IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC03-1328

OMAR BLANCO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (Criminal Division)

****

AMENDED ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Omar Blanco, defendant at trial, will be referred to as "Blanco". Appellee, State of Florida, will be referred to as the "State". References to the records will be:

1. "**ROA**" for Direct Appeal in Case Nos. 62,371 and 62,598 (Blanco v. State, 452 So.2d 520 (Fla. 1984), cert. denied, 469 U.S. 1181 (1985)

2. "**1-PCR**" for Postconviction and State Habeas Corpus records in Case Nos. 68,839 (postconviction appeal) and 68,263 (state habeas corpus) (Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987)

3. "**2-PCR/2PP**" consolidated cases - **Second Postconviction Appeal** in Case No. 83,829 (Blanco v. State, 702 So.2d 1250 (Fla. 1997) and **Direct Appeal of Resentencing** in Case No. 85,118 (Blanco v. State, 706 So. 2d 7 (Fla. 1997), cert. denied, 525 U.S. 837 (1998).

4. "**3-PCR**" for the instant appeal.

Any supplemental records will be designated by an "S" proceeding the record symbol. Blanco's initial brief will identified as "IB." All will be followed by the volume and page number(s).

STATEMENT OF THE CASE AND FACTS

Historical Perspective - This is Blanco's third postconviction appeal before this Court in addition to his state habeas corpus review. The initial postconviction appeal and state habeas review were addressed to guilt, penalty phase, and appellate counsel's performance in the first conviction and sentencing as well as the requirement to repatriate Blanco to Cuba. Relief was denied for both. See Blanco Wainwright, 507

So.2d 1377, 1380-81 (Fla. 1987). The federal courts found no constitutional infirmity in the conviction, but reversed the death sentence for a new penalty phase proceeding upon a finding of ineffective assistance of penalty phase counsel. See Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), cert. denied, 504 U.S. 943 (1992). During the second sentencing, Blanco litigated a postconviction claim of newly discovered evidence under Florida Rule of Criminal Procedure 3.850, accusing Enrique Gonzalez of killing John Ryan. Relief was denied and affirmed on appeal. See Blanco v. State, 702 So.2d 1250 (Fla. 1997).

Following the new penalty phase, Blanco was sentenced to death and such was affirmed. Blanco v. State, 706 So. 2d 7 (Fla. 1997), cert. denied, 525 U.S. 837 (1998). In his latest collateral challenge, Blanco is attempting to re-litigate his 1982 conviction and much of **appendix** to the initial brief deals with trying to find inconsistencies in the testimony of witnesses related to already settled guilt phase issues (3-PCR.2 204-303; IB 5-30). In referencing the **appendix** items, Blanco almost exclusively uses them to attack guilt phase issues. Because the guilt phase issues were resolved in earlier postconviction litigation and are barred here, these materials are irrelevant to the instant matter.

Case facts: On June 5, 1982, Blanco was convicted of the January 14, 1982 armed burglary and first-degree murder of John

Ryan ("Ryan"). Blanco v. State, 452 So.2d 520, 522-23 (Fla. 1984). (ROA.XI 1749-51). He received a death sentence for the murder and a consecutive 75 year sentence for the armed burglary. Id. (ROA.XII 2016-22). On direct appeal, Blanco presented nine issues.[1] Affirming the convictions and sentences on direct appeal, this Court found the following facts:

> Fourteen-year-old Thalia Vezos testified that at approximately 11 p.m. on January 14, 1982, she was in her bed reading at her home in Ft. Lauderdale when she saw a man standing in the hallway holding a gun and carrying a brown wallet-type object under his arm. The intruder indicated that Thalia was to keep quiet. He then cut the wires to her telephone and left the room. Thalia's uncle, John Ryan, appeared in the hall and tried to take the gun from the intruder. Ryan was shot in the scuffle and landed on top of his niece on the bed. The intruder shot Ryan six more times. The intruder then fled. Thalia ran next door to the home of the Wengatzes, where the police were called.
>
> The police arrived at the crime scene at 11:14 p.m. Officer Bull went next door and spoke to Thalia, who described the intruder as a Latin male, between 5'8"' to 5'10"', 180 to 190 pounds, wearing a gray or light green jogging suit, with dark curly hair. Officer

[1] Blanco appealed his conviction to both the Fourth District Court of Appeals and the Florida Supreme Court. The District Court case was transferred to the Supreme Court and as a result two Supreme Court case numbers (#62,371 and #62,598) are listed for the direct appeal. In it, Blanco argued: (1) the court erred in denying the motion to suppress evidence following an illegal arrest; (2) it was error to refuse to allow Blanco to present evidence; (3) the court erred in conducting critical stages in Blanco's absence; (4) it was error to force Blanco to present witnesses; (5) the jury was instructed improperly; (6) the court erred in allowing identification testimony from George Abdeni and Thalia Vezos; (7) Blanco's statements should have been suppressed; (8) court erred in imposing separate sentence for underlying felony of aggravated burglary; (9) it was error to impose a death sentence (S3-PCR.7 992-1068 - Exhibit 1).

Bull sent the description to a dispatcher at approximately 11:24 p.m. A man who lived across the street, George Abdeni, came forward with a report that he had heard shots and screaming and had seen the profile of a person in a gray jogging suit heading east from the Vezos property. This information was contained in a police BOLO that included the fact that the suspect was proceeding eastward.

The BOLO as dispatched described the suspect as a Latin male about 5'10"' in height with a dark complexion, black curly hair, some kind of mustache, wearing a gray or light green jogging suit, and running in an eastwardly direction. Officer Price, who was in the area, positioned his car approximately one and a half miles from the scene in a driving lane facing east on 30th Street next to North A1A to watch for someone fitting the BOLO description. At approximately 11:57 p.m. he saw appellant riding a white bicycle on the sidewalk southbound on A1A and determined that appellant fit the description on the BOLO except for his pants, which at first appeared to be heavy corduroy. He also had full facial hair. Officer Price requested more information. He then followed appellant for approximately one-tenth of a mile before stopping him. The first thing the officer noticed when he got within three to four yards of appellant was that the gray pants were the same material as the top of the sweatsuit. Officer Price requested a backup unit. He asked appellant if he possessed a gun. Appellant replied, "No Ingles." The officer frisked appellant, but found nothing but a necklace and watch which appellant was wearing. When the backup unit arrived, the officers handcuffed appellant and took him to the murder scene. Mr. Abdeni identified appellant as having the same profile and jogging suit as the figure he had seen earlier. Appellant was then formally arrested.

A man's purse containing appellant's ID papers and a watch belonging to Thalia Vezos was found near the door to Thalia's bedroom.

On the day following the murder, Thalia Vezos identified appellant in a line-up as the perpetrator. The Broward County Grand Jury indicted appellant on February 2, 1982, for first-degree premeditated murder

> and for armed burglary. Trial began on June 1, 1982, and the jury found appellant guilty on both counts. In compliance with the jury's recommended verdict, the trial judge sentenced appellant to death for the murder. He was sentenced to 75 years for the armed burglary.

Blanco, 452 So. 2d at 522-23.

Four issues were raised in Blanco's Supreme Court petition: (1) whether death sentence was constitutional; (2) whether the line-up should have been suppressed; (3) whether there was probable cause to arrest; and (4) whether the court should have permitted Blanco to present evidence of another's guilt (S3-PCR.7 1138-79). On January 14, 1985, certiorari was denied. Blanco v. Florida, 469 U.S. 1181 (1985).

On January 31, 1986, Blanco moved for postconviction relief. There, he raised 11 claims[2] and after an evidentiary hearing, the motion was denied (1-PCR 582-97). In his appeal, Blanco raised ten issues[3] and this Court affirmed. Blanco, 507

[2] (1) ineffectiveness of penalty phase counsel; (2) court's interference causing counsel to be ineffective; (3) ineffectiveness of guilt phase counsel; (4) conducting proceedings in absence of Blanco's interpreter; (5) questioning Blanco and counsel's failure to object; (6) ineffectiveness for failure to challenge Blanco's competency to stand trial; (7) reducing jury's sense of sentencing responsibility; (8) incorrect penalty phase jury instructions; (9) use of felony murder aggravator; (10) constitutionality of sentence based on prior conviction; (11) improper prosecutorial comments during penalty phase (1-PCR 451-533).

[3] (1) ineffectiveness of penalty phase counsel for "failure to meaningfully advise Mr. Blanco regarding the significance of a sentencing proceeding, and by his attorneys' failure to

So.2d at 1380-83. Later, on federal habeas corpus review, the sentence was vacated based upon the finding of ineffectiveness of penalty phase counsel. See Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), cert. denied, 504 U.S. 943 (1992).

In his state habeas corpus petition, Blanco raised two issues. The first was ineffectiveness of appellate counsel for failing to raise on direct appeal: (a) conflict of interest between counsel and Blanco, (b) lack of an interpreter during trial caused Blanco to be absent from court, and (c) court error in not giving Blanco Miranda warnings before questioning him. The second issue was that Blanco could not be executed, but had to be repatriated to Cuba.

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investigate and present substantial evidence in mitigation of punishment"; (2) court erred in ordering counsel to present evidence counsel believed counter-productive and by not determining whether Blanco knowingly and intelligently waived right to counsel; (3) ineffectiveness of guilt and penalty phase counsel based on revelation of attorney client confidences; (4) court erred by conducting proceedings in Blanco's absence; (5) court erred in repeatedly questioning Blanco without warning him that statements would be used against him in penalty phase; (6) Blanco was incompetent to stand trial and counsel was ineffective is failing to press the competency issue; (7) jury recommendation is unreliable; (8) "jury was incorrectly advised and instructed as to the number of jurors required to return a life recommendation"; (9) "by sentencing Mr. Blanco to death based upon statutory aggravating circumstances subsumed in the conviction for first-degree murder, the trial court failed to genuinely narrow the class of persons eligible for the death penalty, unconstitutionally placed Mr. Blanco twice in jeopardy, and allowed for an automatic death penalty"; (10) death sentence improper as it was based upon unconstitutional prior conviction (S3-PCR.8 1227-1329 Exhibit 6).

This Court characterized Blanco's first issue as "appellate counsel's failure to recognize egregious fundamental constitutional error appearing on the face of the trial record, to wit: ineffective assistance of trial counsel." Blanco, 507 So.2d at 1384. In denying relief, this Court found postconviction review provided the proper and more effective method to obtain review of such issues. Id. Also, this Court rejected the assertion Blanco was entitled to repatriation to Cuba under a Department of State "press communique" announcing an agreement to repatriate Mariel refugees found ineligible to enter the United States. This conclusion was based upon fact the communique was not a "treaty" and the United States was not obligated to return Cuban nationals, but did bind Cuba to accept those returned by the United States. Id.

Following denial of his state collateral review, Blanco filed a federal habeas corpus petition. In it he raised 15 claims.[4] After an evidentiary hearing, Blanco's challenges to

[4] (1) the conviction and death sentence were the result of impermissible/suggestive pretrial identification procedures, which created likelihood of misidentification; (2) Blanco's death sentence unconstitutional as he cannot be distinguished from similarly situated defendants who received life; (3) prior violent felony aggravator violated Eighth Amendment; (4) death sentence based upon automatic aggravator; (5) conviction violates due process as it is not based on sufficient evidence; (6) it was unconstitutional to admit Blanco's statements; (7) it was error to order defense to present evidence which counsel believed counterproductive, and by not determining whether Blanco knowingly and intelligently waived right to counsel; (8)

his conviction were rejected, but a new sentencing was ordered. Blanco v. Dugger, 691 F.Supp 308 (S.D. Fla. 1988). On appeal, the Eleventh Circuit Court of Appeals affirmed. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). Both parties sought certiorari review, but were denied. See Blanco v. Singletary, 504 U.S. 943 (1992); Singletary v. Blanco, 504 U.S. 946 (1992).

On August 1, 1989, Blanco filed a second motion for postconviction relief addressed to the penalty phase (2-PCR/2PP 2454-95). The State moved to have the motion dismissed as Blaanco was receiving the relief requested, i.e., a new penalty phase (2-PCR/2PP 2600-01). The motion remained pending until the day the second penalty phase commenced. On April 18, 1994, the State reminded the Court of the outstanding motion. The

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ineffectiveness of guilt and penalty phase counsel for revelation of "confidences and secrets" to the court which violated "duty of loyalty," caused unconstitutional conflict of interest, and "undermined the reliability of his sentencing determination"; (9) it was unconstitutional to conduct proceedings in Blanco's absence and in absence of interpreter; (10) constitutional violation to question Blanco repeatedly through counsel because the court failed to warn Blanco his statements could be used in sentencing, it was ineffective assistance to fail to object; (11) Blanco was incompetent to stand trial, conviction and sentence are unconstitutional, and counsel was ineffective for failing to present competency issue; (12) penalty phase jury's sense of sentencing responsibility was denigrated; (13) penalty phase jury was instructed improperly as to the number of jurors required for life recommendation; (14) prosecutor's closing injected irrelevant and inappropriate factors into jury's sentencing considerations; and (15) ineffectiveness of penalty phase counsel for failure to advise Blanco regarding significance sentencing proceeding and failure to investigate/present mitigation. (S3-PCR.9 1535-1604 Ex. 11).

defense admitted the 1989 postconviction motion was moot, and the court so found (2-PCR/2PP 702-03).

