IN THE SUPREME COURT OF FLORIDA

ANTHONY JOHN PONTICELLI,
Appellant,

v. **CASE NO. SC03-17**

STATE OF FLORIDA,
Appellee.
_____/

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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In his brief, Ponticelli asserts, with no citation to authority, that a *de novo* standard of review applies because he "has presented several issues which involve mixed questions of law and fact." Because the Circuit Court conducted an evidentiary hearing in this case, the applicable standard of review is: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."'" *Blanco v. State,* 702 So. 2d 1250, 1252 (Fla. 1997), *quoting Demps v. State,* 462 So. 2d 1074, 1075 (Fla. 1984). With respect to the *Brady* claim, the standard of review is: A trial court's finding, after evaluating conflicting evidence, that *Brady* material had been disclosed is a factual finding that should be upheld as long as it is supported by competent, substantial evidence. *Way v. State*, 760 So. 2d 903, 911 (Fla. 2000); *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999). With respect to the claims that were denied without an evidentiary hearing, those rulings will be affirmed if the law and competent substantial evidence support the findings of the trial court. *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998). With respect

to the ineffective assistance of counsel claims, whether counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is reviewed *de novo*. *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999) (requiring *de novo* review of ineffective assistance of counsel); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the *Strickland* test, *i.e.*, deficient performance and prejudice, present mixed questions of law and fact which are reviewed *de novo* on appeal. *Cade v. Haley*, 222 F.3d 1298, 1302 (11th Cir. 2000) (stating that, although a district court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, *citing Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998); *Strickland,* 466 U.S. at 698, 104 S.Ct. 2052 (observing that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact).

RESPONSE TO REQUEST FOR ORAL ARGUMENT

The State defers to the Court's judgement as to whether oral argument is truly necessary.

THE PRIOR PROCEEDINGS AND THE FACTS OF THE CRIME

On direct appeal from his conviction and sentence of death, this Court summarized the facts and procedural history of

Ponticelli=s case in the following way:

> Anthony J. Ponticelli appeals his convictions of first-degree murder and sentences of death. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm the convictions and sentences. According to testimony at trial, on November 27, 1987, Ponticelli was invited to watch video movies at the home of Keith Dotson, whom Ponticelli met while at a convenience store that afternoon. Ponticelli arrived at Dotson's house between 6:30 and 7:00 p.m. and stayed thirty to forty-five minutes. Later that evening he returned to Dotson's house in an automobile. Upon his return, Ponticelli told Dotson's cousin, Ed Brown, that there were two people in the car whom he intended to kill for money and cocaine. Ponticelli showed Brown a gun and told him he would need a ride back to his house. Brown agreed to give him a ride and gave Ponticelli Dotson's telephone number. When the phone later rang several times, Dotson and his friends intentionally did not answer it. Around 11:30 p.m., Ponticelli returned to Dotson's house in a taxi cab. He told those present that he had killed the two people in the car for cocaine and $ 2,000. Ponticelli asked Brown if he thought that a person would live after being shot in the head. Although Brown told him he did not think he had to worry about it, Ponticelli expressed concern, telling Brown that he had heard one of his victims moaning. After Ponticelli washed his clothes to remove blood stains, Brown drove him home. According to testimony of Timothy Keese, who lived with Ralph and Nick Grandinetti, on the evening of November 27, Keese saw Ponticelli at the Grandinetti brothers' home around 7:30 p.m. The three were discussing money Ponticelli owed the brothers for cocaine he had purchased from Ralph. Ponticelli told the brothers that he would sell whatever cocaine they had and then settle up with them. The brothers agreed to take Ponticelli to sell the cocaine. Keese left the house; and when he returned around 10:00 p.m. the Grandinettis were not at home. The brothers did not return that night. The Grandinettis were found in their car the following day. Nick was found badly injured with his head on the floorboard of the car. He was gasping for air and kicking his foot when found. Nick's head was covered with blood and there was blood

