advocacy skills by seeking to persuade a jury that the proposed defense of killing, or having someone else kill, a victim because the victim was blackmailing him by threats of disclosure to the IRS should merit a verdict of a lesser degree of homicide than first degree murder (R14, 339-340, 344). Mr. Royston had taken but did not pass a private polygraph (R14, 339) and it is perhaps understandable that Trevena would have preferred to rely on a legal as opposed to factual defense (R14, 342).

> Royston have made to Mr. Trevena have been inadmissible hearsay?
>
> A Probably would have, but where they might lead was, first of all, I wanted to know as much as I could know personally, and professionally it may lead to something else.
>
> Q But then in all likelihood, the actual statement would be inadmissible?
>
> A In all likelihood the actual statement would be inadmissible. (R19, 974)

Moreover, the prosecutor's notes regarding his personal interpretations of remarks by potential witnesses do not constitute material that must be turned over pursuant to Brady and its progeny.[16] See, e.g., Williamson v. Moore, 221 F.3d 1177, 1183 (11th Cir. 2000)(no Brady violation in state's failure to turn over non-verbatim, non-adopted witness statements, not admissible at trial as impeachment evidence; appellate court may not speculate on what might have been discovered if the documents had been turned over); Marrero v. State, 478 So. 2d 1155, 1156 n 1 (Fla. 3d DCA 1985); Hickman v. Taylor, 329 U.S. 495 (1947) (transcribed notes of a witness interview contain a real risk of inaccuracy and

---

[16] Cox's notations in Defense Exhibit 23 included a comment that "He never said I hired Gail and Michael to kill but he pretty much made it clear." Trevena acknowledged the notation (R14, 340) and on redirect recalled the part about saying he denied ever hiring Gail or Michael to kill anyone, but didn't recall saying that he made it clear (R14, 346).

untrustworthiness); Williamson v. Dugger, 651 So. 2d 84, 88 (Fla. 1994)(Most of the "withheld" evidence consisted of the prosecutor's trial preparation notes; they did not reflect the verbatim statements of any witness interviewed and had not been signed, adopted or approved by the persons to whom they were attributed. The notes also included trial strategy notations by the prosecutor and his personal interpretations of remarks made by the witnesses. Such material is not subject to disclosure); Breedlove v. State, 413 So. 2d 1, 5 (Fla. 1982).

Appellant asserts that Gartley testified below about seeing Gail Mordenti and Larry Royston together at a car auction and while Mordenti quotes a portion of the court's order appellant omits the lower court's recitation that:

> The only witness called by the defense who could even come close to establishing proof of an affair between Gail Mordenti and Larry Royston would be John "Jack" Gartley. Jack Gartley testified that he saw Gail Mordenti and Larry Royston at an auto auction together holding hands and knew they dated (see Transcript from November 27, 2001, pp. 12-13, attached). He also testified that he was heavily sedated and on narcotics for back pain during the time at which the auction would have occurred, raising questions about his credibility. (See, Transcript from November 27, 2001, p. 28, attached). As such, this allegation is without merit. (emphasis supplied) (R10, 1411)

The lower court properly denied relief.[17]

---

[17] Obviously, Gartley could have testified at trial; he had given a pretrial sworn statement on April 18-19, 1990 (R18, 861). Atti also had Gartley's police interview of March 16,

(e) **Hotel Name** -

Appellant next complains of a Brady violation in the state's non-disclosure of the hotel name and points to Detective King's evidentiary hearing testimony that he thought it was in March or April of 1990 that he checked the hotel registration cards and was unsuccessful in finding Mordenti's name. Karen Cox's recollection was that weeks before trial, after earlier unsuccessful efforts to locate the hotel, the officers searched the registration cards and found nothing. There was no effort by her to deliberately hide the name of the hotel from the defense (R16, 689-690).

This complaint appears to be repetitious to the argument made at the time of trial. The trial transcript reflects that Detective King checked the records at the Days Inn in Tarpon Springs and found no registrations (DAR 509-510, 518). Subsequently at the new trial hearing motion on September 12, 1991, the defense urged the state had not disclosed the hotel name and prosecutor Cox explained that Gail Mordenti initially had not recalled at deposition but the name was given earlier in the investigation to detectives and that Det. King had been deposed earlier. She thought there was no further interest

---

1990 (R15, 520-521). There is no Brady violation regarding Gartley.

since it had been investigated (DAR 1556, 1558-60). Appellee submits first that the claim should be deemed procedurally barred since the alleged non-disclosure could have been raised on direct appeal. Post-conviction motions are not to be used as second appeals. Lopez v. Singletary, 634 So. 2d 1054 (Fla. 1993); Medina v. State, 573 So. 2d 293 (Fla. 1990); Cherry v. State, 659 So. 2d 1069 (Fla. 1995).

Secondly, relief must be denied since as the lower court determined there was no favorable evidence in the form of hotel registration cards in the possession of, and suppressed by, the state (R10, 1396-98). Even now, appellant does not submit any favorable evidence. This contention is meritless.

(F) **Interview of FBI Agent Carmody** -

Appellant next complains that Defense Exhibit 21, an interview of Carmody by prosecutor Karen Cox, was not disclosed. Carmody indicated that Mordenti had been helpful in the bank robbery investigation. Trial defense counsel Atti testified below that he was aware of Carmody and that his client had given him this information.

> Q. ...You were familiar with Michael Mordenti's involvement in Horace Barnes' conviction, or, I think, he pled guilty to a bank robbery.
>
> A. Most definitely.
>
> Q. You were aware that Michael Mordenti had had

contact with Barry Carmody and that led to the arrest of Horace Barnes?

A. That's correct.

Q. So you knew that the involvement was, in essence, a good guy helping to solve the problem?

A. That's correct. (R15, 547)

There is no Brady violation when the defense has the information. See Occhicone, *supra*; Walton, *supra*; Jones v. State, 845 So. 2d 55 (Fla. 2003).

(G) **Tracey Leslie's Consideration** -

Appellant contends that Defense Exhibits 59 and 60 demonstrate that the prosecutors gave considerations to Tracey Leslie in return for Barnes' testimony. Appellee disagrees.

Karen Cox testified she had no recollection of talking to Barnes at all in the jail, or having a detainer lifted for Barnes or arranging a visit for Leslie and Barnes (R16, 684-685). She never suggested that Barnes say anything other than the truth (R16, 686). Cox recalled that Barnes and Leslie were boyfriend and girlfriend and both were brought to the jail as potential witnesses at the Mordenti trial (R16, 704). She identified Exhibit 59, a handwritten note (appearing to be Nick Cox's writing) concerning getting state charges taken care of. She presumed that related to Leslie's entering a plea to a number of uttering forged instrument charges (R16, 705-707).