A third postconviction motion was filed during the re-sentencing (2-PCR/2PP 2934-37) and alleged "newly discovered" evidence that Enrique Gonzalez was the killer. Following the February 24, 1994 evidentiary hearing, the court found the defense witnesses untrustworthy and denied the motion (2-PCR/2PP 3406-07). Blanco appealed claiming (1) newly discovered evidence of Gonzalez's guilt entitled him to a new trial and (2) the court erred in denying the motion for recusal. Blanco v. State, 702 So.2d 1250, 1251-52 n.4 (Fla. 1997). The matter was held in abeyance until after resentencing. Id.

At the new penalty phase, Blanco presented "ten lay witnesses, the statements of his mother and father, and the testimony of two mental health experts." Blanco v. State, 706 So.2d 7, 8-9 (Fla. 1997). Following the jury's ten to two death recommendation, the court imposed a death sentence upon finding the prior violent felony aggravator and merged aggravators of pecuniary gain with felony murder (burglary) outweighed statutory mitigator of "impaired capacity" with the non-statutory mitigation of "1) potential for rehabilitation; 2) fatherhood; 3) dull intelligence; 4) impoverished background; 5) organic brain damage; 6) unwavering declaration of innocence; 7) oppression in Cuba; 8) good character; 9) strong religious

beliefs; 10) cooperation with police; and 11) loving family relationship." Blanco, 706 So.2d at 8-9, n. 5-7. On direct appeal, Blanco raised seven issues.[5] This Court affirmed, Id. at 11. Following such, a petition for certiorari was filed with the Supreme Court[6] and on October 5, 1998, it was denied. Blanco v. Florida, 525 U.S. 837 (1998).

On September 15, 1999, Blanco initiated a fourth round of postconviction litigation (treated as his third) and on May 29, 2001, filed an amended motion (3-PCR.2 204-303). In it he asserted claims addressed to both the original 1982 guilt phase penalty phases as well as the 1995 resentencing. The motion included an allegation that Enrique Gonzalez was the actual perpetrator and Blanco requested that a fingerprint collected from the crime scene, and unidentified to date, be run through the Automated Fingerprint Identification System ("AFIS") (3-

[5] "Blanco claims the court erred in the following matters: 1) refusing to allow defense counsel to retain the mental health expert of his choice; 2) refusing to instruct on the statutory mitigating circumstance of extreme duress; 3) giving undue weight to the jury's present and prior death recommendations; 4) under-weighing the mitigating circumstance of impoverished background; 5) proportionality; 6) the felony murder aggravating circumstance is unconstitutional; 7) the death penalty is cruel and unusual." Blanco v. State, 706 So.2d 7, 9, n.8 (Fla. 1997).

[6] (1) whether Blanco was denied access to a competent psychiatrist; (2) whether it is constitutional for the same felony to establish felony murder as well as an aggravator; and (3) whether the trial and appellate courts gave the mitigation the appropriate weight (S3-PCR.12-13 2169-2227 Exhibits 21-22).

PCR.3 338-46). The State objected and a hearing was held September 17, 2001, during which, it was disclosed that Blanco's fingerprint expert had compared the unidentified print to Enrique Gonzalez and found in was not a match (3-PCR.5 347-51, 816-68, 828-29). Based upon this admission and Blanco's persistent declaration since 1994 that Gonzalez was the murderer, the court denied the request for an AFIS run, finding such was unnecessary (3-PCR.2 380-82; 3-PCR.5 831-32, 833-35). The State Responded to Blanco's postconviction motion and included an appendix of supporting record documents (3-PCR.3 406-533; S3-PCR.7-19). Following the February 27, 2002 Huff v. State, 622 So. 2d 982 (Fla. 1983) hearing (3-PCR.6 920-86), the court analyzed each claim. (3-PCR.3 535-47). In denying relief summarily, the court cited the State's response where it agreed with it and incorporated the State's response and appendix by specific reference. The court found relief unwarranted because the claims were either legally insufficient, procedurally barred, or meritless. (3-PCR.3 535-47). This appeal followed.

SUMMARY OF THE ARGUMENT

Issue I - The court exercised its discretion properly in denying Blanco's request to run an unidentified fingerprint through the AFIS system. Blanco's theory was that Enrique Gonzalez was the killer, however, the defense expert, as postconviction counsel conceded, determined the print did not belong to Gonzalez or other known persons checked by the defense. The request was denied properly, and Blanco failed to meet the criteria for "newly discovered evidence", Brady v. Maryland, 373 U.S. 83 (19063) or Giglio v. United States, 405 U.S. 150 (1972) claims. This Court should affirm.

Issues II and III - Blanco waived his argument that an evidentiary hearing should have been held on his postconviction claims because he has offered no specific analysis. Likewise, no analysis has been offered in support of his cumulative error argument. However, if the merits are reached, the court properly analyzed the legal sufficiency, procedural bars, and merits of the claims. The factual and legal conclusions, included in the court's order, are supported by the law and competent, substantial evidence. This Court should affirm.

Issue IV - There was no error in the resolution of Blanco's claim of contamination as he failed to present evidence or argument on the issue when offered the opportunity. The issue was waived and the ruling should be affirmed.

ARGUMENT

ISSUE I

THE COURT DID NOT ERR IN DENYING BLANCO'S REQUEST TO RUN A LATENT FINGERPRINT THROUGH AFIS SYSTEM (restated)

Blanco maintains it was error for the court to deny his motion to run an unidentified print found at the crime scene through AFIS (IB 34-35). He asserts, such denial precluded his search for "newly discovered evidence" (IB 36-39); exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963) (IB 39-42); and permitted the State to present misleading testimony under Giglio v. United States, 405 U.S. 150 (1972) (IB 42-44). The AFIS run results, he claims would be relevant and material (IB 34-35). Blanco has failed to show any abuse of discretion in denying the request to experiment with the unidentified print as Blanco had already determined that the print did not match Enrique Gonzalez ("Gonzalez") or other suspects against whom he tested the print. Moreover, he has failed to meet the criteria for establishing newly discovered evidence, Brady material, or a Giglio violation.

In his motion and argument for an AFIS run, Blanco asserted he had a due process right to have the print run, and he could not determine at the time whether it was "viable, newly discovered evidence." (3-PCR.3 338-41; 3-PCR.5 818, 823). Blanco did not raise claims of newly discovered evidence or

Brady[7] and Giglio violations in conjunction with the request for an AFIS run. "[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). See Archer v. State, 613 So.2d 446 (Fla. 1993).

The standard of review for the denial of a postconviction discovery test is abuse of discretion as announced in State v. Lewis, 656 So.2d 1248, 1250 (Fla. 1994). "On a motion which sets forth good reason, [] the court may allow **limited discovery into matters which are relevant and material**, and where the discovery is permitted the court may place limitations on the sources and scope." Lewis, 656 So.2d at 1250 (emphasis supplied). Because Blanco's assertion was that Gonzalez committed the murder, and the defense expert determined the print was not that of Gonzalez, Blanco did not and cannot show that his request for additional discovery in the form of an AFIS run would develop relevant and material evidence. As such, the court did not abuse its discretion in denying Blanco's request.

The trial evidence consisted of Blanco's bag, containing

[7] While Blanco claimed a Brady violation respecting the unidentified print because it was not given to the defense to test against other possible suspects "such as Rey Alonso, Enrique Gonzalez and Fidel Romero" (3-PCR.2 339-40), this is a different argument than made here and renders it unpreserved.

his identification papers and Thalia Vezos' ("Vezos") watch, found just outside the door to the room where John Ryan ("Ryan") was killed. Blanco, 452 So.2d at 522-23. Also, the two eye witnesses, Vezos, the victim's niece, and her neighbor George Abdeni ("Abdeni"), identified Blanco as the man they saw that night. Id. Vezos reported it was Blanco who was in her home, spoke to her, cut the telephone lines, and killed her uncle by shooting him six times. Id. Abdeni testified that after hearing gun shots, he saw Blanco leave the scene. Id. During the original guilt phase, the jury was informed Blanco wore socks over his hands and did not leave the unidentified print on Vezos' bedroom door. (ROA.6 893-94, 1005-06, 1020-21).

The thrust of Blanco's 1994 postconviction hearing and resentencing was that Gonzalez killed Ryan. This has persisted through the instant litigation. However, postconviction counsel admitted his expert concluded that Gonzalez did not leave the unidentified print (3-PCR.5 827-28). Given the facts adduced at trial establishing Blanco as the person who killed Ryan in conjunction with the fact Blanco's expert determined that the print was not Gonzalez's, it was not an abuse of discretion to deny Blanco access to the AFIS system. It matters not to whom that print belongs, because the alleged killer, according to Blanco, is Gonzalez, and the print is not his.

In denying the discovery request, the court reasoned the

identity of the person who left the print in question, was irrelevant and the request for AFIS testing was a "red herring" as Blanco's allegation was that Gonzalez was the killer (3-PCR.5 825-36). Once it was admitted by the defense that the print was not left by Gonzalez, the court reasoned:

> It's similar to throwing mud at the barn door and seeing what sticks, hoping that something sticks. If you said it could be Enrique Gonzalez, I would have been more than happy to order a comparison because that is a legitimate request. ... But once it turns out not to be Mr. Gonzalez, we can't take another shot and let's hope it belongs to somebody else.
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> ...
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> THE COURT: ... But as I suggested today you're stabbing in the dark. If Mr. Gonzalez -- Mr. Blanco knows it's Mr. Gonzalez and it's not then he's just taking a stab in the dark hoping and that's not fair.

(3-PCR.5 829-32). The court reasoned "it's not relevant who [the print] belongs to unless it's Mr. Gonzalez, because Mr. Blanco says it was Mr. Gonzalez" who killed Ryan (3-PCR.5 832-33). The court concluded "there is no reason to look anywhere else except for Mr. Gonzalez. That's been looked at, it's not him. There's no need to look any further." (3-PCR.5 835).

Blanco has failed to show the relevance to further testing of the unidentified print. Under Lewis, the court did not abuse its discretion in denying the request for an AFIS run. Likewise, Blanco cannot show newly discovered evidence, a Brady claim, or a Giglio violation.

In order to prove entitlement to relief based upon newly discovered evidence, Blanco must show:

> ... evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." If this test is met, the court must next consider whether the newly discovered evidence is of such a nature as to probably produce an acquittal on retrial. Additionally, we have said that newly discovered evidence, by its very nature, is evidence that existed but was unknown at the time of the prior proceedings.

Wright v. State, 857 So.2d 861, 870-71 (Fla. 2003) (citations omitted). See Kokal v. State, 30 Fla. L. Weekly S21 (Fla. Jan. 13, 2005); Brown v. State, 846 So.2d 1114, 1126 (Fla. 2003); Ventura v. State, 794 So.2d 553, 570 (Fla. 2001); Robinson v. State, 770 So.2d 1167, 1170 (Fla. 2000); Jones v. State, 709 So.2d 512, 520-21 (Fla. 1998). "[I]n conducting a cumulative analysis of newly discovered evidence, we must evaluate the newly discovered evidence in conjunction with the evidence submitted at trial and the evidence presented at prior evidentiary hearings." Kokal, 30 Fla. L. Weekly at S21.

This Court has noted the elements of a Brady claim are:[8]

[8] Although this Court has noted three elements to a Brady claim, the "due diligence" requirement remains and is subsumed in the analysis of whether evidence was withheld. See Occhicone v. State, 768 So.2d 1037, 1042 (Fla. 2000)(reasoning "[a]lthough 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

"(1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice to the defendant must have ensued." Boyd v. State, 2005 WL 318568, *5 (Fla. Feb. 10, 2005) (quoting Lugo v. State, 845 So.2d 74 (Fla. 2003). See, Strickler v. Greene, 119 S.Ct. 1936, 1948 (1999); Freeman v. State, 761 So.2d 1055, 1061-62 (Fla. 2000); Jones v. State, 709 So.2d 512, 519 (Fla. 1998); Provenzano v, State, 616 So.2d 428, 430 (Fla. 1993). To prove prejudice, a defendant must show the evidence was exculpatory and material. Way v. State, 630 So.2d 177, 178 (Fla. 1993). It is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id. See Kyles v. Whitley, 514 U.S. 419, 435 (1995).