spattered all over the car. Ralph was found dead in the back seat. According to the medical examiner, Ralph died within one to two minutes of being shot once in the back of the head at close range. Nick Grandinetti survived until December 12, 1987. An autopsy revealed that he had suffered two gunshot wounds to the back of the head. There were a number of bruises on the back and side of his head that were consistent with blunt trauma to the head. The skin on the right ear was peeling and red which was consistent with hot pressure being placed on the ear for an extended period of time. Nick died of cardiac arrest which was secondary to the gunshot wounds. Ponticelli's best friend, Joseph Leonard, testified that around 9:30 p.m. on November 27, Ponticelli came to Leonard's house and returned a gun Leonard had given him. Ponticelli told Leonard that he "did Nick" which Leonard understood to mean that Ponticelli had shot and killed Nick Grandinetti. Ponticelli asked Leonard and his roommate what he should do with the bodies. Leonard further testified that the next day Ponticelli told him that the Grandinettis had been harassing him about money that he owed them and were not going to let him leave their house until they got their money. The three left in a car. Ponticelli directed the brothers around the back roads trying to sell their cocaine. He then shot them both in the head. After dropping the gun off at Leonard's house, he had a flat tire so he left the bodies and took a cab home. Leonard eventually gave the police the murder weapon and a statement. After the murder weapon was given to police and statements from Leonard and his roommate were taken, Ponticelli was arrested. There was also testimony that on the Sunday after the shootings, Ponticelli burned some clothes in Ronald Halsey's back yard. When asked why he was burning the clothes, Ponticelli told Halsey that he had shot two men whom he owed money for cocaine. He told Halsey that he shot both of the men in the back of the head and threw one of them in the back seat. The other man was still moving so he hit him a couple of times in the head with the butt of the gun. He parked the car when he had a flat tire and took several grams of cocaine and $900 in cash. After his arrest for the murders, Ponticelli discussed the murders with a cellmate, Dennis Freeman, who testified at trial. According to Freeman, Ponticelli asked him if he would

help him dispose of some evidence and drew Freeman a map showing the location of the evidence. The map had Keith Dotson's name and telephone number on it. Ponticelli told Freeman that he made several phone calls from the victims' house to get them to believe that he was trying to sell cocaine for them. He thought about killing the brothers at their home but there were other people there, so he asked the brothers to take him to Keith Dotson's house to sell the cocaine. After leaving Dotson's house, they drove to a place where he killed them. Ponticelli told Freeman that he shot the driver first with two shots to the head and then shot the passenger once in the head. One of the men was still alive. Ponticelli then drove to Joey Leonard's house, where he told Leonard and his roommate what he had done. He gave Leonard the gun and discussed disposing of the bodies. After he left Leonard's house, he had a flat tire, so he abandoned the car. He took a cab to Dotson's house where he washed his clothes which he later burned. Ponticelli told Freeman that he shot the brothers because he wanted to rob them of cocaine and money. Ponticelli was charged with two counts of first-degree murder and one count of robbery with a deadly weapon. At the close of the state's case-in-chief, a judgment of acquittal was entered as to the robbery charge. The jury found Ponticelli guilty of both counts of first-degree murder and recommended that he be sentenced to death for each murder. The trial court sentenced Ponticelli to death in connection with both convictions. The court found two aggravating factors [FN1] applicable to both murders and a third factor [FN2] applicable to the murder of Nick Grandinetti and two mitigating factors in connection with both murders. [FN3]

> [FN1] The murders were committed for pecuniary gain, and the murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. [FN2] The murder was especially heinous, atrocious or cruel. [FN3] In mitigation the court found that Ponticelli had no significant history of prior criminal activity, and that he was twenty years old at the time of the offense.