Exhibit 59 appeared to be a request by Leslie that before she's released back to federal prison that she be allowed to have her state charges disposed of (so she didn't have to wait on pending state charges when released from federal prison)(R16, 708-709).

Exhibit 60 was a letter dated April 10, 1991 signed by Tracey Leslie, thanking for help on the state charges. The case file on Leslie showed that she was charged with ten counts, eight counts of uttering, one grand theft and one count of dealing in stolen property. The entry on March 29, 1991 that she pled no contest to all counts except count 9 and was sentenced to five years in prison, concurrent with time served in federal prison. This was an above the guidelines sentence. It was consistent with Leslie having written, thanking them for getting the case on the docket (R16, 720-725). There was no Brady violation.

(H) **Gail's Grand Jury Testimony** -

Appellant has failed to argue with any specificity that Gail Mordenti's grand jury testimony contained any Brady material required to be disclosed. Routinely, grand jury testimony is not available to counsel nor was evidence presented establishing a Brady violation. It is not acceptable to merely refer to a one sentence adoption of an argument in the lower court. See, Duest v. Dugger, 555 So. 2d 849 (Fla. 1990); Lawrence v. State,

831 So. 2d. 121, 133 (Fla. 2002); Anderson v. State, 822 So. 2d 1261, 1268 (Fla. 2002); Pagan v. State, 830 So. 2d 792, 811 (Fla. 2002).

(I) **FBI Hair Analysis** -

There were no defects in the FBI hair analysis required to be disclosed under Brady and the state did not withhold information. Although his memo below only recites that there were defects in the hair analysis (R9, 1314), here appellant focuses on the evidentiary hearing testimony of Steve Robertson. Robertson, a chemist, reviewed some hair and fiber work done by Agent Malone of the FBI laboratory (R12, 138). Robertson did not disagree with Malone's conclusion that there was a non-match between unknown hairs found at the scene and Michael Mordenti (R12, 141-142). Robertson apparently disagreed with Malone's statement that the lab has a policy that a hair has to have fifteen microscopic characteristics or it's not good for comparison when Robertson apparently had been told there is no such policy (R12, 147). After reading Malone's testimony (R12, 148), he couldn't think of an instance that the problem Robertson suggested "where it would be significant"; it only went to the format of documentation. He agreed that Malone gave favorable testimony to the appellant (R12, 148-149). The instant claim is frivolous.

(J) **FBI Metallurgical Analysis** -

The lower court rejected the attack on the state's use of the testimony of FBI metallurgist expert John Riley, both as it pertained to the claim of ineffective assistance of trial counsel (R10, 1405)("Based upon the experts' testimony, the Court does not find that even if counsel had retained an expert in metallurgy, the outcome of the proceeding would have been different") and as a Brady/Giglio claim (R10, 1413-1415)("Defendant has failed to demonstrate that the state intentionally presented false and misleading evidence in the form of Riley's testimony.... Just because experts do not agree does not indicate to this Court that one side has intentionally put on false and misleading testimony... As such, Defendant is not entitled to relief upon this allegation" - R10, 1415).[18] The state did not withhold or suppress favorable evidence.

While appellant's post-hearing memorandum did not burden the lower court, here Mordenti argues that the testimony of William Tobin and Erik Randich require Brady relief. Quite apart from the fact that FBI expert John Riley continues to stand by his

[18] In the lower court, appellant's post-hearing memo merely offered the conclusory assertions that the state "failed to disclose defects" in the metallurgical evidence, that the "database was woefully inadequate" and the evidence was "nothing more than junk science" (R10, 1314). Interestingly, nowhere in his forty-three page memorandum does appellant refer to defense experts Randich and Tobin (R9, 1286-1328).

testimony (R17, 803-855) and rejects the defense witnesses' suggestion that the FBI has an assumption that each lot of lead is homogeneous (R17, 828-829), appellant simply cannot satisfy the Brady elements that the state had favorable evidence or suppressed it or that there is a reasonable likelihood of a different result. See Trepal v. State/Crosby, 846 So. 2d 405, 427 (Fla. 2003) ("After evaluating the conflicting testimony of the witnesses, the court concluded that Trepal was not impermissibly prejudiced by the testimony of Martz. We agree.")

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE.

The standard of review regarding the trial court conclusion that counsel did not render ineffective assistance is two-pronged: the appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo. Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001).

The lower court addressed the claim of ineffective assistance of trial counsel at guilt phase in Claim I of the Order Denying Relief (R10, 1384-1408). Specifically, the court

found (1) that counsel was not deficient in allegedly failing to impeach properly Gail Mordenti regarding her grant of immunity (R10, 1386-87); (2) that counsel was not deficient in failing to investigate Gail Mordenti's financial records or failing to bring out to the jury her financial woes (R10, 1388-91); (3) that appellant waived by not addressing at the evidentiary hearing the claim that counsel failed to impeach Gail Mordenti regarding statements appellant allegedly told her after Thelma Royston was killed (R10, 1391). Further the trial court did not find that counsel was generally unprepared to represent Defendant. In fact, the court found that "the allegation that counsel was woefully unprepared in representing Defendant is without merit" (R10, 1394). In support of the finding, the court noted that Mr. Atti filed his notice of appearance in January 1991, approximately six months prior to the commencement of trial and:

> Once Mr. Atti began working on the case, he acquired all the files from Barry Cohen of the preliminary investigation. (R10, 1393)
>
> * * *
>
> ....Mr. Watts also testified to the voluminous amount of records that were retrieved from Barry Cohen from his initial representation of Mordenti (R10, 1393)
>
> * * *
>
> The Court is aware that Paula Montlary, Watts' legal assistant, added that Watts sought a

> continuance, but Defendant did not want a continuance. (R10, 1394)