As noted in Mordenti v. State, 2004 WL 2922134, 10 (Fla. Dec. 16, 2004): "To establish a *Giglio* violation, it must be shown that (1) the testimony given was false; (2) the prosecutor

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because the evidence cannot then be found to have been withheld from the defendant."); High v. Head, 209 F.3d 1257 (11th Cir. 2000) (finding Strickler did not abandon due diligence requirement of Brady); Way v. State, 760 So.2d 903 (Fla. 2000).

knew the testimony was false; and (3) the statement was material. *See Guzman*, 868 So.2d at 505; *Ventura v. State*, 794 So.2d 553, 562 (Fla. 2001); *Rose v. State*, 774 So.2d 629, 635 (Fla. 2000)."

The print was known to and used by Blanco at trial; hence, it is not newly discovered evidence, nor was it suppressed in violation of Brady. The fact it was not Blanco's print was known to the jury and offered as a reason for acquittal. (ROA.6 1006-08; ROA.10 1690). As such, the jury was not misled and Blanco has not established a Giglio violation. Moreover, no prejudice has been proved under any of the three theories offered by Blanco. The possibility that the print could eventually be identified as coming from someone other than Blanco or Gonzalez would not produce an acquittal. The jury already knew the print was not Blanco's and based on his present defense, i.e., Gonzalez was the killer, the fact that the print was not Gonzalez's would in no way alter the evidence showing Blanco killed Ryan. Blanco left his identification documents at the scene and was recognized by Vezos as the one who shot her uncle and seen by Abdeni leaving the home after shots were fired. Blanco, 452 So.2d at 522-23. The claim must fail. Nothing about the unidentified print undermines confidence in the verdict. The denial of an AFIS run was not an abuse of discretion and should be affirmed.

ISSUES II AND III

THE SUMMARY DENIAL OF EACH CLAIM WAS WELL REASONED AND SUPPORTED BY THE LAW AND RECORD; THE ALLEGATION OF CUMULATIVE ERROR IS UNPRESERVED AND MERITLESS (restated)

It is Blanco's position in **Issue II** that it was error to deny summarily his postconviction motion. He asserts the issues challenging the forensic evidence against him have not been challenged before, and he should have been given an opportunity to present evidence of the changes in forensic evidence procedures. Blanco asks for an opportunity to litigate, "to finality once and for all", unanswered questions raised by review of the crime scene investigation. He also asserts the court erred in failing: (1) to attach portions of the record to the order denying relief; (2) to make findings of legal sufficiency or insufficiency; and (3) failing to make a finding the motion was timely[9] (IB 45-48). In **Issue III**, Blanco groups some claims together and argues the court failed to consider them cumulatively, while again asserting some claims were pled sufficiently to gain an evidentiary hearing (IB 51, 58, 63-66).

This Court should find that Blanco has failed to offer any

[9] The postconviction motion was not denied as untimely. Instead, each claim was assessed. Implicit in the resolution of the matter, is that the motion was filed timely. As such, there did not have to be an announcement that the motion was timely. Blanco's complaint is irrelevant to this litigation, and will not be addressed further.

analysis to support his conclusory argument that the summary denial was improper, or that certain claims were pled sufficiently to gain a hearing, and as such, has waived appellate. Blanco fails to offer analysis why the denied claims were not procedurally barred or refuted from the record. For example, Blanco pleads: "Claims VI, VII and VIII raise viable issues that are pled sufficiently to require evidentiary hearing;" "Claims XII and XIII address the eyewitness identifications of Abdeni and Vezos and are sufficiently pled to require evidentiary hearing;" and Claim XVIII is a viable claim raising issues that are sufficiently pled to be considered at evidentiary hearing."[10] (IB 64-64). An appellant may not simply allege error without offering supporting argument. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived); Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990). Given Blanco's dearth of legal argument and failure to offer record proof that the denied claims were not legally insufficient, procedurally barred or meritless, this

[10] Similar arguments are offered by Blanco for postconviction Claims XVI, XV (IB 64-65); Claim XVI (IB 65); Claim XVII (IB 65); and XXII (IB 65).

Court should find the issue waived. However, should this Court determine the merits should be reached, the following is offered to establish the summary denial was correct and that no cumulative error was either argued below, or shown on appeal. This Court should affirm.

On review, a summary denial of postconviction relief will be affirmed where the law and competent substantial evidence supports its findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998). In Lucas v. State, 841 So.2d 380, 388 (Fla. 2003), this Court stated: "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." See State v. Coney, 845 So.2d 120, 134-35 (Fla. 2003); Peede v. State, 748 So.2d 253, 257 (Fla. 1999) (citation omitted). To support a summary denial, the court "must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." McLin v. State, 827 So.2d 948, 954 (Fla. 2002) (quoting Anderson v. State, 627 So.2d 1170 (Fla. 1993)).

While Blanco asserts there have been changes in forensic analysis, such as DNA testing, gunshot residue analysis, and acceptance of eye-witness identifications, he must assert these

claims under the case law developed for collateral review. Postconviction litigation is not another method for reassessing the sufficiency of the evidence, forensic collection methods, or any number of other means to question a jury's finding of guilt. See, Florida Rule of Criminal Procedure 3.851; Strickland v. Washington, 466 U.S. 688 (1984); Rivera v. State, 717 So.2d 477, 480 n.2 (Fla. 1998) (finding it impermissible to recast claim which could have or was raised on appeal as one of ineffectiveness to overcome the procedural bar or relitigate issue considered earlier); Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995) (same); Muhammad v. State, 603 So.2d 488, 489 (Fla. 1992) (opining "[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack."); Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (holding "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal"). To the extent Blanco is trying to re-litigate his guilt or innocence without showing ineffectiveness of counsel or some constitutional error made retroactive to his case, he is procedurally barred. Blanco is not entitled to re-litigate his guilt until **he** is satisfied "finally once and for all."

With respect to the challenge to the court not attaching records to its order, the complaint is meritless. This Court

has held repeatedly that attachment of records is unnecessary where specific references are made to the record relied upon by the court. See Spencer v. State, 842 So.2d 52, 69 (Fla. 2003) (reaffirming "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion"); Diaz, 719 So.2d at 866; Asay v. State, 769 So.2d 974 (Fla. 2000); Anderson v. State, 627 So.2d 1170 (Fla. 1993); Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990). All that is required of the court is to state its rationale for denying relief. Diaz, 719 So.2d at 867. In assessing each claim, the court announced its findings and conclusions. Standing alone, the order sufficiently advises the parties of its rationale and allows for appellate review. Further, the court relied on the State's response and attendant appendix which gave specific record citations. Through these references, added support was provided for the conclusions of legal insufficiency, procedural bars, meritless arguments, and claims refuted from the record.

The record belies Blanco's claim that the court failed to make findings of legal sufficiency or insufficiency (3-PCR.3 535-46). Findings of legal insufficiency were made with respect to Claims I, III (fiber evidence), IV, VIII (unspecified psychological and/or psychiatric data), and XII (ineffectiveness

of counsel re: police investigation) (3-PCR.3 536-38, 546). The court found a procedural bar respecting Claims I, II, III (alleged confession and gunshot residue test), VI, VII, X - XV, XVII - XX, and XXII. Where appropriate, the court discussed the claims it found not cognizable, refuted from the record, meritless, and/or not ripe.[11] Based on this review, the court assessed the legal sufficiency, and ruled accordingly. Where the claim was not deemed legally insufficient, another basis for the denial of relief was stated. A review of he order shows the court considered each issue and made factual and legal findings which it supported by analysis and pleadings as well as portions of the record as referenced by the State. Such rebuts Blanco's claim the court failed to make findings of legal sufficiency. However, should this Court determine Blanco's appellate pleading deficiencies did not waive the issues, and he generally challenges the denial of relief, the State offers the following.

In reviewing the denial of relief here, the procedural history is relevant. Blanco has received collateral review in state and federal court of his conviction and original sentence. See Blanco, 452 So.2d at 520; Blanco, 507 So.2d at 1377; Blanco, 943 F.2d at 1477 (finding ineffectiveness of penalty phase counsel only and reversing for new sentencing; Blanco, 702 So.2d

[11] Claims I, III-VI, VIII-IX, XI, XIV-XXII (3-PCR.3 537-46).

at 1250 (rejecting claim of newly discovered evidence that Gonzalez was killer). The re-imposition of the death penalty was affirmed on appeal. See Blanco, 706 So.2d at 7. Hence, review is limited to counsel's actions and other collateral issues arising from the re-sentencing, unless newly discovered evidence can be shown to support claims stemming from the initial guilt phase. See Fla. R. Crim. Pro. 3.851.

Postconviction Claims I, IV, and V - There, Blanco asserted the State withheld exculpatory evidence or used false/misleading evidence in the form of: (1) manipulation of conviction against Blanco in a prior violent felony case ("armed robbery"), (2) fingerprint evidence not matched to Blanco or residents of the victim's home and not given to the defense for testing, and (3) "other factors in the defendant's background militating against the imposition of the death penalty." (3-PCR.2 216-18, 228-34). The court reasoned **Postconviction Claim I** (Brady claim) and **Postconviction Claim IV** addressed to Blanco's prior violent felony conviction for armed robbery was legally insufficient because Blanco did not show that he did not have access to the files of the co-defendants in the robbery case.[12] The court

[12] Another basis for finding the matter legally insufficient is that Blanco does not plead what exculpatory, material evidence he did not have or how he was prejudiced given the fact the armed robbery conviction was affirmed on appeal. See Reaves v. State, 826 So.2d 932, 942 (Fla. 2002) (finding Brady claim legally insufficient and denied properly where defendant failed

noted **Postconviction Claim V**, challenging the use of Fidel Romero's testimony in the robbery case, was not ripe for review because Blanco had not made this challenge in that case (3-PCR.3 469-70, 539). In determining **Postconviction Claims I and IV** were procedurally barred and meritless, the court referenced the State's response (3-PCR.3 436-47, 469-70, 537).

The procedural bar rests on the fact the challenge to the prior violent felony aggravator was raised and rejected previously. See Blanco, 507 So.2d at 1380; Blanco, 691 F.Supp. at 315-16 (S3-PCR.7 1138-79; S3-PCR.8-9 1227-1443 Exs. 4, 6-8). Those issues which were raised and rejected previously, are barred on collateral review. Muhammad, 603 So.2d at 489 (opining "[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack."). Blanco should not be permitted to challenge his death sentence by attacking the underlying felony in piecemeal litigation. Cf. Pope v. State, 702 So.2d 221, 223 (Fla. 1997) (noting piecemeal litigation not proper; defendant may not file successive postconviction motion raising another aspect of claim raised in prior motion); Card v. Dugger, 512 So.2d 829 (Fla. 1987).

Blanco is barred from challenging the use of the prior

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to allege how items of evidence were exculpatory or impeaching).

armed robbery conviction in his capital case because he never challenged it in the armed robbery case on the grounds raised here. **Postconviction Claims I, IV, and V** addressed to the armed robbery conviction are not ripe for collateral review. See Occhicone v. State, 768 So.2d 1037, 1040 n.3 (Fla. 2000) (agreeing "defendant must first collaterally challenge his prior conviction in a separate proceeding before bringing this claim"); Henderson v. Singletary, 617 So.2d 313 (Fla. 1993). The validity of that prior conviction remains intact and it is not ripe for challenge here.[13]

Furthermore, the claims of Brady and Giglio violations are refuted from the record and meritless. Blanco does not identify what information he could not have discovered through the use of due diligence[14] or what evidence was known by the State to be false. The record refutes Blanco's claims that the State knew he was not involved in the armed robbery because his charges

[13] The armed robbery conviction was affirmed on appeal. See Blanco v. State, 466 So.2d 1152 (Fla. 4th DCA 1985). Hence, the general allegations of the State refiling charges, granting plea deals to co-defendants, or use of their testimony are matters which could have been raised on direct appeal in the armed robbery case. Blanco is barred from challenging such now See Fla. R. Crim. P 3.850.

[14] See Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000) (reasoning "[a]lthough 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.")

were dismissed, and the victim identified, Fidel Romero, only. The records from **Blanco's** initial conviction and re-trial for the armed robbery (S3-PCR.13-18 2228-3366 Exhibits 23-24) establish the charges against him were not dismissed, but were transferred to another judge due to scheduling difficulties. (S3-PCR.13 2251-54, 2261-70). Blanco knew whether or not he committed the armed robbery, and upon what evidence he was convicted. He clearly was aware of the matter as he challenged the use of that conviction in both the state and federal courts.

The record belies Blanco's assertion he had not been identified as a participant in the robbery as the eyewitness identification was discussed in both robbery trials[15] (S3-PCR.15 2677-85 Exhibit 23; S3-PCR.17 3179-80, 3184-89; S3-PCR.18, 3199-3202 Exhibit 24). The challenge to the conviction based on Fidel Romero's[16] testimony and the sentences Romero and Gonzalez received does not establish a Brady violation as Blanco was either aware of or through the use of due diligence should have known of the co-defendants' sentences. Following reversal of

[15] In the initial armed robbery trial, the victim, McGee identified Blanco from a photograph line-up and Gonzales in a live line-up as two of the men involved. On re-trial, the jury heard of McGee's identifications, but also saw he was unable to identify Blanco in court months after the robbery and after Blanco had changed his hair style (S3-PCR.15 2677-85 Exhibit 23; S3-PCR.17 3179-80, 3184-89; S3-PCR.18 3199-3202 Exhibit 24).