Ponticelli v. State, 593 So. 2d 483, 486-487 (Fla. 1991).[1]

THE RULE 3.850 PROCEEDINGS

Ponticelli filed an initial 3.850 Motion on April 11, 1995. (SR1-60). Amended 3.850 Motions were filed on July 26, 1995, October 11, 1995, April 4, 1996, and June 20, 1997. (SR195-296, 297-494, 495-699, 700-849). A Fifth Amended Motion to Vacate was filed on July 30, 1998. (SR1255-1612). An evidentiary hearing was held (over several days) before the Honorable Victor J. Musleh, Circuit Court Judge for the Fifth Judicial Circuit of Florida, in and for Marion County, on April 21, 1997, (R170-290),[2] July 10-14, 2000, (R491-1633), October 16-17, 2000, (R1634-1970), January 29-30, 2001, (R1986-2321), and May 24, 2001. (R2341-2469). An Order denying the Fifth Amended Motion to Vacate in part was issued on November 3, 1998. (SR1673-93). A final Order denying the remaining claims was issued on November 1, 2002. (SR7136-60). A Motion for Rehearing was filed on November 18, 2002. (R2481-2713). An Order denying the Motion for

[1]On a Petition for Certiorari to the United States Supreme Court, this case was remanded in light of *Espinosa v. Florida*, 505 U.S. 1079 (1992). On remand, this Court affirmed Ponticelli's convictions and death sentences. *Ponticelli v. State,* 618 So. 2d 154 (Fla. 1993).

[2]This hearing pertained to Ponticelli's public records request. The defense presented the testimony of six witnesses, Judith Bunker, Julie Ellicott, Mary Helen Brannan, James Gettemy, Yvonne Shores and Lois Smith. (R171-290).

Rehearing was issued on December 17, 2002. (R2758). Ponticelli filed Notice of Appeal on January 3, 2003. (R2759-60).

The Evidentiary Hearing Facts

At the evidentiary hearing held on July 10, 2000, Ponticelli's first witness was Timothy Keesee, a roommate of the victims, Ralph and Nick Grandinetti. (R505-6). On the day after the murders, Keesee told Investigator Bruce Munsey (Munster) (sic) that he and his brother had left the trailer the night before "because at that time my brother was in the Navy, and they had coke out ... we had done a line of coke ... I knew my brother was uncomfortable, and I was, too, so we left." (R507-8). Keesee said Ponticelli also used cocaine that night and he had previously come to the trailer "probably eight or ten times" to purchase cocaine. He had never seen Ponticelli when he was not under the influence of cocaine. (R508, 511, 512). Keesee saw Ponticelli as "figety [and] anxious" and thought that Ponticelli was paranoid. (R513). He told the prosecutor that Ponticelli had used cocaine the night of the murders although he subsequently denied that statement in a deposition and at Ponticelli's trial. (R513-4). He explained, "At that time I was still under the influence of cocaine ... I had paranoid feelings also ... I was trying to get out of the spotlight ... So I was trying to play ball and just get the past past me." (R514). On the same day

Keesee spoke with Investigator Munster, he gave permission for Munster to search his car and drug paraphernalia was found. He was charged with cocaine possession about one month before he gave a deposition in this case. (R515). He subsequently pled to the cocaine charge and received "30 days and two years probation, and I believe it was 500 dollars." (R516-7). Keesee testified that he was under the influence of cocaine when he testified at Ponticelli's trial. He said, "I had done a couple of lines that morning before the trial ... when I walked in the front door, down in the bathroom in the front." (R521, 537). He stated that he had been "clean" for more than eleven years and was now narcotics-free. (R522-3).

On cross-examination Keesee reiterated that he was paranoid during this time period and was not truthful with Ponticelli's defense counsel regarding the use of cocaine. (R531-2). He had cooperated because "they still had my stuff, my car, all my stuff in the trunk, and I was doing my best to get the stuff back and cooperate with them." (R533). He told the Prosecutor, Sarah Balius, that they all had done cocaine the night of the murders, "Yes, we did; one line." (R534). He felt that he had helped the prosecution's case against Ponticelli by admitting the use of cocaine and also helped himself. (R537). He recalled testifying at Ponticelli's trial that Ponticelli was Nick

Grandinetti's largest cocaine customer. In his words, "He's the one I saw the most." (R542). He did not know if the cocaine purchased by Ponticelli was for his own personal use or for re-sale purposes. (R544).

Upon being recalled as a witness by the State, Keesee said he would not change the testimony that he had given at Ponticelli's trial. (R680).