(4) Additionally, the lower court found no merit to the contention that counsel was ineffective for failing to investigate Michael and Gail Mordenti's divorce as it was not an amicable one, citing Gail Mordenti's trial and evidentiary hearing testimony as well as a taped phone conversation from March 8, 1990 played at the evidentiary hearing (R10, 1395); (5) the court found that the defense "has provided no credible evidence that Gail Mordenti and Larry Royston were involved romantically" and thus a claim of ineffectiveness on that point was meritless (R10, 1396); (6) the court found to be meritless a claim that counsel failed to investigate hotel registration cards at the Days Inn as no hotel records have ever been recovered and there is no deficiency by counsel (R10, 1396-98); (7) the lower court found that the testimony established at the evidentiary hearing "reveals that counsel did investigate the alibi witnesses" and the testimony established that it was "a deliberate decision not to call Lynn Bouchard" (R10, 1398-99) because of the problems with her clocking in at the restaurant and issues related to a car receipt between appellant and Ms. Bouchard. Atti had a "gut" feeling she would not be a beneficial witness. Attorney Watts concurred and felt they would lose credibility by presenting Bouchard (R10, 1400). The

evidence is more than ample to support the trial court's finding "that it was a conscious, strategic decision not to call Ms. Bouchard....the Court finds that they were not deficient as they deliberately chose not to present her as a witness" (R10, 1400). The lower court also credited the testimony of attorney Watts who explained that they chose not to call Marie Rotering as her testimony would have been cumulative to Ms. Bouchard's testimony. (R10, 1401). Consequently:

> The Court finds that Defendant's allegation lacks merit. Counsel for Defendant called other alibi witnesses, and chose not to call Ms. Bouchard for specific reasons, as outlined above. As such, Defendant's allegation in this regard is without merit. (R10, 1401)

(8) The Court rejected a claim of ineffectiveness for the failure to request a continuance of trial as there was testimony that Mordenti specifically did not want a continuance (R10, 1401); (9) the Court found that trial counsel could not be found ineffective for the failure to secure the presence of two men spotted at the crime scene "when Detective King did not even have any reliable leads on the true identity of these two men who were observed for a fleeting moment by a passing vehicle's occupants. As such, this particular allegation is without merit." (R10, 1403); (10) the court rejected a claim of ineffective counsel in preparation for witness Horace Barnes, since this Court found the testimony about mob association to be

harmless error. (R10, 1403); (11) the court found that appellant failed to show a deficiency in failing to cross-examine Agent Gerald Wilkes as the court agreed with counsel that it is unnecessary and can be a proper tactical decision where the testimony is not harmful. (R10, 1404-05); (12) the court found that no prejudice was established by the failure to retain an expert in metallurgy - there is no reasonable probability of a different outcome - since defense experts could not conclusively refute John Riley's claims and conclusions (R10, 1405)[19]; (13) the court found that it was decided among the defense table that Mordenti would not testify on his own behalf (R10, 1406). See also DAR 1528; (14) the court found that appellant failed to show a violation of the husband/wife privilege since they were together several years prior to their marriage (R10, 1407).

Appellant spends almost the entirety of his argument contending that the prejudice prong has been satisfied (Brief, pp. 80-91). It appears that he has chosen not to address the many findings and conclusions that trial counsel were not deficient in the representation of Mordenti. Appellant's choice is fatal to his argument since the courts have consistently

---

[19] The Court similarly rejected a Giglio/Brady claim noting that disagreement among experts does not demonstrate that false and misleading testimony was provided (R10, 1413-1415).

demanded of post-conviction defendants seeking to prevail on ineffective counsel claims that they demonstrate both deficiency and prejudice (a reasonable probability of a different result). The failure to show each of the two prongs ends the inquiry, requiring denial of relief. See Strickland v. Washington, 466 U.S. 668, 697 (1984)("....there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one"); Stewart v. State, 801 So. 2d 59, 65 (Fla. 2001); Downs v. State, 740 So. 2d 506, 518 n. 19 (Fla. 1999)(finding no need to address prejudice prong where defendant failed to establish deficient performance prong); Thompson v. State, 796 So. 2d 511, 516 (Fla. 2001); Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001); Mann v. State, 770 So. 2d 1158 (Fla. 2000)(must show counsel's performance was deficient and that the deficiency prejudiced the defense); Williamson v. Dugger, 651 So. 2d 84 (Fla. 1994); Bottoson v. Moore, 234 F.3d 526, 532 (11th Cir. 2000). Appellant is mistaken to the extent that he contends that deficiency has been established merely because trial counsel indicates that he did not have a strategic or tactical reason for his actions or inactions. The reasonableness of counsel's performance is an objective inquiry. The relevant question is

not whether counsel's choices were strategic, but whether they were reasonable. See Roe v. Flores-Ortega, 528 U.S. 470, 481, 145 L.Ed.2d 985, 997 (2000); Chandler v. United States, 218 F.3d 1305, 1315 n. 16 (11th Cir. 2000)(en banc).

While unnecessary to do so, appellee will respond to the items mentioned in appellant's prejudice section.

1). **Miranda** - Notwithstanding collateral counsel's leading questions below, the trial transcript testimony of Detective Kroll does not clearly indicate that the March 8, 1990 contact of Royston and Mordenti at the jail following arrest that day occurred after Miranda warnings (DAR 572-581). In any event, that Atti testified it did not occur to him to object on the basis of Rhode Island v. Innis, 446 U.S. 291 (1980)(R15, 545) matters not; there is neither deficiency nor prejudice (a reasonable probability of a different result) since witness Kroll did not relate to the jury any statement pursuant to an "interrogation" ("Q. Did that person, Michael Mordenti, ever acknowledge in any way that he knew Larry Royston? A. No, he didn't" - DAR 581).[20]

---

[20] At trial, the prosecutor asked Detective Rosalyn Kroll about an incident at the jail when Mordenti and Royston were two to three feet apart in the booking area. Following a defense objection and bench colloquy and proffer outside the hearing of the jury (DAR 573-578), the defense withdrew its objection (DAR 578).

2). **Marital Statements** - Appellant notes that counsel indicated it was an oversight not to object to Gail Mordenti's statements on the basis of marital privilege. The lower court properly concluded that relief was unavailable since not shown to be statements during the marriage (she merely knew he kept throw away pieces and associated with shady people). Neither prong of Strickland is satisfied. See Bolin v. State, 650 So. 2d 19, 20 (Fla. 1995)("we do point out that it is only the communications which are not admissible. The former spouse's testimony as to what she observed is admissible. Kerlin v. State, 352 So. 2d 45 (Fla. 1977)".) Trial counsel cannot be deemed ineffective for having failed to urge a meritless argument.

3). **The Testimony of Marge Garberson** - Garberson testified that Mr. Royston had inquired of her willingness to kill his wife (DAR 390-391). Defense counsel did not object to that testimony and Mr. Atti acknowledged at the evidentiary hearing that Mr. Mordenti was not mentioned in that earlier proposal Royston had made to Garberson ("I don't remember it being anything that was damaging to our case" (R16, 611-612))[21]. Trial counsel was not deficient in failing to object to the Garberson testimony since Garberson did not connect appellant to Royston and did not

[21] Appellee notes that Mordenti was charged in the indictment and the jury convicted him also of conspiracy (DAR 1591-92).

impede the defense theory that Royston may have hired another to kill his wife. There is neither deficiency nor prejudice in failing to object to non-damaging testimony.