[16] Romero's trial resulted in a conviction which was affirmed on appeal. Romero v. State, 435 So.2d 318 (Fla. 1983).

the initial robbery convictions of Blanco and Gonzalez, Romero testified at the 1984 re-trial and outlined his involvement in the robbery along with the roles Blanco and Gonzalez played. Romero revealed the State assisted with a reduction of his 75 years sentence to five years in exchange for his testimony (S3-PCR.18 3227-32 Exhibit 24). The plea deal agreed to by Romero is part of the clerk's file in his armed robbery case (S3-PCR.18 3367-69 Exhibit 25) and Gonzalez's **two year sentence in January 1984** for the robbery was entered before Blanco's April 1984 robbery re-trial (S3-PCR.18 3370-76 Exhibit 26). Given this, there is no question this information was available to Blanco, or could have been found through due diligence, thereby negating any Brady and Giglio claims.

Similarly, the **1984** convictions obtained by the State against the co-defendant's,[17] the Probable Cause Affidavit, and the Indictment refute Blanco's assertion the co-defendants were suspects in Ryan's murder, but that charges were dropped because

[17] To the extent Blanco asserts the State rushed his armed robbery conviction, it must be noted his second penalty phase took place in 1994 and the retrial of the armed robbery was affirmed in 1985. Blanco v State, So.2d 466 So.2d 1152 (Fla. 4th DCA 1985). Blanco challenged the use of his armed robbery conviction in the 1994 sentencing, but later stipulated to the admission of certified copies of the conviction (2-PCR/2PP 389-91, 697, 1282). This conviction after the murder, but before the capital sentencing, is a valid prior violent felony. Castro v. State, 644 So.2d 987, n. 3 (Fla. 1994). Blanco's alleged "rush to convict" in **1982** produced no basis to question the 1994 capital sentencing based on the **1984** robbery conviction.

they had helped convict Blanco of the armed robbery. **In 1982**, Blanco was sentenced for Ryan's murder and the armed robbery conviction was utilized. While Gonzalez was convicted in 1982 for robbery, that was overturned and he took a plea **in 1984**, Romero's assistance **in 1984** and the reduction of his sentence were known by Blanco and the jury. The Probable Cause Affidavit and Indictment reveal there was only one suspect in Ryan's murder, namely, Blanco (3-PCR.1 1-4).

The record supports the conclusion that **Postconviction Claim I** addressed to fingerprint evidence is legally insufficient, conclusory, and speculative (3-PCR.3 536). Blanco did not comply with the pleading requirements of Brady by attesting he was unaware of the existence of certain fingerprints collected or that other areas of the house were not tested. He offered no support for the statement that evidence not turned over to the defense for testing is presumed exculpatory, or that evidence the State never possessed should be considered a Brady violation.[18] Conclusory allegations are legally insufficient on their face and may be denied summarily.

[18] The allegation that there were fingerprints in other areas of the victim's home is speculative at best, and therefore, is not sufficient to establish that such fingerprints existed or that they would exonerate Blanco. The claim is legally insufficient. It fails to allege that the State had evidence which could have been turned over or that the alleged evidence undermines confidence in the outcome of the trial.

Ragsdale v. State, 720 So.2d 203, 207 (Fla. 1998); Occhicone, 768 So.2d at 1042; Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988) (finding claim legally insufficient where defendant asserted undisclosed photographs might have proven another person was responsible for crime).

The sub-claim addressed to "certain fingerprint evidence" or specifically "an unsolved readable latent print" lifted from Vezos' door is refuted from the prior appellate records, as well as the instant litigation. The thrust of Blanco's defense has been that Gonzalez killed Ryan (2-PCR/2PP 523-603). Yet, Blanco does not even attempt to plead how the fingerprint could exonerate him, especially in light of the fact a defense expert opined the print was not from Gonzales.[19] Vezos' eyewitness testimony was that Blanco broke into her home and shot Ryan. She did not recognize Gonzalez's photograph (2-PCR/2PP 1316; 3-PCR.5 827-35). Materiality and suppression have not been shown.

The fingerprint evidence was not suppressed. Notification of the prints collected and the test results were revealed in discovery submissions, depositions, and/or testimony. The discovery submission identified Deputy Marhan, Aide Matheson, and Dennis Grey as witnesses and included Marhan's Latent

[19] The State incorporates its answer to Issue I wherein it was shown that Blanco's expert determined that the unidentified print was not from Gonzalez, the person Blanco says killed Ryan.

Fingerprint Report (S3-PCR.19 3432-35 Exhibits 28-29). The defense filed the depositions it took of Grey and Marhan which discussed print collection/testing. Detective Richtarcik noted Marhan's fingerprint report (S3-PCR.19 3451-67 Exhibits 30-31).

In opening statement, defense counsel argued there were no fingerprints left by the burglar at the crime scene nor was there evidence of forced entry (ROA.V 766-67, 771) and the existence and import of the fingerprint analysis was subject to cross-examination during the guilt phase of Blanco's trial. Counsel brought out through Detective Garnerd that the latent print found did not match Blanco's prints and may have been of recent origin (ROA.VI 1007-1009). ID Technician Matheson testified how he processed the scene, the photographs he took, the evidence collected, and latent prints lifted (ROA.VI 937-93). Garnerd noted his attempts to lift latent prints from the areas near or on: (1) damaged window and counter tops in the room where Ryan found, (2) cut lines and telephones, (3) doors leading to the patio, (4) walls, and (5) items in the brown purse found at the scene. During his cross-examination, Garnerd discussed the latent print collected (ROA.VI 970-77 991-92). Clearly, the evidence was not withheld.

Also, since his conviction, Blanco has asserted Gonzalez was the true perpetrator and now he claims Gonzalez confessed (2-PCR/2PP 523-602; 3-PCR.2 220, 223, 226, 230, 232-33).

Because, Blanco's expert examined the "unsolved readable latent print" and found it did not match Gonzalez, there can be no showing of prejudice arising from the prior inability to match the print (3-PCR.5 827-36; S3-PCR.18-19 3377-3432 Exhibit 27). This is true, particularly in light of the overwhelming evidence produced against Blanco. Vezos identified Blanco as the man she saw standing in her hallway holding a gun and carrying a man's brown wallet. She stated she conversed with him and he cut the telephone lines. Vezos described the fight between Blanco and Ryan which led to Ryan's death. Abdeni identified Blanco as the man he saw leaving Vezos' home after the shooting. The police recovered the brown wallet at Vezos' bedroom door, and found it contained Blanco's identification papers and Vezos' watch. Blanco, 452 So.2d at 522-23. Whether the unidentified print belonged to an acquaintance of Blanco's or a welcome visitor to the home does not undermine confidence in the trial outcome. Summary denial was proper.

With respect to the allegation the State withheld "other factors in the defendant's background", as found by the court, the claim is legally insufficient as well as meritless. Blanco did not identify what alleged evidence was undisclosed or how such personal information was not known to him and available to defense counsel. Blanco's personal information, by definition, is something he would know. His conclusory claim that the State

withheld some unidentified information is a legally insufficient pleading and summary denial was proper. Ragsdale, 720 So.2d at 207. See Reaves v. State, 826 So.2d 932, 942 (Fla. 2002) (finding Brady claim legally insufficient where defendant failed to allege how items of evidence would assist defense); Asay v. State, 769 So.2d 974, 982 (Fla. 2000) (holding summary denial of insufficiently pled Brady claim proper). Blanco offered nothing in support of his allegation. Moreover, by failing to identify the alleged suppressed evidence, he cannot show how the evidence might be material and alter the result of his sentencing. The pleading requirements of a Brady violation have not been met.

Likewise, given the fact "other factors" in "background" is information personal to Blanco, he is unable to establish the State suppressed evidence. Strickler, 119 S.Ct. at 1948; Occhicone, 768 So.2d at 1042; Way v. State, 760 So.2d 903, 910 (2000). "[T]here is no Brady violation if the defendant knew or should have known the essential facts permitting him to take advantage of the information in question, or if the information was available to him from another source." Carter v. Bell, 218 F.3d 581, 601 (6th Cir. 2000). Blanco did not plead that he did not have, or could not have obtained, such personal evidence. The State may not be charged with a Brady violation where the allegedly non-disclosed information was known to the defendant. See, Carter, 218 F.3d at 603 (finding no Brady violation where

State failed to disclose defendant's own knowing actions); Oats v. Singletary, 141 F.3d 1018, 1032 (11th Cir. 1998) (declining to address whether clemency board was required to disclose "investigation file" under Brady as defendant had not made showing information was exculpatory or unavailable). Summary denial was correct.

Postconviction Claim II[20] - In his motion, Blanco contended his **guilt phase counsel** rendered ineffective assistance by failing to find or develop: (1) connection between Alonso, Gonzalez, and Romero in other burglaries; (2) alleged involvement of Alonso, Gonzalez, and Romero in the murder; and (3) untested or undiscovered fingerprint evidence (3-PCR.2 220-22). It is Blanco's contention these failures permitted witnesses to be untruthful, thereby, denying him a fair trial. This claim was denied as procedurally barred because Blanco had raised ineffectivenes of counsel in two prior postconviction motions and appeals (3-PCR.3 537). The record supports this.

In Pope v. State, 702 So.2d 221, 223 (Fla. 1997), this Court recognized a defendant was barred from bringing a

[20] The claim is legally insufficient and devoid of factual support as Blanco failed to identify the witnesses who should have been questioned at trial or how these unidentified witnesses were untruthful (3-PCR.2 220-21). Blanco's claims were conclusory and failed to allege how the result of the proceedings would have been different. Ragsdale v. State, 720 So.2d 203, 207 (Fla. 1998).

successive postconviction motion unless based on newly discovered evidence. "A defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by filing successive motions." Jones v. State, 591 So.2d 911, 913 (Fla. 1991). Here, Blanco suggested Ryan's confessed killer was Gonzalez, and Carmen Congora and Roberto Alonso had information linking him to the murder (3-PCR.2 220). Counsel's alleged failure to investigate this information was offered below as ineffective assistance. That factual basis was raised and rejected in the **1994 postconviction motion** and subsequent appeal when presented as newly discovered evidence. Blanco, 702 So.2d at 2151. On appeal, this Court summarized the evidence:

> During the pendency of the resentencing proceeding, Blanco filed his second (the present) rule 3.850 motion, seeking to present newly discovered evidence. The trial court held an evidentiary hearing on February 24, 1994, and Blanco advanced the theory that another man, Enrique Gonzales, was the killer. Blanco presented two witnesses. Carmen Congora testified that on the night of the murder she saw Gonzales wearing a bloody shirt. She also stated, however, that she lives in a home for the mentally impaired, is easily confused, and did not remember the day or the year she saw the bloody shirt. The second witness, Roberto Alonso, testified that on the night of the murder he rode bicycles with Blanco and that Gonzales came in later wearing a bloody shirt. Alonso also admitted, however, that he has a criminal record, was currently in prison for murdering someone with a machete, and had seen Blanco while in prison.
>
> Blanco additionally introduced a statement by his mother, Zenaida, who lives in Cuba, wherein she said that a woman named Mamita told her that Enrique Gonzales told Mamita in prison that he did the

> killing. Blanco introduced two letters, one by Mamita and one by Julio Guerra, saying that Gonzales was the killer. The State, on the other hand, presented three witnesses who had known Blanco while in jail and to whom Blanco had made incriminating statements. Finally, Thalia Vesos, the adolescent girl who had confronted the killer in her bedroom seconds before the shooting, was shown photographs of both Blanco and Gonzales and testified unequivocally that Blanco and not Gonzales was the man she had seen.

Blanco, 702 So.2d at 1251-52. Clearly, a claim of newly discovered evidence precludes a finding of ineffective assistance, because by definition, newly discovered evidence must have been in existence at the time of trial, but could not have been discovered by counsel using due diligence. Kight v. State, 784 So.2d 396, 400 (Fla. 2001); Scott v. Dugger, 604 So.2d 465, 468 (Fla. 1992); Jones, 591 So.2d at 915.

All Blanco alleged below was a different argument (ineffectiveness) based upon the same factual scenario rejected previously. It is inappropriate to use a different argument to re-litigate the same issue. Rivera, 717 So.2d at 480, n.2; Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995).

Likewise, the claim is procedurally barred because Blanco challenged the effectiveness of guilt phase counsel in prior litigation. Not only were guilt phase counsel's actions challenged in state postconviction litigation, Blanco, 507 So.2d at 1380, but also in federal habeas corpus litigation, Blanco, 943 F.2d at 1477. Any challenge to guilt phase counsel are

procedurally barred. Pope, 702 So.2d at 223; Jones, 591 So.2d at 913; Card, 512 So.2d at 829.