Frank Porcillo was the next witness. He first met Ponticelli in 1986 or 1987 when he was living in Silver Springs, Florida. (R556-7). Porcillo testified, "I was sitting up at the store where kids hang out ... and he walked up and introduced himself because he had just moved to the neighborhood and he didn't know anybody." Subsequently, he and Ponticelli became friends. (R557). They would hang out, party, and smoke marijuana. (R558). He had been with Ponticelli on occasions when Ponticelli smoked cocaine. He stated that Ponticelli's behavior would change after he smoked the drug. He became "paranoid, looking around all the time, just not easy to be around ... " (R562-3, 565). In addition, Ponticelli would ramble and respond to noises inappropriately. (R565). On the Friday night after Thanksgiving in 1987, Porcillo and a few friends drove to the Kwik King store, where he initially met Ponticelli, and he saw Ponticelli by a pay phone. Ponticelli approached the car Keesee was in and

spoke with the driver, Jason Garry. (R566-7). He noticed a "red Ford" car parked by the pay phone, but did not know who it belonged to at that time. (R569, 580). After leaving that location, Porcillo and his friends told each other that Ponticelli was "whacked." (R568). He learned the next day that Ralph and Nick Grandinetti had been shot and one of them was dead. (R569).[3] No one from the State Attorney's Office, Marion County Sheriff's Department, or defense team ever talked to him about his observations of Ponticelli the night of the murders. (R570, 577).

On cross-examination, Porcillo stated that he had only seen Ponticelli use cocaine "once" because he quit associating with him. (R573). He said he knew Ponticelli had done cocaine the night of the murders because " ... I know the guy enough to know what he was like before and after it." (R574, 576). He said Ponticelli was the only person that could have told the defense attorney that they had seen each other the night of the murders but he did not "know much about the trial, period, as far as what happened at the trial." (R578). He did not know that Ponticelli was with the Grandinetti brothers on the night they were shot. (R580). He did not call the police and report what

[3]Nick Grandinetti died December 12, approximately two weeks later. *Ponticelli v. State*, 593 So. 2d 483 (Fla. 1991).

had transpired at the Kwik King store because he " ... was 15 years old and I didn't know anything about the case ... the details ... or anything until a few months ago." (R581).

Brian Burgess first met Ponticelli on Thanksgiving Day, 1987, at Keith Dotson's house. (R591, 592). He and Dotson were watching movies, and, when Ponticelli arrived, they "partied," consuming beer and cocaine. (R592, 593). Shortly thereafter, Burgess, Ed Brown, John Turner, and Ponticelli left the house to obtain more cocaine. (R593-595). They drove to a trailer and Ponticelli went inside while the other three remained in the car - - he returned with cocaine and they drove back to Keith's house. (R595). Subsequently, Ponticelli "cooked it up" and he and Ponticelli smoked the cocaine. (R596, 597). He did not tell Investigator Munster, Prosecutor Balius, or defense attorney Reich that they had smoked cocaine because they never asked. (R599). In reviewing a report of a recorded statement that he gave to Investigator Munster dated January 26, 1988, Burgess had told the investigator that he had first seen Ponticelli on the Friday after Thanksgiving at Dotson's house when he came "in by himself and he had a pistol down the front of his pants, and he said he was going to kill two dudes." (R604). Burgess said that he saw Ponticelli twice on the Friday night following Thanksgiving, 1987. (R603, 605, 606). The first time he saw

Ponticelli was between 7:00 p.m. and 8:00 p.m. - - he was acting nervous and “edgy-like.” (R607). When Ponticelli returned later that same evening, Burgess described Ponticelli as "really paranoid." He explained: "Just real nervous, couldn't sit down, looking out the windows, looking out the doors, gong from room to room, window to window, and had a knife in his hand the whole time." (R607). He recalled testifying previously that Ponticelli had come into the house, and stated, "I did it” - - Ponticelli had cocaine and money on him at that time. (R608). Had he been asked during the trial, Burgess would have informed the prosecutor or the defense attorney about Ponticelli's drug use the night of the murders. (R613).