4). **Immunity** - The lower court determined that the claim of counsel ineffectiveness for the failure to impeach Gail Mordenti regarding her grant of immunity was meritless and the jury could evaluate her credibility (R10, 1386-87; DAR 701-05). Trial counsel Atti admitted deposing Gail Mordenti on July 5 and that he cross-examined her at trial only on questions about perjury. Atti knew at the time of trial there was a difference between use and transactional immunity (that use immunity is more limited and protects only from the statement the witness gives) and acknowledged his cross-examination of Gail Mordenti at pages 704-ff of the direct appeal record (R16, 617-620). Mr. Atti also had Gail Mordenti's March 8, 1990 statement in which prosecutor Atkinson informed her she was given use immunity (R16, 597-599). There is neither deficiency nor prejudice (and if deficiency is not shown, a reviewing court need not consider prejudice).[22]

5). **Gail's Prior Alleged Inconsistent Statement** - Appellant

[22] Even if it could be argued that Gail Mordenti may have misdescribed the immunity as total rather than use, such error would redound to the benefit of the defense if the jury mistakenly believed she had more to gain by her testimony than she did.

asserts that counsel was ineffective in failing to show an inconsistent statement about when she possessed a gun and bullets. Gail Mordenti testified at trial on direct examination that she provided to the authorities a gun appellant had previously given her to help in their investigation (DAR 661-664); see also testimony of Detective Karen Kirk at DAR 707-709. On cross-examination, counsel asked if she remembered the March 8th statement to authorities about when she had obtained the gun and the witness said she did not. She stated she didn't know the date, that she had gotten the gun from appellant when she was working at Carlisle Hyundai (she worked there from October 1989 until April of 1990). (DAR 684-685). When shown the statement the witness did not remember making it (DAR 689). Defense counsel then read the statement (DAR 691-692). During closing argument defense counsel referred to a piece of paper and the prosecutor objected that it was not in evidence (DAR 1223-1225). Defense counsel argued he was trying to show the jury the witness's reaction when he put the paper down and the prosecutor stated that the defense could argue what he perceived to be the witness's reaction, but was objecting to the defense testifying to a piece of paper not in evidence. The prosecutor argued that the statements were not introduced into evidence and the witness stated she didn't recall (DAR 1227-1228). The court

ruled it was not in evidence (DAR 1230-34). Defense counsel indicated he didn't need to add anything more (DAR 1233).

Notwithstanding appellant's and Mr. Atti's assertions, when Gail Mordenti possessed the gun and bullets was not critical, or even important. The evidence clearly established that it was not the murder weapon. FBI firearms expert Gerald Wilkes (a witness whom appellant criticizes counsel for not cross-examining) testified on direct examination that neither of the two semi-automatic .22 pistols (Exhibits 10 and 12 which had the consecutive serial numbers 045100 and 054101) could have fired the bullets and fragments recovered at the murder scene (DAR 451)[23]. Pawnbroker Fred Long identified the documents establishing that Mordenti had purchased those two guns (DAR 711-713; state Exhibit 8, DAR 1862-64). The precise timing of Mordenti's transfer of that gun to Gail Mordenti is not material.[24] Irrespective of counsel's current musings, neither prong of Strickland v. Washington, 466 U.S. 668 (1984) has been

---

[23] He even added that if a weapon had been submitted initially with the bullets, he wouldn't have been able to positively identify it since the microscopic markings were not sufficient to further identify a weapon (DAR 448).

[24] If Gail Mordenti received one of these .22 automatic guns before the homicide it does not matter since the expert testimony is undisputed that it was not the murder weapon. If appellant gave her the gun after the homicide it still does not matter since it was not the murder weapon.

satisfied.

Both this Court and the federal courts have repeatedly stressed that an attorney's own admission that he or she is ineffective is of little persuasion in these proceedings. See, e.g., Routly v. State, 590 So. 2d 397, 401, n. 4 (Fla. 1991); Kelley v. State, 569 So. 2d 754, 761 (Fla. 1990); Breedlove v. State, 692 So. 2d 874, 877 n 3 (Fla. 1997); Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992); Harris v. Dugger, 874 F.2d 756, 761 n 4 (11th Cir. 1989); Provenzano v. Singletary, 148 F.3d 1327, 1331-32 (11th Cir. 1998)("Accordingly, it would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable. The question is not one to be decided by plebiscite, by affidavits, by deposition, or by live testimony. It is a question of law to be decided by the state courts, by the district court, and by this Court, each in its own turn." Id. at 1332). Similarly, that trial counsel erroneously believed that the timing of the gun transfer was extremely significant is not dispositive.

Mr. Atti in his direct testimony recalled that Gail Mordenti indicated in her March 8, 1990 statement that appellant had given her the gun prior to the homicide. That gun was provided to the authorities and analyzed by the FBI (R15, 560). He

recalled that at trial she stated she received it after the murder (R15, 561). Then, this colloquy occurred with leading questions:

> Q So that would indicate if she received it after the murder, that the gun would have been in the possession of Michael Mordenti at the time of the homicide?
>
> A That's correct.
>
> Q And that's the significant fact, who had possession of the gun the date of the homicide?
>
> A That's correct.
>
> Q So that change between what's the original statement and what her trial testimony is, from your point of view, pivotal. Is that fair or how would you describe it?
>
> A I would say that's absolutely pivotal as to when the gun changed hands. (emphasis supplied)(R15, 561)

Mr. Atti testified on cross-examination that FBI Agent Riley's testimony that the bullets from the gun provided by Gail Mordenti matching the bullets from the victim was not viewed as harmful, "that fit right into where I was going." Deputy Kirk's testimony about recovering the bullets from Gail Mordenti was not a negative but a positive, "that Gail had control of the gun during the time of the murder" (R16, 612-613).