Blanco fails to establish the present challenge to guilt phase counsel's effectiveness with respect to the fingerprint evidence is not barred, given that this is the third round of postconviction litigation, and Gonzalez was not the person who left the print. The State reincorporates its analysis presented in **Issue I**. Any challenge to counsel's assistance could have been presented in an earlier motion. This Court should find Blanco has abused the process. Pope, 702 So.2d at 223.

However, should the Court reach the merits, Blanco is not entitled to relief. Below, he asserted **guilt phase** counsel failed to investigate information surrounding Gonzalez' involvement and to challenge the collection of fingerprint evidence, thus, allowing witnesses to be untruthful (3-PCR.2 221). Yet, the court's findings from the prior postconviction case preclude labeling counsel ineffective as the evidence was fabricated after trial, and would not produce an acquittal.

> First, this Court finds that the testimony of Carmen Congora and Roberto Alonzo is not worthy of belief and qualifies as newly discovered evidence only in the sense that the testimony presented was made up by Carmen Congora and Roberto Alonzo after Omar Blanco's trial. I therefore find that their testimony does not qualify as newly discovered evidence.
>
> Second, assuming arguendo, that their testimony qualifies as newly discovered evidence, based on the fact that I have found it unworthy of belief and

> totally inconsistent with the evidence at trial, I find that there is no probability that their testimony would result in Mr. Blanco's acquittal.
>
> Third, this Court finds that the letters from Cuba stating that Enrique Gonzalez confessed to the murder of John Ryan would not be admissible in a retrial of Mr. Blanco.
>
> Fourth, again assuming arguendo, that the letters would be admissible in a retrial of Mr. Blanco, I find that even with their submission to a jury, there is no probability that it would result in an acquittal of Mr. Blanco, considering all of the testimony at the trial and the testimony of Thalia Vezos at the 3.850 hearing that Enrique Gonzalez, specifically, was not the person who committed the crime.

Blanco, 702 So.2d at 1252 (quoting from trial court's order). Blanco has failed to prove ineffectiveness under Strickland.[21]

Blanco has not established either deficient performance or prejudice arising from guilt phase counsel's investigation of the fingerprint evidence under Strickland. The fingerprint evidence was challenged at trial;[22] no prejudice has been shown.[23]

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[21] For a defendant to prevail on an ineffective assistance of counsel claim, he must establish (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 688 (1984). See Arbelaez v. State, 889 So.2d 25, 31-32 (Fla. 2005); Davis v. State, 875 So.2d 359, 365 (Fla. 2003); Valle v. State, 778 So.2d 960, 965 (Fla. 2001). There could be no deficiency as the "new evidence" was newly fabricated; Blanco, 702 So.2d 1252; and not worthy of belief or of producing an acquittal, thus no prejudice.

[22] In opening statement, counsel noted that Vezos, was mistaken in her identification of Blanco, that no fingerprints were left by the burglar, and there was no forced entry (ROA.V 766-67, 771). At trial, the police were cross-examined about

Postconviction Claim III - Below, Blanco contended his conviction was unsound based upon newly discovered evidence of (1) Gonzalez's alleged confession; (2) new opinion that gunshot residue tests should not have been relied upon at trial; and (3) FDLE's report fiber evidence was inconsistent with Blanco being in Ryan's home (3-PCR.2 223-26). The judge found the issue of the alleged confession to be procedurally barred because it had been raised and rejected in Blanco, 702 So.2d at 1252. Consequently, the prior litigation refutes the instant claim of newly discovered evidence (3-PCR.3 538). The challenge to the gunshot residue was deemed procedurally barred and not "newly discovered" as it was substantially challenged at trial (3-PCR.3 538). The objection to the fiber evidence was found legally insufficient as Blanco failed to state when he discovered it

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their fingerprint collection, that none matched Blanco's prints, and that a print on the door jamb of the room where Ryan was killed remained unmatched (ROA.VI 937-1022). In guilt phase closing argument counsel questioned the evidence the State presented linking Blanco to the crime (ROA.X 1688-1702). Counsel argued that "[t]hese fingerprints that were introduced into evidence - they don't prove that Omar Blanco fired the gun." (ROA.X 1690).

[23] The jury knew Blanco's prints were not found at the scene, but he was "unequivocally" identified by Vezos, Blanco, 702 So.2d at 1251, and Abdeni, a purse containing Blanco's personal items and Vezos' watch was located at the scene, Blanco, 452 So.2d 522-23, and gun power residue was found on Blanco's hands (ROA.VIII 1226-69). There is no possibility of a different result had counsel investigated the fingerprint evidence differently, especially in light of the fact the print did not match Gonzalez.

(FDLE's report was in the original discovery submission) and he did not explain how such would exonerate him. Moreover, the report and notes regarding the fiber evidence were part of the second postconviction motion, thus, Blanco failed to show, such was newly discovered (3-PCR.3 538-39). These conclusions are supported by the record and should be affirmed.

With respect to Gonzalez's alleged confession, the matter is procedurally barred as noted in the State's analysis of **Postconviction Claim II** above and incorporated here. Gonzalez's confession was the subject of the 1994 postconviction litigation and was rejected on appeal.[24] See Blanco, 702 So.2d at 1251-53. Blanco is barred from raising the claim again or from characterizing it as "newly discovered." See Spencer, 842 So.2d at 60-61; Muhammad, 603 So.2d at 489. This Court should affirm.

The challenge to the gunshot residue testing conducted in this case is procedurally barred. Blanco alleged below the testing conducted for barium and antimony to show gunshot residue: (1) differed from the standard testing done "then and now" and has been "discontinued as 'un-reliable'" and (2) today such trace amounts could have come from using bike chain oil (3-

[24] This Court agreed the testimony of Carmen Congora and Roberto Alonzo did not constitute newly discovered evidence as it was fabricated after the initial trial. Blanco, 702 So. 2d at 1252. Yet even assuming it was newly discovered, it was so inconsistent with the trial evidence there was no possibility an acquittal would have been obtained. Id.

PCR.2 224-25). The pith of the claim is the admission/reliance upon the gunshot residue test at guilt phase. Guilt phase counsel thoroughly cross-examined William Kinard regarding the validity of the gunshot testing in this case, and the manner in which the identified elements could get on a subject's hands.[25] Given this fact, the claim could have been raised on direct appeal and now is procedurally barred. Spencer, 842 So.2d at 60-61 (discussing procedural bar); Muhammad, 603 So.2d at 489. Further, based upon counsel's questioning of the expert, the record refutes the claim of newly discovered evidence. Cf. Porter v. State, 653 So.2d 374, 379 (Fla. 1995) (holding "newly

[25] At the 1982 trial, without objection, Kinard was declared an expert after which, he explained how in 1974, he and the Bureau of Alcohol Tobacco and Firearms began using the flameless atomic absorption spectrophotometry test to identify barium and antimony to discern gunshot residue and the protocols, testing, and parameters for opining that gunshot residue was present. Based on these, Kinard opined the tests results were consistent with Blanco having fired a weapon using a two hand grip. On cross-examination, Kinard agreed that under certain circumstances, the residue could be transferred to a person's hands based on coming in contact with barium and antimony laden objects such as brake shoes and other mechanisms. Yet, the test Kinard used would not pick up on those compounds because his test looks for the salt of the elements, not the elements themselves. Counsel challenged Kinard about other testing methods, the particular weaknesses in the flameless test, and the fact the FBI requires a higher level of barium and antimony results to opine that gunshot residue is present, but the FBI and ATF use different tests. Kinard admitted "the mere fact that we find barium and antimony does not unequivocally to the exclusion of all other possibilities put a gun in Mr. Blanco's hand....", but it provides a strong indication a gun was fired (ROA.VIII 1226-39, 1241-46, 1249-50, 1252-69).

discovered evidence, by its very nature, is evidence which existed but was unknown" at trial). This matter could have been challenged earlier. Blanco may not advance a different argument, by couching his claim as "newly discovered" evidence, in order to overcome the procedural bar. Cf. Rivera, 717 So.2d at 480, n.2; Cherry, 659 So.2d at 1072. The same applies to his single sentence argument of ineffective assistance, which is inconsistent with a claim of newly discovered evidence as noted above. Asay, 769 So.2d at 989 (finding "one sentence" conclusory allegation that counsel was ineffective is an improper pleading and attempt to relitigate procedurally barred claims); Freeman, 761 So.2d at 1067. The summary denial should be affirmed.

Postconviction Claims VI and VII - In **Claim VI**, Blanco contended the court prevented him from testifying at the second penalty phase when he would not be permitted to discuss evidence of innocence, and thus, his waiver of the right to testify was not knowing and voluntary (3-PCR.2 238). However, in **Claim VII**, Blanco blamed counsel for the decision not to testify. The court concluded both challenges were procedurally barred as the trial error could have been raised on appeal, and the claim of ineffectiveness was merely an impermissible recasting under Robinson v. State, 707 So.2d 688, 697-99 (Fla. 1998) (3-PCR.3 539). Such are correct, because court error is a matter which mawy be raised on appeal; failure to do so bars consideration on

collateral review. State v. Coney, 845 So.2d 120, 137 (Fla. 2003) (noting "[t]o the extent Coney's claims on this point are claims of trial court error, such claims generally are not cognizable in a rule 3.850 motion."); Muhammad, 603 So.2d at 489. Recasting trial error as ineffectiveness does not overcome the procedural bar.[26] Rivera, 717 So.2d at 480 n.2.

It is well settled the defendant possesses the ultimate authority to decide to exercise his constitutional right to testify. Jones v. Barnes, 463 U.S. 745, 751 (1983); United State v. Burke, 257 F.3d 1321, 1323 (11th Cir. 2001). When the colloquy between the court and Blanco is reviewed, without question, it is clear Blanco was not denied his right to testify or to voice his innocence to the jury; he was merely precluded from presenting other witnesses/evidence of impermissible lingering doubt.[27] Blanco knew he could testify on his own

[26] Blanco's claim of ineffectiveness was legally insufficient and conclusory. He merely stated he wished to testify and had he testified, the penalty phase would have been different (3-PCR.2 239). There was no allegation of what Blanco would have disclosed nor how such would have altered sentencing. The summary denial was proper for this reason. Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989).

[27] The court advised Blanco "that if Mr. Blanco were to take the stand in the penalty phase, he could deny his guilt. Therefore, what I said about lingering doubt [and his testimony] would not apply." After discussing this matter with counsel, Blanco reiterated he would not testify because he could not present the other evidence he wanted to offer and "if [he] could present the rest of the testimony that shows [his] innocence, [he] would testify." The court explained: "No, I cannot allow

behalf and profess his innocence. It was Blanco who decided, because he could not present "other evidence" of innocence[28], that he would not testify. Such was Blanco's right. No constitutional violation occurred.

Further, the record refutes the claim counsel failed to inform Blanco of his right to testify. Not only did penalty phase counsel so inform his client, but the court likewise advised Blanco.[29] Given this, the record refutes the allegation counsel did not advise his client. No prejudice can be found from counsel's representation because the court advised Blanco of his rights (2-PCR/2PP 2206-09, 2229-31). Blanco has failed to carry his burden under Strickland. Summary denial was proper.

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that, but you could take your stand, yourself, and make all the denials you would like to the jury." Again Blanco refused and the court found the waiver of the right to testify free, knowing and voluntary(2-PCR/2PP 2229-31).

[28] Lingering or residual doubt is not a proper subject of capital sentencing nor is there a constitutional right to present such evidence. Way v. State, 760 So.2d 903, 916-17 (Fla. 2000); Bates v. State, 750 So.2d 6, 9, n.2 (Fla. 1999); Sims v. State, 681 So.2d 1112, 1117 (Fla. 1996).

[29] Counsel Moldof stated: "I would traditionally do is tell the Court it's my recommendation, Mr. Blanco, that at this point, it's his choice, you know, whether he takes the stand or not, that I've had discussions with him about that." Also, Moldof reported "... but I think Mr. Omar Blanco has a right, if he wanted to take the stand in this penalty phase." The court instructed: "Mr. Blanco, the Constitution of the United States and the Constitution of the State of Florida both give you certain rights. One of those rights is the right to testify at this hearing and tell the jury your side of the story or anything you would like to tell them, you understand that?" (2-PCR/2PP 2206-09).

Postconviction Claim VIII - In his motion, Blanco asserted his second penalty phase counsel was ineffective for failing to (1) investigate mitigating evidence; (2) "develop previous psychological and psychiatric evidence"; and (3) "present sufficient evidence at the second penalty phase proceedings ... to reasonably convince the jury of the mitigating circumstances." (3-PCR.2 242). Blanco did not elaborate as to what "previous psychological and psychiatric evidence" counsel should have presented, but he points to six non-statutory factors which he claimed should have been offered (3-PCR.2 242-43). The factors cited were: (1) "the victim was a participant in the defendant's conduct;" (2) religious devotion; (3) remorse; (4) good death row behavior; (5) defendant's cooperation; and (6) lack of an intent to kill (3-PCR.2 242-43). The court adopted the State's reasoning and cited those pages in the response wherein the State asserted the claim related to the psychological/psychiatric data was legally insufficient, and the other factors, including mental health, were refuted from the record (3-PCR.3 481-85, 541).