On cross-examination, Burgess stated that he was not sure if he had met Ponticelli on Thanksgiving or in the early morning hours of Friday morning. (R616). In addition, his testimony at Ponticelli's trial was truthful. Ponticelli had told the other people in the house that he was going to kill the Grandinetti brothers and take their cocaine. Subsequently, he left, returned bloody, and reiterated his earlier statements that he was going to kill the two brothers and had done it. (R627). Burgess also said that Ponticelli "acted like a young kid that was wired up, that had a good buzz going. Yeah, he talked sensible." (R639).

Edward Brown was the next witness. (R646). During the week

of Thanksgiving in 1987, Brown, his brother Warren, and their friend Brian Burgess visited Brown's aunt in Silver Springs Shores, Florida. (R647). He recalled meeting Ponticelli for the first time in the early morning hours of the Friday following Thanksgiving, 1987. (R652). He stated, "We were at our house ... we were just sitting around drinking beers ... it just turned into a little party ... a bunch of people would come by ... I think Tony had come by ... somehow or another I got to meet him that night." (R652). Initially, Brown said that he did not consume any cocaine with Ponticelli on Thanksgiving night or early Friday morning. (R652-3). However, he recalled leaving the house with John Turner, Tony Ponticelli, and Brian Burgess, while it was "still dark," to go purchase cocaine at a "trailer where the two brothers lived." (R654). Upon arrival, he said Ponticelli went inside the trailer alone to get the cocaine. After he got back in the car, Brown said, "We were just talking ... drove back to the house ... stopped at a store ... got ... an orange juice jug ... they made a homemade pipe out of it." (R655). He said "John or Tony" cooked the cocaine because he "and Brian had never smoked anything." All four proceeded to smoke it in the car and back at the house. (R656-7). He recalled that Ponticelli appeared to have been affected by the cocaine. (R657). Brown said he did not know if it was important

whether or not Ponticelli had been doing cocaine at the time of the murders. He said, "At the time ... it was ... very new to us ...we were kind of scared to death. And this was serious. We knew it was serious, but we had no idea that cocaine played an important part in this, in the trial." (R675). He further stated, "If we knew it would have made a difference, we would have been a lot more straightforward, I think." Brown recalled that the defense team had told him, " ... Tony had gotten real religious and that he had just given up and wasn't real interested in the case." (R676).

On cross-examination, Brown said nobody had ever told him not to mention the use of cocaine prior to the murders committed by Ponticelli. He said, "It wasn't a cover-up. It was more fear on their parts." (R678).

Michael Barnes and Ponticelli grew up together and had met "twenty-three, twenty-five years ago." (R682-3). While they were growing up, Barnes said that Ponticelli was " ... always a laid back person, quiet, never said anything ... always following behind ... Whatever we would do ... he would do it with us." (R683). Barnes testified that he and Ponticelli started experimenting with drugs and started drinking as well. (R685). During their high school years, they used “black beauties” and mescaline and smoked hashish. (R686, 687). He said they started

using cocaine " ... in high school ... we started doing a few lines here and there, but as we got out of high school, that's when it started getting ... more and more doing it." (R687). He said when Ponticelli used cocaine, he wasn't himself, and started to become paranoid. He thought Ponticelli "was hallucinating ... really bugging out from it." (R688, 689). Although he was never contacted by Ponticelli's trial defense team, he said he would have told them everything he could, he had "nothing to hide." (R702).

On cross-examination, Barnes admitted that Ponticelli knew about him and could have given his name to the defense attorney. (R703). He recalled that Ponticelli was an A student when he was in school. (R706).