Attorney Watts recalled that in her March 8, 1990 statement Gail Mordenti indicated that she had gotten the gun (which she furnished to law enforcement) prior to the homicide but at trial

stated she got it afterwards (R18, 927-928). He opined why he thought it important:

> A Well, as I recall, two pistols, and if she had the pistol before the homicide, well then, how did Michael use it during the homicide? It didn't make sense that way. It had to have been that she got it after the homicide.
>
> Q And do you recall that the FBI metallurgy testimony was that the bullets in that gun were consistent or similar to the metallurgy analysis with the bullets that were found at the crime scene?
>
> A Yes.
>
> Q Indicating that they were purchased in the same box or --
>
> A The impression from the testimony was that the bullets that were found at the scene were of the same metallurgical composition as the bullets in the gift box that Michael had given to Gail. (emphasis supplied) (R18, 928-929)
>
> * * *
>
> Q So in terms of the testimony you were giving regarding the date whether Gail Mordenti had the gun prior to the homicide or after the homicide, does that -- is that significant to go into towards Michael Mordenti's --
>
> A How did he use it in the homicide?
>
> Q The gun he had, there was no similarity in terms of the bullets?
>
> A Correct. (emphasis supplied) (R18, 930)

On cross-examination, Watts acknowledged that at trial FBI expert Wilkes had testified that neither the gun provided by Gail Mordenti to the authorities nor the gun seized from

appellant (at the time of his arrest) were in fact the murder weapon and:

> Q But it didn't have anything to do -- the issue regarding the gun did not relate back to it potentially being the murder weapon?
>
> A Not that I recall. I thought none of the guns were the murder weapon. (emphasis supplied) (R19, 971)

On redirect examination the witness related that the FBI testimony had been that the type of bullet found in Gail's gun was metallurgically the same as that found in the victim (R19, 984-985).

Gail Mordenti explained in deposition and at the hearing below that appellant when he gave her the gun changed the bullets that had been in the gun. See Defense Exhibit 25, pp. 29-30, deposition of June 27, 1991; see also R19, 1094.

Similarly, appellant's argument about the bullets is meritless. Gail Mordenti testified at the hearing below and in deposition at the time of trial that when appellant gave her the gun at his office he changed the bullets (R19, 1094); Defense Exhibit 25, Deposition of Gail Mordenti on June 27, 1991, pp. 29-30 (appellant told her she didn't want the bullets that were in the gun; he took them out, opened the drawer that had box of shells, put them in the gun when she turned it over to authorities).

6). **Failure to Retain Expert in Metallurgy** - The lower court satisfactorily concluded that counsel was neither deficient nor was prejudice established in light of the testimony presented (R10, 1405). ("Based upon the experts' testimony, the court does not find that even if counsel had retained an expert in metallurgy, the outcome of the proceeding would have been different.")

7). **The Thirteen Minute Cell Phone Call** - Appellant next argues that trial counsel rendered ineffective assistance because he had a sworn statement from, but did not call, Ray Cabral to testify that appellant was trying to sell him a boat (an assertion not even urged in ground 1 of his motion for postconviction relief). Cabral testified below that he was not interested in purchasing a high speed boat from appellant (R13, 276-277).

Trial counsel would not be ineffective in not calling Cabral. For the defense to initiate evidence that Royston and appellant knew each other or had a business-related reason to be in contact would have undercut immediately the argument advanced to the jury that a phone call may have been made to Mordenti's office but that someone else answered the phone at the other end (DAR 1235) and would be implausible to urge at trial after Mordenti had told investigating officers that he didn't know

Royston. Secondly, according to Cabral, Mordenti's conversation pertained to selling a speed boat which was not Cabral's "cup of tea." (R13, 276).

Finally, even if a deficiency were found, the prejudice prong would not be satisfied. After Gail Mordenti gave her statement to prosecutor Atkinson and law enforcement officers on March 8, 1990 she made a taped phone call to appellant. She told him she had received a subpoena from the State Attorney's office regarding the Royston murder. Appellant interjected that she "don't know nothing about it. You're not involved. So don't worry about it." (R19, 1054). He instructed her to tell them "nothing," to "stay cool," that if pressed to give a lie detector test "you don't have to take nothing. No way." (R19, 1055-1057). When asked if that would implicate her, appellant answered:

> No way. I wouldn't take one if anybody asked me to take one. Say no, it's none of your fucking business. I don't take a lie detector for nobody. (R19, 1057).

When Gail asked if she should call Larry, appellant emphatically answered: "No... No way. They've got a suspect. The guy's over six feet tall." (R19, 1057). Appellant further advised her "Don't talk nothing on the phone" (R19, 1058), told her she has nothing to worry about since she hadn't gone out with Larry and concluded:

> That's the end of it. You never talked to him, he never questioned you about nothing. Volunteer no information. Fuck 'em....
>
> * * *
>
> They have nothing (R19, 1059)
>
> * * *
>
> Just be cool. You got nothing to tell them anyway, so don't worry about it. You're clear. (R19, 1060).

Counsel's failure to call Cabral does not create a reasonable probability of a different result.

8). **Alleged Failure to Prepare for Gail's Testimony** - While Atti initially indicated difficulty in scheduling Gail Mordenti's deposition, on cross-examination he conceded that he had five bound volumes of Gail Mordenti depositions, taken on February 19, 1991, June 27, 1991, July 5, 1991; he also had her sworn statement from March of 1990 (R16, 597-599). The trial court's order correctly disposed of this claim (R10, 1388-1391).

Appellant asserts that Defense Exhibit 58 shows that Gail Mordenti was being investigated for grand theft of Fortune Savings in April 1989. Actually, that exhibit lists Gail Mordenti as a witness and Jack Gartley as a suspect (SR8, 1400-1423). That same exhibit contains a letter of April 20, 1989 referring to a Final Judgment in favor of NCNB National Bank and

that Mr. Gartley was found civilly liable for floating checks at NCNB and the court entered treble damages under the civil theft statutes (SR8, 1409). See also State Exhibit 19, the complaint and final judgment by NCNB National Bank against Gartley. On August 31, 1988 the court entered judgment against Gartley in the amount of $20,702.26 (SR8, 1492-1497).

9). **Jack Gartley** - The lower court found that "the defense has provided no evidence to indicate that Gail Mordenti and Larry Royston had anything other than a business relationship" (R10, 1396). Gartley testified that he was heavily sedated and on narcotics for back pain "raising questions about his reliability". Since the defense "has provided no credible evidence that Gail Mordenti and Larry Royston were involved romantically, the Court finds this allegation lacks merit." (R10, 1396). Trial counsel was not ineffective. There is neither deficiency nor prejudice.

10). **Gail's Statement that Gartley "is an albatross around my neck"** - Appellant has failed to show either deficiency or prejudice. Gail explained at the hearing below her basis for the remark that Gartley was not performing in the business, as he said he would (R19, 1067-1068).

11). **Failure to Talk to Prior Defense Investigator** - This claim is meritless. Trial defense counsel had the entirety of the

investigative and lawyer files of Mr. Millwee and Mr. Cohen. They had the sworn statements and subsequent depositions. There is no deficiency in failing to talk to a prior investigator.