Blanco did not identify what other **mental health data** should have been investigated/presented at the second penalty phase. The allegation is legally insufficient for this reason and conclusory, making summary denial proper. Freeman.

Neither deficient performance nor prejudice, as discussed

in Strickland, have been shown especially in light of the record which reflects that the defense presented two mental health experts[30] and eleven family members and friends,[31] many of whom testified to aspects of Blanco's alleged mental condition at various times in his life. The court found the statutory mitigator of "defendant's capacity to conform his conduct to the requirements of law was substantially impaired", and gave it considerable weight. Likewise, non-statutory mitigation of "dull intelligence" and "organic brain damage" was found. (2PP 3519-20). Blanco's mental health condition was investigated and presented below. He has not come forward with any more evidence which should have been presented and he has not established

[30] Dr. Maulion opined Blanco showed elements of organic brain syndrome. The doctors discussed possible origins of the brain disorder and how such affects behavior. Dr. Maulion related this syndrome and behavior to Blanco's actions on the night of the murder. It was the doctor's opinion Blanco was suffering under **extreme mental/emotional disturbance**, **extreme duress**, and his **capacity to appreciate and conform his conduct to the requirements of the law was impaired** (2-PCR/2PP 1783-86). Dr. Burkstel agreed Blanco's ability to conform his conduct to the law was substantially impaired (2-PCR/2PP 1767-68, 1774-78, 1780-83, 1787-88, 1953).

[31] Alicia Oniva testified and Zenaida Blanco's statement revealed Blanco needed oxygen as a baby and family members on his mother's side had psychological problems (2-PCR/2PP 1566, 1574, 1719-25). According to Caridad Padron, Marta Benejas, Jeraldo Luis Herrera and Rosa Chavianno, Blanco had suffered seizures/convulsions as a child (2-PCR/2PP 1603, 1612, 1621, 1664). Chavianno characterized Blanco as not "right in his head." (2-PCR/2PP 1668). Horatio Blanco's letter related that Blanco's mother had a nervous disorder and had been hospitalized for a long period of time. Blanco had been hit in the head and had to be taken to the hospital (2-PCR/2PP 1744, 1747-48).

deficient performance or explained how he was prejudiced. The record refutes any claim of ineffectiveness. Strickland, 466 U.S. at 688-89, 694 (reasoning high level of deference must be paid to counsel's performance; distortion of hindsight must be limited as the standard is to evaluate performance based on the facts known at time of trial); Cherry, 659 So. 2d at 1073.

With respect to religious devotion, remorse, cooperation, and lack of intent to kill, the pith of Blanco's allegation is that more evidence could have been developed through his testimony, but he was precluded from testifying. The matter is procedurally barred, because the underlying allegation, that he was not permitted to testify, was an issue which could have been raised on appeal. Having failed to do so, Blanco may not recast his claim as one of ineffective assistance. Rivera, 717 So.2d at 480 n.2 (finding claim procedurally barred as defendant was using impermissibly "different argument to relitigate the same issue" he raised on direct appeal. The State also reincorporates and relies on its response to **Postconviction Claims VI and VIII**.

Turning to the alleged mitigation that should have been presented, the Court will find the record establishes there was neither deficiency nor prejudice. Blanco's defense was and continues to be one of innocence. In fact, the court found Blanco's "unwavering declaration of innocence" to be a mitigating factor (2PP 3520). It found as mitigation: (1)

strong religious beliefs; (2) rehabilitation; and (3) cooperation with police (2PP 3519-21). Hence, Blanco has not proven counsel failed to raise religious devotion or cooperation as non-statutory mitigating factors. Under Strickland, both deficient performance as well as prejudice must be shown. Blanco failed to carry his burden because he has not shown that counsel failed to present the evidence, or that a life sentence would have been obtained. Similarly, to the extent he is asserting there was more evidence which could have been offered, he has not shown that it would not have been cumulative to that which was presented. See Gudinas v. State, 816 So.2d 1095, 1106 (Fla. 2002) (finding counsel not ineffective for failing to present cumulative evidence in mitigation); Cherry v. State, 781 So.2d 1040, 1051 (Fla. 2000) (noting "even if trial counsel should have presented witnesses to testify about Cherry's abusive background, most of the testimony now offered by Cherry is cumulative.... Although witnesses provided specific instances of abuse, such evidence merely would have lent further support to the conclusion that Cherry was abused by his father, a fact already known to the jury."). The summary denial was proper.

Blanco points to “good death row behavior” as mitigation, however, he admits that such evidence “was not able to be developed then but should be presented now as the record is more clear at this time.” Given his own admission that the evidence

was not available, counsel may not be deemed ineffective for not having presented non-existent evidence. Strickland, 466 U.S. at (reasoning high deference must be paid to counsel's performance; distorting effects of hindsight must be limited); Cf. Cherry, 659 So.2d at 1073. Ineffectiveness has not been shown.

The offered mitigation of "victim was a participant in the defendant's conduct"[32], "remorse", and "lack of intent to kill" are counter to Blanco's continued claim of innocence. Clearly, if Blanco is not the party responsible for Ryan's death, remorse and lack of intent to kill do not come into play. This Court found the aggravators of prior violent felony and felony murder merged with pecuniary gain. (2PP 3516-17) and having found the mitigator of "unwavering declaration of innocence", there is no reasonable probability that the result of the sentencing would have been different had Blanco come forward to admit his guilt, show remorse, and assert that there was no intent to kill. Moreover, the lack of intent to kill is refuted by the record where the victim was shot seven times. To the extent the lack of intent to kill is an attempt to raise residual doubt, it is

[32] Blanco asserted that had Ryan, into whose house Blanco entered without permission, not fought back, he would not have been killed. Blanco's suggestion that this amounts to mitigation is unsupportable. It was Blanco who caused Ryan to react and protect his family and property; it was Blanco who should never have entered Ryan's home and upon discovery should have left immediately. Killing Ryan for protecting his family does not amount to mitigation for Blanco.

not a proper consideration for the penalty phase, Way, 760 So.2d at 916-17, and counsel was not ineffective.

Postconviction Claims IX, X and XI - In these claims, Blanco alternately challenged: (1) the court for not requiring "statistical and comparative evidence on proportionality"; (2) counsel for not challenging proportionality and for not presenting experts on the subject, thus, leaving the court with nothing upon which to decide proportionality, and (3) the statute as unconstitutional[33] (3-PCR.2 246-55). The court found the challenge to the judge and statute meritless as proportionality review is for this Court, thus, making the issue procedurally barred. Moreover, proportionality review was conducted on direct appeal, Blanco, 706 So.2d at 11, and is not cognizable on collateral review. The claim of ineffective assistance was likewise found meritless and rejected as a recasting of the direct attack on proportionality (3-PCR.2 541).

Such rulings were appropriate. Blanco did not present a valid issue in **Claim IX** because proportionality review is for this Court, not the trial judge,[34] and there is no basis for forcing the State to present statistical or empirical data so

[33] Blanco claimed the failure of section 921.141, Florida Statutes to require the trial court to make record findings on proportionality based on statistical and comparative evidence violates the Equal Protection (3-PCR.2 254-55).

[34] Claims of trial court error are barred on collateral review. See State v. Coney, 845 So.2d 120, 137 (Fla. 2003).

that the court could conduct a proportionality review.[35] Proportionality review is the unique function of this Court and the review is made based upon the aggravation and mitigation presented at trial compared to other death penalty cases. See Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). Having received that review on appeal, Blanco could not reassert it on postconviction review, nor could the trial court sit in review of this Court's determination. See Young v. State, 739 So. 2d 553. 555 n.7 (Fla. 1999) (announcing "trial court has no authority to review actions of [the Florida Supreme] Court").

[35] To the extent Blanco claims there was a data base outlining Florida's capital cases which should have been presented, the claim is meritless. This Court has access to all Florida cases, and is the appropriate body for conducting a proportionality review. There is neither a need nor a basis for submitting "empirical data" redundant to case law. Requiring the State to offer "statistical proof" is not a proper postconviction claim. The parties are responsible for presenting aggravating and mitigating factors to assist with individualized sentencing, and it is up to this Court to consider proportionality. To have the State present unidentified "statistical evidence" is irrelevant to the matter before the sentencer. See Lockett v. Ohio, 438 U.S. 586, 604 (1975); Hitchcock v. Dugger, 481 U.S. 393 (1978); Johnson v. State, 660 So.2d 637, 646 (Fla. 1995). There is "[n]othing in [Lockett which] limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Lockett, 438 U.S. at 604, n.12. "Statistical proof" is irrelevant evidence. See, Scott v. Dugger, 891 F.2d 800, 805 (11th Cir. 1989) (rejecting claim journalist, opposed to death penalty and who had written about it extensively, should have testified); Martin v. Wainwright, 770 F.2d 918, 935-37 (11th Cir. 1985) (affirming exclusion of testimony about deterrent effect of death penalty). The claim is meritless.

Blanco is barred from relitigating the matter.[36]

Similarly, in **Claim X and XI**, he cannot recast a proportionality review as one of ineffective or constitutional error. Valle v. State, 705 So. 2d 1331, 1336 n. 6 (Fla. 1997); Rivera, 717 So.2d at 480 n.2; Medina, 573 So. 2d at 295. Further, his conclusory claim did not warrant an evidentiary hearing. He merely claimed "empirical data" should have been presented, but failed to identify what that data was or how it would alter the sentencing. As such, the claim was legally insufficient and denied properly. Kennedy, 547 So.2d at 913.

With respect to the general merits of the claim, the State reincorporates it analysis presented in **Claim IX** to establish that proportionality review is the duty of the Florida Supreme Court and that proportionality review does not rise to the level of a federal constitutional claim. While the parties present evidence and testimony related to a defendant's crime and character to ensure individualized sentencing, the

[36] With respect to Blanco's assertion that this Court's proportionality review was unconstitutional, the claim is legally insufficient and procedurally barred. The matter was pled in conclusory terms, merely asserting this Court failed to conduct an "in depth study", thus, the Constitution of the United States was violated. In the alternative, he asserted Florida's capital sentencing was unconstitutional. He has cited no case which establishes proportionality review is of federal constitutional dimension. In fact, the opposite is true. Proportionality is a state mandate, not federal. Pulley v. Harris, 465 U.S. 37, 44-51 (1984); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Summary denial was correct.

proportionality of the sentence is determined by this Court. The record reveals that counsel presented mitigating evidence, which this Court took into account in its proportionality review. Counsel was not ineffective under Strickland nor does charging this Court with proportionality review render the statutes unconstitutional. Relief was denied properly.

Postconviction Claim XII and XIII - Here, Blanco claimed the eyewitness identifications from Vezos and Abdeni should have been excluded from the **guilt phase** and that **guilt phase counsel** failed to cross-examine the witnesses properly (3-PCR.2 256-66). The court correctly found the matters procedurally barred (3-PCR.3 542), because the admissibility/use of the eyewitness testimony had been raised on direct appeal and in a prior postconviction litigation.

Blanco had a postconviction review, both state and federal, of the guilt phase aspects of his trial. This is a successive postconviction motion related to guilt phase issues for which Blanco has failed to give a basis for re-litigating. Pope, 702 So.2d at 223; Jones, 591 So. 2d at 911; Card, 512 So.2d at 829. Moreover, allegations of court error are not cognizable in postconviction litigation. Coney, 845 So.2d at 137.

The propriety of the admission of the eyewitness testimony from Vezos and Abdeni was litigated on direct appeal and in federal habeas corpus review. (S3-PCR.7 1009-18, Exhibit 1,

Issues I and VI; 1138-79 Exhibit 4; 3S-PCR.9 1538-51, 1560-62 Exhibit 11 Claims I and V). These issues were resolved against Blanco. Blanco, 453 So.2d at 523-24; Blanco, 943 F.2d at 1508-09. He may not use a different argument, such as ineffective assistance to obtain a second appeal. Rivera, 717 So.2d at 480-82 n.2 and 5; Marajah v. State, 684 So. 2d 726, 728 (Fla. 1996); Medina, 573 So.2d at 295.

Postconviction Claim XIV - It was Blanco's position below that the lack of an interpreter rendered him absent from two critical stages of his guilt phase: (1) motion to suppress hearing; and (2) hearing on counsel's motion to withdraw (3-PCR.2 268-69). The court correctly found this procedurally barred as it had been raised and rejected on direct appeal, the first state postconviction litigation, and on federal habeas review.[37] Blanco has litigated prior postconviction actions, and each has affirmed the result of his guilt phase. A subsequent attack on the guilt phase must allege new or different grounds than those raised previously. Kight, 784 So.2d at 400; Pope, 702 So.2d at 223. Moreover, the claim is refuted from the record as this Court, as well as the Eleventh Circuit Court of Appeals found Blanco had an interpreter throughout the critical

[37] Blanco v. State, 452 So.2d 520, 523 (Fla. 1984); Blanco v. Wainwright, 507 So.2d 1377, 1380 (Fla. 1987); Blanco v. Singletary, 943 F.2d 1477, 1507 (11th Cir. 1991).

stages of the proceedings. Blanco, 507 So.2d at 1380-81; Blanco, 943 F.2d at 1507-08. This Court should affirm.