Joseph Orlando, Ponticelli's nephew, testified that he and Ponticelli spent a lot of time together when they were growing up. (R710). He said Ponticelli was like any normal thirteen to fifteen year-old-child. He further stated, "I would describe Anthony as ... a typical child. I mean, not any more outgoing than anyone or not any more quiet than anyone." (R711). Between the ages of thirteen to fifteen, Orlando and Ponticelli started to drink, and acted as bartenders at family gatherings. He said there was "a lot of sneaking beers out to the poolside and back." (R711). As they got older, they got involved in drugs,

including marijuana, hash, and cocaine. (R712). When Orlando got married in September, 1987, Ponticelli came to the wedding and they got involved in snorting and smoking cocaine and drinking at a party. Orlando described it as a binge. (R716, 718). He described Ponticelli as a "more extreme person with paranoia" when he was using cocaine. (R721). Orlando was not contacted by Ponticelli's trial counsel in 1988, but would have been willing to talk to them and testify on Ponticelli's behalf. (R722-3).

John Como is Ponticelli's cousin. (R724). The two of them grew up together but Ponticelli, " ... didn't fit in with the rest of us ... he wasn't in with our click ... he was like the outcast." Como stated that Ponticelli started working out, lost weight, and "started ... hanging out with some of my friends ..." (R725). Ponticelli started smoking marijuana at about the age fourteen and drank alcohol as well. Como testified that Ponticelli's reaction to marijuana was "normal." (R726). Eventually the group moved on to the drug "mescaline." (R726-7). He recalled one time when Ponticelli and he smoked pot that was laced with "angel dust or something like that" - - Ponticelli passed out from the effects of the drug. (R727). He further stated, " ... we picked him up. We put him in the car, and we took him to a friend's house ... inside the air conditioning ... and then ... boom ... he was fine after that." (R727-8). Nobody

else passed out that day. (R743). A year or two later, Como said, the cocaine use started. (R728). In 1986, Como's family moved to Spring Hill, Florida, where they opened a restaurant. (R729). He recalled a time when Ponticelli came for visit (from New York) and they decided to have a party at the restaurant. (R729, 730). Ponticelli had brought cocaine with him from New York: " ... as soon as they got off the plane, he said, 'It's snowing in Florida. I'm gonna make it snow in Florida.'" (R730). Ponticelli got "all sweaty and freaking out" that night at the restaurant, "hearing noises" and was "like a mad man."(R732, 733, 734). He said it took "a good twenty minutes" to calm him down. (R734). Como was never contacted by Ponticelli's trial attorney but would have been willing to testify on his behalf. (R739).

On cross-examination, Como said that Ponticelli could have provided Como's name to his attorney as well as the names of other witnesses. (R739). He did not recall any of Ponticelli's family attending the trial. (R744). He and Mike Barnes had discussed the restaurant incident prior to their testimony at the evidentiary hearing. (R747).

Wendy Falanga has known Ponticelli since they were thirteen. (R769-70). Ponticelli was extremely shy and unsure of himself. She is very outgoing, and Ponticelli liked to spend time with

her. (R770). Ponticelli was very close to her parents and helped around their house. She stated: "My parents adored him." She and Ponticelli got involved with cocaine at about age 14. (R771). They used or took valium, meprobamate, alcohol, ativan, or anything else to come down off the cocaine. (R772). She said, "I kind of convinced Tony to begin using." (R773). During their high school years, Falanga and Ponticelli began freebasing on a daily basis, sometimes going weeks without sleeping or eating, doing nothing but drugs. (R774). She recalled, " ... times when Tony would have like black-outs ... one particular time ... when I actually thought he was dead ... I couldn't wake him up, couldn't get him to speak ... he didn't wake up until almost two days later." (R775-6). Ponticelli's personality would change when he was using cocaine. "It was night and day. When he wasn't using he was shy, sweet, polite. He was a doll." She further stated, "When he was using, he became ultra-paranoid." (R776). At that time, she testified, " ... we were using every day." (R777). She did not recall ever seeing Ponticelli become violent. (R778). Eventually she learned that Ponticelli had moved to Florida when she received a letter from him informing her that he was in jail. She said, "The letters from him were really odd." (R780). The letters were quite lengthy, (10 to 20 pages) and contained sentences that were fragmented and included

scripture. She was surprised because she did not know Ponticelli to be religious at all. (R781). Although she had not been contacted by Ponticelli's trial attorney, she would have been willing to testify on his behalf. (R783).