12) & 13). **Failure as to Lynn Bouchard; and Maria Rotering** - The lower court unequivocally found that the testimony of both Atti and Watts confirmed that a considered tactical decision was made not to call Lynn Bouchard (R10, 1398-1401). That finding is amply supported by the record. Atti was not going to take a chance putting on a witness that potentially would not prove to be a solid alibi and he seemed to recall notes that Rotering didn't have first hand knowledge (R16, 601-605). Watts was equally blunt: Bouchard's time card was not punched and the auto title documents "seemed to be contrived. They were written over, they were crummy documents" (R19, 952). Watts looked at the documents and thought it too dangerous to use her. The defense team made a calculated decision not to call her. You don't put on a witness who will be unable to explain inconsistencies in testimony (R19, 951-958). He wouldn't call Rotering without Bouchard (the Millwee memo may have said Rotering was just backing up Bouchard with no independent recollection of events) (R19, 959-960). Watts felt others provided the alibi.

Trial counsel cannot be deemed deficient merely because

second-guessing collateral counsel may have chosen a different course of action.[25] See Maharaj v. State, 778 So. 2d 944, 959 (Fla. 2000) (attorney not ineffective in making strategic choice not to present alibi witness whom he found was not credible); Sweet v. State, 810 So. 2d 854, 861 (Fla. 2002)("We conclude that Adams was not deficient in deciding not to call Gaskins as a witness based upon the possibility that Gaskins' out-of-court identification could have come in at trial"); Rose v. State, 675 So. 2d 567, 570 (Fla. 1996)(rejecting claim of ineffective assistance of counsel because "at the evidentiary hearing, trial counsel testified that he was well aware of the problems with each witness and consciously decided not to call any of these witnesses who said they had seen the victim or Rose's van because their testimony would have been more detrimental than helpful"); Fennie v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 619 (Fla., July 11, 2003).

14). **Michael Milligan** - Appellant fails to demonstrate how counsel's alleged lack of knowledge about Michael Milligan

---

[25] Appellant erroneously suggests the lower court made a finding that Lynn Bouchard was credible in her contorted testimony about timesheets and auto papers. It did not. Rather the court credited the testimony of attorneys Atti and Watts that there were problems with the testimony that they did not wish to chance with the jury. Moreover, the decision was not predicated on a failure to investigate. Defense counsel had obtained the Bouchard statement from the earlier investigative work of Millwee working for former counsel Barry Cohen.

constitutes either deficiency under Strickland or that the prejudice prong of a reasonable probability of a different result has been satisfied.

15). **Horace Barnes** - There is neither deficiency nor prejudice. The trial court sustained the defense objection to the testimony about appellant saying he was in the mob (DAR 749) and the lower court repeated this Court's finding of harmless error in Barnes' testimony.[26] In any event trial counsel did elicit on cross that Barnes had numerous, more than five, prior convictions (DAR 751).

16). **Failure to Present FBI Agent Carmody** - There was neither deficiency nor prejudice in the failure to call Carmody. He had no information regarding appellant's involvement in the conspiracy and murder of Thelma Royston. And as to penalty phase trial counsel Watts conceded that the jury pretty well understood that Mordenti had led a crime-free life (R19, 966).

Finally, as the lower court noted, there was no false testimony by Gail Mordenti when testifying that appellant was "involved in some kind of investigation with bank robbery" (DAR 658), since he was involved if he assisted Carmody (R10, 1416).

---

[26] To the extent one considers Barnes' evidentiary hearing below, he claimed he was lying to Corporal Baker and Cox and others because of anger to Mordenti, and he would not likely have revealed that then.

17). **Steve Cook** - Counsel was not ineffective in failing to call cumulative witness Steve Cook, son and best friend of Anna Lee, who did not provide his information to law enforcement and was unaware his mother had gone to meet with witness first without investigators (R12, 161-162), especially in light of the testimony of Richard Watts that he felt the alibi was adequately established by Lee and others (R19, 959).

18). **Failure to Seek Continuance** - As noted by the trial court, lead counsel felt prepared and there was testimony that defendant did not want a continuance (R10, 1394).

To the extent that appellant urges that trial counsel was inexperienced in capital litigation, that too is insufficient for the granting of relief. See U.S. ex rel. Williams v. Twomey, 510 F.2d 634, 639 (7th Cir. 1975)("Necessarily, every lawyer must begin his career without experience. Portia without experience was a remarkably successful representative of Antonio.").

19). **Cumulative Consideration** - The lower court correctly determined that since there were no individual errors, the cumulative error claim must fail. See Downs v. State, 740 So. 2d 506, 509 n. 5 (Fla. 1999); Freeman v. State, 761 So. 2d 1055 (Fla. 2000) (R10, 1423).

ISSUE III

WHETHER THE LOWER COURT ERRED IN ALLOWING THE TESTIMONY OF A FORMER EMPLOYEE OF TRIAL ATTORNEY WATTS.

The standard of review in considering the trial court's ruling on the admission of evidence and testimony is abuse of discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1029 (Fla. 1981).

During the evidentiary hearing appellant objected to the state calling as a witness trial counsel Richard Watts' former paralegal Paula Montlary, who is currently employed in the Attorney General's capital litigation division. Appellant acknowledged having had the opportunity to depose her. (R17, 731-732).

Ms. Montlary testified that when she had interviewed she had mentioned the potential conflict regarding the Mordenti case and thereafter she had no involvement in the case as an employee of the Attorney General's Office. Subsequently, after the September 11th incident, she was contacted by CCRC and the State Attorney's Office (R17, 736-740). She was deposed on October 1, 2001 (R17, 761).

Whatever attorney-client privilege may have been applicable previously, Mordenti's allegations of ineffective assistance of

counsel in his post-conviction motion ended it and Montlary could testify just as Watts did. See generally, Turner v. State, 530 So. 2d 45 (Fla. 1987) (attorney-client privilege on communications waived); Reed v. State, 640 So. 2d 1094 (Fla. 1994) (conversations between defendant and lawyer are not protected by the attorney-client privilege and the waiver extends to the attorney's files; waiver must necessarily include information relating to strategy ordinarily protected under the work product doctrine); LeCroy v. State, 641 So. 2d 853 (Fla. 1994); Arbelaez v. State, 775 So. 2d 909, 917 (Fla. 2000) (defendant waived his attorney-client privilege when he filed his motion claiming that counsel rendered ineffective assistance by failing to adequately investigate and prepare for trial); Trepal v. State, 754 So. 2d 702, 708 (Fla. 2000). Appellant's claim is meritless.