Postconviction Claims XV and XVI - In **Claim XV**, Blanco averred he was offered a life sentence, which counsel "begged" him to take, but he refused as he was innocent. Blanco claimed the State's seeking a death sentence and the judge's imposition of it following the jury's ten to two recommendation was vindictive (3-PCR.2 270-71). In **Claim XVI**, Blanco alleges ineffective assistance of his "second penalty phase counsel and third 3.850 counsel" for not communicating that the plea offer was for **life with the possibility of parole** after 25 years (3-PCR.2 272-74). **Claim XV**, had Blanco complaining the plea offer was for **life without parole**, but he was merely informed it was a life sentence offer (3-PCR.2 270). However, the record establishes it was the defense who asked for a possible life sentence, but was rejected (2-PCR/2PP 152), and later the State reaffirmed it was seeking the death penalty (2-PCR/2PP 409).

The court properly determined **Claim XV** related to vindictiveness was procedurally barred as the challenge to the court and prosecution could have been raised on appeal. Likewise, the record was found to refute the claim as the court was not involved in plea negotiations (PCR.3 543). **Claim XVI** was denied as refuted from the record based on the court's finding that it was the defense seeking a plea offer, but being

rejected by the State. The court relied upon the State's response for added reasons to deny the claims (3-PCR.3 453-44).

Blanco offers nothing in support of his bold assertion of vindictiveness on the part of the State and court because a death sentence was sought and imposed following a full penalty phase hearing and a jury recommendation of ten to two for death. Such is a conclusory claim subject to summary denial as well as one claiming trial court error. See Coney, 845 So.2d at 137; Ragsdale, 720 So.2d at 207; Kennedy, 547 So. 2d at 913. Given that this is a challenge to the actions of the State and judge, such issues are barred from collateral review because they are matters for direct appeal.[38] Spencer, 842 So. 2d at 60-61; Muhammad, 603 So. 2d at 489. Moreover, as the court found, the record refutes that the State offered a plea. Instead, it was the defense that sought a life offer, but the State rejected it. (2-PCR/2PP 152, 409). There can be no vindictiveness[39] where a

[38] Should this Court perceive the claim is merely another attack upon the sufficiency and/or validity of the death sentence, the matter is barred as it is not appropriate to use a different argument to re-litigate a direct appeal issue. Medina v. State, 573 So.2d 293, 295 (Fla. 1990).

[39] The record reflects that at no time did the State indicate death would not be appropriate. The penalty phase jury was presented evidence and argument related to the circumstance of the crime, as well as aggravation and mitigation present. It was the jury's reasoned judgment, by a ten to two vote, that Blanco should be sentenced to death. This alone establishes there was no vindictiveness on the part of the State or court. Florida law provides that the jury's recommendation be given

plea offer was not made by the State and the judge was not involved in plea negotiations.[40]

Assuming arguendo a plea had been offered, it is well settled a defendant who rejects a plea offer "may not complain simply because he received a heavier sentence after trial" because, "[h]aving rejected the offer of a lesser sentence, [defendant] assumes the risk of receiving a harsher sentence. Were it otherwise, plea bargaining would be futile." Stephney v. State, 564 So.2d 1246, 1248 (Fla. 3d DCA 1990) (citing Mitchell v. State, 521 So.2d 185 (Fla. 4th DCA 1988)). Blanco alleges a plea offer was communicated by counsel who begged that it be accepted. Blanco refused, thus, he assumed the risk.

Blanco's alternate argument raised in **Claim XVI** is refuted by the record and factually inconsitent with his arguments in **Claim XV**. Blanco asserted both 1994 penalty phase and postconviction counsel,[41] ineffectively communicated an alleged plea offer, thus, making his rejection of the offer unknowing.

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great weight. Tedder v. State, 322 So.2d 908 (Fla. 1975).

[40] In order to show a vindictive sentence, "[t]here must be a showing that the enhanced sentence was directly attributable to judicial vindictiveness or punitive action." Santana v. State, 677 So. 2d 1339, 1339 (Fla. 3d DCA 1996).

[41] To the extent Blanco claims ineffectiveness of postconviction counsel, the matter is not cognizable. There is no claim of ineffective assistance of collateral counsel. Spencer v. State, 842 So.2d 52, 60-61 (Fla. 2003); Vining v. State, 827 So.2d 201, 218 (Fla. 2002); King v. State, 808 So.2d 1237 (Fla. 2002); Lambrix v. State, 698 So. 2d 247 (Fla. 1996).

In **Claim XV**, Blanco averred the plea was for **mandatory life**, but counsel merely told him it was for life, but "**begged**" him to take it (3-PCR.2 270). Then he claimed that the offer was for **life with the possibility of parole**, but counsel did not explain this nuance and this nuance made all the difference in his analysis. Such is a specious argument and must be rejected as the record reflects no plea offer was made to Blanco. Hence, he cannot establish counsel failed to communicate an offer which did not exist. Similarly, there can be no prejudice shown by litigating the penalty phase and imposing a death sentence based upon a jury's recommendation. Blanco has not satisfied the dictates of Strickland. Relief was denied properly.

Postconviction Claim XVII[42] - This claim was addressed to the State's alleged deliberate use of false and/or misleading evidence or testimony **in the guilt phase** related to: (1) a girl's bike; (2) the ownership and placement of the brown purse at the crime scene; and (3) Abdeni's eyewitness account (3-PCR.2 275-84). The pith of the claim addressed guilt phase issues in an attempt to re-litigate the sufficiency of the evidence, re-challenge the credibility of the witness and evidence produced by the State, and put forward, for yet another time, Blanco's theory that Gonzalez killed Ryan.

[42] State incorporates its analysis from Claims XII and XIII.

The court found:

> The Defendant has failed to show, beyond the mere conclusion, that the State knew that any evidence was false or misleading. The girl's bike that was recovered was known to the Defendant at the time of trial. If he was riding a different bicycle, he knew it at the time of his trial and three previous postconviction motions. Likewise, he knew of Mr. Abdeni's testimony was (sic) disclosed before the Defendant's 1982 trial and depositions were taken. The brown purse and its contents were entered into evidence during the original trial. The ownership of the purse containing the Defendant's ID, and how the Defendant lost his ID, was examined. The Defendant has failed to show that any of the evidence listed in this claim was not known to him before trial or at the time of his previous postconviction motions. The Defendant has also failed to state how any of the foregoing "new" evidence would exonerate him. This claim is denied as successive and without merit. See *State's Response* p. 113-116. This claim is denied.

(3-PCR.3 544-45). These findings are supported by the record.

Recently, this Court discussed Giglio, stating:

> A ***Giglio*** claim is based on the prosecutor's knowing presentation at trial of false testimony against the defendant. ... To establish a ***Giglio*** violation, it must be shown that (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material....
>
> ...
>
> > . . . the false evidence is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." ... The State, as the beneficiary of the ***Giglio*** violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt....

Mordenti v. State, 894 So.2d 161, 175 (Fla. 2004).

In order to prevail on a claim of newly discovered evidence two requirements must be met by the defendant:

> First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." [c.o.]
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. [c.o] To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial." [c.o.]

Jones, 709 So.2d at 521-22.

Here, Blanco has not pled that he did not know of these alleged inaccuracies in the evidence at the time of his trial, nor could he. He would know whose bike he was riding and how he came to lose his identification papers and purse.[43] Similarly, Blanco did not plead that neither he nor his counsel had knowledge of the statement, deposition and/or testimony of Abdeni or Laurie Wengatz. Blanco did not offer any analysis for his assertion of prejudice. The court correctly found Blanco's

[43] Blanco has had a full hearing and appeal on his claim that Gonzalez killed Ryan and the alleged evidence Carmen Congoro and Roberto Alonso saw Gonzalez with a bloody shirt. The testimony was rejected as untrustworthy. Blanco v. State, 702 So.2d 1250 (Fla. 1997). This evidence does not qualify as "newly discovered" nor is Blanco entitled to a second review. Rivera v. State, 717 So.2d 477, 482 n.5 (Fla. 1998); Marajah v. State, 684 So.2d 726, 728 (Fla. 1996)

claim conclusory claim and pleading deficiencies subject to summary denial. Cf. Atwater v. State, 788 So.2d 223, 229 (Fla. 2001) (noting conclusory claims do not require evidentiary hearing); Ragsdale v. State, 720 So.2d 203, 207.

Blanco has offered no facts to support his assertion the referenced evidence was false and the State knew it to be so. Merely because Blanco alleged he lost his wallet, he has not shown that informing the jury Blanco's identification papers were found at the crime scene amounted to false testimony. Likewise, any "discrepancies" between a witness' account to the police and that to the jury are subject to cross-examination and later argument by counsel. The differences in testimony do not establish a Giglio violation nor necessitate an evidentiary hearing under the "newly discovered" evidence standard when the matters were known to the parties at the time of trial. These pleading deficiencies warranted summary denial. Moreover, given that this was a successive postconviction attack on the guilt phase, and Blanco failed to show a valid basis why the matter could not have been raised in the prior litigation, the summary denial must be affirmed.

Postconviction Claims XVIII - XXI - Here, Blanco challenged the constitutionality of section 921.141, Florida Statute in four respects: (1) it does not set standards for determining the weight to be assigned aggravating and mitigating factors; (2)

the felony murder aggravator is an automatic aggravator; (3) the use of victim impact evidence is improper; and (4) "electrocution is cruel and/or unusual punishment" (3-PCR.2 285-94). Each claim was found procedurally barred because it could have been or was raised on direct appeal. Also, each was found meritless as the challenges have been rejected repeatedly.

The general challenge to the constitutionality of section 921.141(3) was a matter which could have been raised on direct appeal and is now barred. Coney, 845 So.2d at 137; Spencer, 842 So.2d at 60-61. To the extent Blanco's **Claim XVIII** can be read as a re-challenge to the weight assigned the mitigation, such was raised on direct appeal from the second sentencing (S3-PCR.11-12 1998-2093 Exhibit 18). Blanco is barred from using a different argument on postconviction to obtain a second review. See Rodriguez v. State, 2005 WL 1243475, 25 (Fla. 2005); Turner v. Dugger, 614 So.2d 1075, 1078 (Fla. 1992). Florida's capital sentencing has been upheld against constitutional challenges Proffitt v. Florida, 428 U.S. 242 (1976); Freeman v. State, 761 So.2d 1055, 1067 (Fla. 2000); Pooler v. State, 704 So.2d 1375, 1380-81 (Fla. 1997). This Court has outlined the weighing process required of courts. Kearse v. State, 770 So.2d 1119, 1134 (Fla. 2000); Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000); Campbell v. State, 571 So.2d 415, 419 n.4 (Fla. 1990). There is no merit to Blanco's challenge.

On direct appeal from the second sentencing, Blanco challenged the statute on the grounds the felony murder aggravating circumstance is an automatic aggravator (**Postconviction Claim XIX**) and electrocution is cruel and unusual punishment (**Postconviction Claim XXI**) (S3-PCR.12 2067-71 Exhibit 18 Points VI and VII) Both were rejected. Blanco, 706 So.2d at 11, n.19. Having raised the issues on direct appeal, Blanco is not entitled to re-litigate them here. Jones v. State, 855 So.2d 611, 616 (Fla. 2003) See Parker v. State, 611 So.2d 1224 (Fla. 1992) (finding claim that "felony murder" aggravator failed to narrow class of persons eligible for death penalty procedurally barred). These challenges have been rejected repeatedly. See Anderson v. State, 841 So.2d 390, 394-97 (Fla. 2003)(finding felony murder aggravator constitutional); Banks v. State, 700 So.2d 363, 367 (Fla. 1997) (same); Sims v. Moore, 754 So. 2d 657 (Fla. 2000) (finding execution by lethal injection constitutional); Provenzano v. Moore, 744 So. 2d 413, (Fla. 1999) (finding electrocution constitutional).

With respect to victim impact evidence, Blanco did not cite where in the record such evidence was presented to the jury. He merely argued everyone is "created equal in the eyes of the law" and that this type of evidence becomes an aggravating factor rendering the statute unconstitutional (3-PCR.2 291). This is the type of claim which could have been raised on appeal, and is

now procedurally barred on collateral review. Muhammad, 603 So.2d at 489. Moreover, it is without merit as this Court has upheld the admission of victim impact testimony against constitutional challenges. Floyd v. State, 850 So.2d 383, 407 (Fla. 2002); Chavez v. State, 832 So.2d 730, 767, n.45 (Fla. 2002); Jackson v. State, 704 So.2d 500, 507 (Fla. 1997); Windom v. State, 656 So.2d 432, 438 (Fla. 1995). The matter was denied properly as procedurally barred and meritless.