ISSUE IV

WHETHER THE LOWER COURT ERRED IN DENYING RELIEF ON THE CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE.

As stated previously in Issue II, *supra*, the standard of review on an ineffective assistance of counsel claim is that the appellate court gives deference to the trial court factual

findings but reviews the ultimate conclusions on deficiency and prejudice de novo. Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001).

Appellant was given an evidentiary hearing on his claim that trial counsel rendered ineffective assistance at the penalty phase. The lower court denied relief as explained in Claim XIII below (R10, 1419-1422)[27]. In pertinent part the lower court's order recites:

> Mr. Watts testified at the evidentiary hearing held on November 27, 2001, that in preparing for the penalty phase he had extensive contact with Defendant, as he was out on bond during his trial. (See Transcript from November 27, 2001, p. 100, attached). Watts also testified that usually the best person to give information on a defendant is the defendant himself, if such defendant is of sound mind, and Mordenti fit into that category of people. (See Transcript from November 27, 2001, p. 101, attached).
>
> Watts also testified he was actively seeking witnesses for Phase II, the penalty phase. (See Transcript from November 27, 2001, pp. 101-102, attached). As to the allegation that Watts failed to call Mordenti's own daughter, he cannot recall that Defendant even mentioned that he had two daughters. (See Transcript from November 27, 2001, p. 100, attached). If Defendant would have indicated to Watts that he wanted his daughter there, Watts testified that he would have located her and brought her there. (See Id.).
>
> Watts also testified that his assistant, Paula Montlary, made the initial call on the witnesses, and once the initial communication was established, Watts attempted to meet the witnesses face-to-face. (See,

---

[27] The direct appeal record reflects that at penalty phase the defense called some fifteen witnesses and appellant testified on his own behalf (DAR TR 1375-1432).

Transcript from November 27, 2001, p. 103, attached). Watts recalled, however, that there were a couple of witnesses he could not meet face-to-face as they were out of town witnesses. (See Id.). Instead, he spoke on the telephone with them, and then met them the day of their anticipated testimony during the penalty phase. (See Id.). Peter Morris, a friend of Defendant, was subpoenaed to testify at the penalty phase; however, Watts testified, although he cannot specifically remember, that it was a conscious decision not to call him to the stand. (See Transcript from November 27, 2001, pp. 103-104, attached).

When specifically asked why he did not request a jury instruction on Defendant's lack of significant criminal history, Watts testified that it was conscious decision. (See Transcript from November 27, 2001, p. 105, attached). Watts explained that Defendant had a history of uncharged bad acts that the judge was going to allow in as rebuttal to the mitigating evidence. (See Transcript from November 27, 2001, pp. 105-106, attached). Watts felt that the jury understood Defendant was crime free up to the point of trial anyway, and that the lack of a criminal background is not a heavy mitigator. (See Id.).

Watts testified that he presented extensive background in regard to Mordenti's family life and presented nonstatutory and statutory mitigators. (See Transcript from November 27, 2001, pp. 108-109, attached).

* * *

In sum, the Court finds that counsel was not ineffective for failing to present adequate mitigating evidence and testimony at the penalty phase of Defendant's trial. In his own words, Watts said: "I believed that I knew Mr. Mordenti's background and felt like we made a more than adequate presentation of it." (See Transcript from November 27, 2001, p. 104, attached). Furthermore, the Florida Supreme Court found that even though Defendant argued, on direct appeal, that he presented "heavy mitigation," the mitigating factors did not outweigh the aggravating circumstances. Mordenti, 630 at 1085. Based upon the foregoing, Defendant is not entitled to relief upon

this claim. (R10, 1422)

Appellant makes no effort to challenge the lower court's determination. Instead he briefly asserts merely that counsel was deficient in not calling Dr. Fireman apparently to report that Mordenti maintained his innocence. Dr. Fireman was not called to testify at the evidentiary hearing. Appellant also criticizes counsel for not calling Agent Carmody to testify of appellant's assistance in apprehending Mr. Barnes. Appellee notes that in the Amended Motion to Vacate no challenge was made to counsel's failure at penalty phase to use Dr. Fireman or Agent Carmody. (Claim XIII at R5, 590-599).

At the evidentiary hearing Mordenti called Richard Watts, the penalty phase trial defense counsel. Watts testified that he had contacted a mental health expert Dr. Alfred Fireman but Fireman offered no mental health mitigation; he found him well-adjusted, hard working. He was unable to find a mitigator because he couldn't find evidence that he had done the homicide (R18, 934-935). Watts looked for mental health mitigation - through the use of Dr. Fireman - and didn't expect to find any (R19, 965), Watts put on evidence of both statutory and non-statutory mitigation (R19, 969).

Appellant has failed to establish either deficiency by counsel at the penalty phase or secondly that any deficiency

resulted in prejudice, i.e. a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, 466 U.S. 668, 694 (1984).

This claim is meritless; the lower court's order denying relief should be affirmed.

ISSUE V

WHETHER THE LOWER COURT ERRED IN SUMMARILY DENYING SOME OF APPELLANT'S CLAIMS.

Appellant next asserts that the lower court erred in summarily denying relief on Claim IV - Admission of Hearsay Evidence; Claim VII - Counsel's Failure to Effectively Conduct Voir Dire; Claim XI - Admission of Statements of Co-conspirator; Claim VIII - Counsel's Failure to Properly Assert Batson and Neil; Claim XVII - Failure to Present Skipper Evidence.

As to Claim IV in the lower court, the court correctly held that allegations of ineffective assistance of counsel cannot be used to circumvent the requirement that such issues are procedurally barred for the failure to raise on direct appeal. Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995); Medina v. State, 573 So. 2d 293, 295 (Fla. 1990); Brown v. State, 755 So. 2d 616, 620 (Fla. 2000). The lower court also correctly ruled

that appellant's claim failed to allege and demonstrate prejudice (R9, 1187-89). Obviously, the substantive hearsay claim is barred since it could have been urged on direct appeal.

As to Claim VII below, the lower court correctly denied relief summarily as procedurally barred as it was a question to be asserted on direct appeal and additionally the allegations were conclusory in nature (R9, 1192-94). Appellee additionally notes that on direct appeal (Issue II) Mordenti raised the issue of whether the trial court had erred in failing to replace juror Haight; consequently, it is inappropriate collaterally to raise a variant of an issue previously considered and rejected. See Cherry v. State, 659 So. 2d 1069 (Fla. 1995).