Postconviction Claim XXII - Here again, Blanco challenged the action of **guilt phase counsel**, alleging he failed to investigate, develop, or contest the police crime scene investigation and prosecution theory (3-PCR.2 295-98). Blanco pled that any of the evidence he referenced was unknown at the time of trial, during the 1986 and 1994 state postconviction motions, or during federal litigation. As the court found in denying relief, the matter was barred as a successive motion[44]

[44] If the merits of this ineffectiveness claim are reached, it is clear neither deficient performance nor prejudice under Strickland have been shown. In the 1982 guilt phase opening statement, counsel noted Vezos was mistaken in her identification of Blanco as the killer. Also, counsel argued there were no fingerprints left by Blanco nor was there a forced entry (ROA 766-67, 771). At trial, police witnesses were cross-examined about the prints collected, that none matched Blanco, and the fact a print on the door jamb of the room where Ryan was killed remained unmatched (ROA 937-1022). In guilt phase closing, counsel questioned the State's evidence linking Blanco to the crime and stated that "[t]hese fingerprints that were introduced into evidence - they don't prove that Omar Blanco fired the gun" (ROA 1688-1702). Counsel challenged the State's

(3-PCR.3 546). See Jones, 591 So.2d at 911 (rejecting piecemeal litigation); Parker, 550 So.2d at 459.

Issue III is addressed to the cumulative effect of Blanco's claims. This has not been preserved for appeal as the matter was not presented below in the same terms as presented in this appeal. See Archer, 613 So.2d at 446; Steinhorst, 412 So. 2d at 338. See also, Occhicone, 768 So.2d at 1040 n.3 (finding claim of cumulative judicial trial errors issue which must be raised on direct appeal and is procedurally barred on collateral review); Torres-Arboleda v. Dugger, 636 So.2d 1321 (Fla. 1994).

Blanco's coupling of "crime scene related issues" does not establish cumulative error. Rather, it highlights Blanco's true motive of re-litigating his guilt by directly challenging the evidence used to support his conviction. That is not a cognizable collateral issue. Moreover, the unidentified print does not belong to Gonzalez, thus, completely undercutting Blanco's theory of defense. Blanco's various speculations as to

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evidence collection and theory. There is no possibility the result of the trial would have been different as the case revolved around the Vezos' account as she identified Blanco as Ryan's killer. Blanco left his identification in the hallway to Vezos' room before fleeing. Blanco, 452 So.2d at 522-23. Given this, Blanco is unable to establish prejudice. Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986) (noting "court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.").

what is "normal" in a burglary[45] are arguably interesting questions for pre-trial preparation, but not on collateral review. Such issues were settled by the jury when the verdict was rendered, and affirmed on direct appeal. Blanco may not use his postconviction motion to re-litigate the sufficiency of the evidence. The State relies upon its discussion of each claim above to address the challenges Blanco makes to other groups of collateral claims. (IB 63-66).

The State also maintains the individual underlying claims are procedurally barred, legally insufficient, and/or meritless, *a fortiori,* Blanco has suffered no cumulative effect which invalidates his conviction or sentence. Zeigler v. State, 452 So.2d 537, 539 (Fla. 1984), sentence vacated other grounds, 524 So.2d 419 (Fla. 1988); Wike v. State, 813 So.2d 12, 22 (Fla 2002); Rose v. State, 774 So.2d 629, 635 n. 10 (Fla. 2000); Downs v. State, 740 So.2d 506, 509 (Fla. 1999); Melendez v. State, 718 So.2d 746, 749 (Fla. 1998); Chandler v. Dugger, 634 So.2d 1066, 1068 (Fla. 1994); Rivera v. State, 717 So.2d 477, 480 n.1 (Fla. 1998).

[45] Blanco (1) points to how the participants should have reacted; (2) offers his conjecture that Ryan knew his attacker merely because he asked "what are **you** doing in my house" (emphasis supplied); (3) identified what he considers alleged inconsistencies in eyewitness accounts and/or why more valuables were not taken; and (4) gives his suppositions as to what evidence should have existed and/or been collected (IB 52-59)

ISSUE IV

THERE WAS NO ERROR IN COURT'S RESOLUTION OF BLANCO'S CLAIM OF CONTAMINATION AS BLANCO FAILED TO PRESENT EVIDENCE OR ARGUMENT ON THE ALLEGED CONTAMINATION WHEN OFFERED THE OPPORTUNITY DURING AN EVIDENTIARY HEARING, THEREBY, WAIVING THE ISSUE (restated)

Here, Blanco maintains the court erred in not holding an evidentiary hearing on the claim of contamination of the trial evidence based upon the manner the clerk stored the evidence (IB 67). It is Blanco's position "[t]he fault entirely rests in the hands of the trial court clerk's office" for the storage of the evidence, and any possible value which could have been developed based upon DNA testing has been lost due to alleged contamination/commingling of Blanco and John Ryan's clothes (IB 67-9).[46] This, Blanco asserts is a violation of his due process rights (IB 67-70). Blanco also complains that the socks entered into evidence were not in the clerk's evidence box when the defense did its examination, thus, calling into question the integrity of the evidence for future testing (IB 70-72). The instant complaint regarding the commingling of evidence is waived and meritless. The issue of the storage of the socks was resolved properly by the court.

[46] Blanco complains the evidence is "tainted" and had he merely accepted the State's offer to test it for DNA, there would have been "devastating results" (IB 69) is unsupported by the record produced below and speculative at best.

Whether to allow discovery in postconviction proceedings in a capital case is reviewed under the abuse of discretion standard. State v. Lewis, 656 So.2d 1248 (Fla. 1994) (noting it is moving party's burden to show court abused its discretion in denying discovery in rule 3.850 proceeding). Under the abuse of discretion standard, a court's ruling will be upheld "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). See Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla. 2000).

The issue of the clerk's alleged improper storage of the evidence is not preserved for review and should be found waived. Steinhorst, 412 So.2d at 338. Blanco failed to present any evidence related to this claim, nor seek a ruling from the court even though his motion to compel the production of the socks contained an argument complaining about how the clerk maintained the evidence and caused contamination (3-PCR.2 367-69, 373-78) and the issue was referred to during the October 22, 2001 hearing but not argued (3-PCR.6 896-98).

Moreover, when Blanco had the opportunity to present evidence on this issue, the record reflects, he declined. Hence, the matter is waived. During the October 22nd hearing (3-PCR.2 367-79), the second point raised by Blanco was:

> . . . if they (socks) were in there (evidence box) it's the way that we found the evidence. ... This is a color copy of photographs of the way the evidence was kept, all of the clothes of the victim, the bloody clothes, along with the items from Omar Blanco's clothes that were taken, a purse and other items that conceivably might have been DNA tested. They were just thrown into the box, and at this point everything has been contaminated. So in response to the State's offer to test for DNA, all of those items would not be susceptible to testing, but perhaps, the socks would be, if they would be placed back in evidence.

(3-PCR.6 897). Based on defense witnesses, Dave Tompkins, Evidence Clerk, and Pedro Fernandez-Ruiz, defense investigator, it was established the socks had been in the box, but renumbered as State's item number 3 as a result of the second penalty phase. The defense agreed the socks were in evidence, and sought time to further investigate to determine whether DNA testing was possible (3-PCR.6 917-18). The State had no objection. When the court inquired whether there was anything else to resolve, defense counsel declined. (3-PCR.6 918).

Blanco took no further action to have the socks or clothing tested, nor did he seek further hearings on the matter. He did not include this claim in his motion for postconviction relief, nor did he allege loss or destruction of vital evidence. Even when given the opportunity to discuss other issues regarding the socks,[47] Blanco declined. Clearly, the court did not restrict

[47] Blanco included allegations of evidence mishandling in his motion to compel (3-PCR.2 367-79) and noted the commingling of evidence was an issue to be argued (3-PCR.6 897).

Blanco on this matter. Instead, it was Blanco who ended the hearing without presenting evidence regarding contamination. Blanco has not shown court error, i.e., he has not established that he was denied a hearing on this matter.

Furthermore, Blanco has not addressed Arizona v. Youngblood, 488 U.S. 51 (1988) which applies to those situations where "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Id. at 57. Here, no evidence has been destroyed. Also, Ryan was shot seven times, six of which were distance wounds, and one which was fired from a distance of three to five inches did not hit any major vessels (ROA.IV 974; ROA.V 1123-33, 1195-1203). Consequently, the record does not establish conclusively, as Blanco would desire, that blood had to be on the killer's clothes. There is only Blanco's unsupported allegation that DNA evidentiary value has been lost. No witnesses were called to support the claim. The defense has not alleged, nor pointed to any evidence the State failed to preserve or intentionally altered, which would exonerate Blanco. At best, as in Illinois v. Fisher, 540 U.S. 544, 547-48 (2004), Blanco may show "potentially useful", but by no means "materially exculpatory" evidence through the alleged absence of Ryan's DNA on Blanco's clothes. Blanco has failed to show, when given the opportunity, bad-faith by the State in its

evidence maintenance as required by Youngblood and Fisher.

Record review reveals identity was not established through blood or other forensic measures. Instead, there was eyewitness testimony from Vezos and Abdeni that Blanco shot Ryan and fled the scene. Blanco's purse, containing his identification and Vezos' watch, was found at the door to Vezos' room. Blanco, 452 So.2d at 522-23 (ROA 793-99; 880-925). The presence/absence of DNA on Blanco's clothes would not be a basis for relief under Florida Rule of Criminal Procedure 3.853. Even if Blanco could establish contamination, no prejudice is shown.

The first trial occurred in 1982, well before DNA was ever used in a forensic manner, thus, the manner of storage of material possibly containing DNA could not have been anticipated and the State should not be penalized more than 20 years later. As noted in Youngblood, due process is not violated when evidence of "potentially useful" value is destroyed, "unless a criminal defendant can show bad faith on the part of the police." Youngblood, 488 U.S. at 58. Not only did Blanco fail to attempt to show "bad faith," but the fact that DNA evidence was not known to have forensic value, and here, would not tend to exonerate Blanco, no constitutional violation can be shown. Blanco cannot satisfy Youngblood and Fisher.[48]

[48] Blanco's request for this Court to establish evidence maintenance procedures is improper and premature.

The record refutes Blanco's insinuation that the socks were missing and allegation the court ruled on his claim. During the motion to compel hearing, Dave Tompkins ("Tompkins") testified he reopened the evidence box and looked for the socks on October 10, 2001 as a result of a subpoena. He denied that the defense photographs of the opened box reflected the box as it existed on July 25, 2001, and noted there were other items initially on top of those photographed. While, Tompkins did not recall seeing socks on the day of the defense view, he stated the socks were in there because he found them in the box when it was opened on October 10, 2001. The socks were found below the "bulk of clothing" and packaged separately in a brown paper bag with red tape on it. Tompkins keeps track of each piece of evidence put into evidence. According to him, the socks were identified as "State's Exhibit 3" because it was reintroduced into evidence at a subsequent hearing, but the original evidence sticker, number 37, was underneath the later sticker. (3-PCR.6 905-11).[49]

Pedro Fernandez-Ruiz ("Ruiz"), the defense investigator,

[49] The record reflects Blanco was looking for State's Evidence 37 (socks) (3-PCR.2 367, 372), but such had been reintroduced during the resentencing as State's Exhibit 3 (2-PCR/2PP 1295, 1336). Blanco's insinuation of State impropriety and unsupportable. He was looking for item 37, somehow forgetting or overlooking the fact the socks were reintroduced at the second penalty phase and renumbered as State's Exhibit 3. This defense error or confusion should not be permitted to be transformed into State error. The records establish a clear chain of custody from 1982 trial through the 2001 viewing.

testified he accompanied counsel on July 25, 2001 and viewed the box in Tompkins' presence. While he stated the socks were not there, he does not recall if he asked Tompkins to produce the socks. Ruiz admitted the defense photographs given the court did not show the entire contents of the box (3-PCR.6 913-17).

Upon the conclusion of this testimony, Blanco's counsel admitted the socks were now present and the State did not object to the defense having additional time to investigate the socks (3-PCR.6 917-18). Blanco points to nothing in the record establishing he took any further steps to test the socks or seek further relief in the trial court. Hence, he obtained the relief he requested, namely, production of the socks and has failed to show the court abused its discretion in the manner the hearing was conducted. By failing to challenge the evidence or to address the allegation of a due process violation below, the matter is not preserved and should be deemed waived. Steinhorst, 412 So.2d at, 338. Relief must be denied.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Ira W. Still, III, Esq., Law Offices of Ira Still, 148 SW 97th Terrace, Coral Springs, FL 33071 on this 24th day of October, 2005.

LESLIE T. CAMPBELL

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on this 24th day of October, 2005.

LESLIE T. CAMPBELL