Finally, appellee submits that the claim below was spurious since Mordenti claimed that he could not further plead the allegation because of insufficient public records responses by agencies (R5, 577); obviously, the appellate record alone is all that is needed to determine voir dire inquiry. Alternatively, appellee adds that the appellate record demonstrates jurors Haight and Baker each had an open mind (DAR, TR 175, 195)

As to Claim XI, the lower court correctly determined that the issue of admissibility of evidence was a question for direct appeal and thus procedurally barred collaterally, that post-conviction proceedings do not constitute a second appeal and the

bar may not be circumvented by claims of counsel ineffectiveness. See Cherry, *supra*. Further, appellant did not satisfy the prejudice prong (R9, 1197-98). Even now, appellant does not submit an argument but merely impermissibly cites the issue below. See Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."); Shere v. State, 742 So. 2d 215, 217 n 6 (Fla. 1999); Sweet v. State, 810 So. 2d 854, 870 (Fla. 2002); State v. Mitchell, 719 So. 2d 1245, 1247 (Fla. 1st DCA 1998).

The lower court correctly denied relief summarily on Claim VIII (R9, 1194-95). The record demonstrates that trial counsel cannot be deemed ineffective for having withdrawn a request for the prosecutor to state a racially neutral reason for a peremptory exercise on juror Ruby Cutler (DAR, TR 237-238) when a few pages earlier Cutler (Juror #13) acknowledged she would have a problem living with herself if she participated in a decision to send a person to his death (DAR, TR, 221).

As to Claim XVII, the lower court correctly denied relief summarily, noting that the trial court had instructed the jury on good moral character as a mitigating factor and had considered appellant's appropriate behavior during the trial

(R9, 1203). See Mordenti v. State, 630 So. 2d 1080, 1083 (Fla. 1994) (The trial court "found the following factors in mitigation.....(8) that appellant behaved appropriately in court during the trial"). Obviously, the substantive claim is procedurally barred as an issue for direct appeal or as a variant of an issue raised on appeal.

Since all of Mordenti's claims are procedurally barred or meritless, no relief can be granted whether the alleged errors are considered singularly or cumulatively.

ISSUE VI

WHETHER THE LOWER COURT ERRED IN DENYING THE CLAIM OF NEWLY-DISCOVERED EVIDENCE AND IN ADDRESSING CERTAIN EVIDENCE AT THE EVIDENTIARY HEARING.

Appellant's final claim is that the lower court did not assess:

1. Evidence of Horace Barnes' false trial testimony;
2. Agent Malone's false or misleading testimony regarding hair evidence; and
3. Jack Riley's testimony regarding metallurgy and the bullets.

To set aside a conviction or sentence because of newly-discovered evidence, a defendant must show (1) the asserted facts must have been unknown by the trial court, the party or trial counsel at the time of trial and defendant or his counsel

could not have known them by the use of due diligence; and (2) the newly-discovered evidence must be of such a nature that it would probably produce an acquittal on retrial or result in a life sentence rather than a death penalty. See Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997); Jones v. State, 591 So. 2d 911, 916 (Fla. 1991); Robinson v. State, 707 So. 2d 688 (Fla. 1998). Appellant has failed to demonstrate a basis for relief.

Appellee initially notes that Mordenti's failure to fully brief this point constitutes a bar and waiver. See Duest, *supra*; Shere, *supra*; Sweet, *supra*.

(1) The Horace Barnes Testimony -

The lower court did address Horace Barnes both under Claim I (ineffective assistance of counsel) and Claim III (Brady claim) in the Order Denying Relief. The court rejected the ineffective counsel claim pertaining to the alleged association with the mob by noting that this Court on direct appeal had found the error to be harmless (R10, 1403). Similarly, under a Brady theory that the state had failed to provide undisclosed benefits, it was unnecessary to further address the claim since this Court's determination that Barnes' testimony was inconsequential, would not have changed the outcome of the proceeding and otherwise constituted harmless error. Mordenti,

630 So. 2d at 1085 (R10, 1415)[28]

(2) Agent Malone's Testimony Regarding Hair Evidence -

Prior to the evidentiary hearing the lower court entered an order on appellant's Second Amended Motion permitting appellant to present at the evidentiary hearing a newly discovered evidence claim as it related to Malone's examination of the evidence and testimony (R9, 1251). At trial, Malone had given testimony favorable to the defendant:

> I compared all the hairs from the victim, Thelma Royston, and her immediate environment to the known hair samples of Mr. Mordenti. None of the hairs on Thelma Royston or her immediate environment matched the hairs of Mr. Mordenti. .....No. It means I didn't find any hairs like his on her. But no, I could not say he was there or wasn't there. (DAR, 724)

Even the defense witness at the evidentiary hearing below Steve Robertson acknowledged that his testimony was favorable (R12, 148). Robertson further admitted that Malone's finding that the

---

[28] To the extent Mordenti is urging relief on the basis that Barnes stated below that he had been untruthful about the mob association statement, the trial court had sustained the defense objection at trial (DAR 749) and this Court determined any error to be harmless. Furthermore, the testimony of Horace Barnes at the evidentiary hearing below was inherently unreliable. His claim that Karen Cox met with him at the jail in 1991 was contradicted not only by the testimony of Corporal Baker that Cox didn't know of Barnes at the time of his interview but by the fact that Barnes was making the same allegations about Mordenti's alleged mob connection in a letter to his attorney Tom Cunningham in February, 1990 almost a year prior to Cox's alleged visit and made the same allegations to detectives in March 1990 interview (R13, 300-308; R17, 778-781).

hairs were not Mordenti's was not suspect (R12, 142) and that as to the format of Malone's presentation he "can't think of an instance where it would be" a significant problem (R12, 149).

(3) Jack Riley's Testimony Regarding Metallurgy and the Bullets -

Contrary to appellant's assertion, the lower court did address the testimony of John Riley regarding the metallurgy and the bullets, finding that trial counsel was not ineffective at guilt phase for failure to retain an expert in metallurgy. The defense experts did not conclusively refute Riley's testimony and the outcome of the proceeding would not have been different (R10, 1405). Additionally, the lower court also rejected a claim of a Brady violation and an assertion of presentation of false or misleading evidence, noting the testimony of Agent Riley and defense witnesses Randich and Tobin (R10, 1413-1415).

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Martin J. McClain, Esq., 141 N.E. 30th St., Wilton Manors, FL 33334, this 10th day of November, 2003.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
ROBERT J. LANDRY
Assistant Attorney General
Florida Bar No. 0134101
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813) 287-7910
(813) 281-5501 Facsimile

COUNSEL FOR APPELLEE