On cross-examination, Falanga said that she and Ponticelli "would be up all night doing drugs." (R785). She did not know whether or not Ponticelli had given her name to his trial attorney. (R787).

Rita Carr was formerly married to Ponticelli's older brother, Peter. (R792). She recalled him as being, "a cute, chubby kid" whom she described as docile ... quiet ... happy. (R793). She said that the Ponticelli family gatherings were "wonderful." She further stated, "It was a nice environment, a happy time." "They had a beautiful yard there and the kids could run around, and they had a pool, and it was a great time." There were foster children there as well, and she did not recall anything that set Ponticelli apart from the other children. (R794). He was a good student during Junior high school years, but, she remembered, "I think he started slipping" in high school. "We would have to push him a little bit to study, do his work." (R795). She attended his high school graduation, and he and his parents eventually moved to Ocala, Florida. (R796). After the murders, but before he was arrested, Ponticelli

returned to New York for his uncle's funeral. Carr said they had an "emotional conversation" while he was staying with them. She said, "He was upset. He felt, I think separated from the family as being adopted. And he was complaining that Dad never spent time with him. And I tried to explain to him that he wasn't being treated any different than the other children that I could see." (R799). Although he went to live in the Ponticelli home as a foster child when he was an infant, he was legally adopted at the age of seven by Mike and Rose Ponticelli. (R800, 805). Carr said she was never contacted by Ponticelli's trial attorney, but she would have been willing to testify on his behalf. (R800).

On cross-examination, Carr said that Ponticelli knew where she lived during his trial and could have told his attorney about her if he wanted her to be a witness in his case. (R802).

Nancy Kelskey, a preschool teacher, is Ponticelli's sister. (R804). She said Ponticelli came to live with her family as a foster child when he was an infant, along with four other foster children. He and the other children were very close. As a young boy, Ponticelli was "very happy, did well in school, typical little child." Eventually the other four foster children went back to live with their parents. (R806). Kelskey said her brother was a good, friendly child, who never had any problems. She said, "My mother adores him. My father was never close with

any of his children and hence, the relationship was the same with Anthony." (R807). During his high school years, Ponticelli changed. She said, " ... he would just go off and do as he pleased. Just not listening, aloof, didn't care." She had her suspicions that her brother was using drugs at that time. (R810). After her brother moved to Florida, she did not have much contact with him. Their parents informed her when Ponticelli was subsequently arrested. (R811). She started receiving letters from him which were overly religious in nature. His letters were erratic, jumped from one topic to another, and did not make any sense. She recalled, " ... he was uncooperative with attorneys at the time." (812). Her children " ... loved their Uncle Anthony. He always gave them rides on his shoulders and took them for walks ... swimming in the pool, playing outside with the dog and the children." (R813-4). She was never contacted by Ponticelli's trial attorney but would have been available to testify on his behalf. (R814).

On cross-examination, Kelskey stated that she knew her brother had been uncooperative with his attorneys from information received from her parents and Ponticelli himself in his letters to her. (R816, 817). During his incarceration at the Marion County jail, Ponticelli called collect to talk to her. However, she never discussed anything regarding the incident

with Anthony. (R819, 920). She knew that he had corresponded with "just about everyone in the family." She said he could have given those addresses to his attorney had he chosen to do so. (R820).

Caterina Rallis is Ponticelli's sister. (R821, 822). Ponticelli got along well with the other foster children in the family. Her brother was no different than the other children in the home. She said, "he was a great, loving little boy ... loved my mother, loved my father ... Mom was a really big factor for him ... he ... really adored her." (823, 824). During his senior year in high school, her brother's personality changed. He became "a bit more distant ... not all the times ... just ... on and off, sporadically." (R825, 826). Although she had never been contacted by Ponticelli's trial attorney, she would have been willing to testify on his behalf.(827).

On cross-examination, Rallis stated that she and her brother had written letters to each other, but she could not recall if it was at "the time or the arrest or later." Ponticelli could have given her address to his attorney had he chosen to do so.(R828).

Concetta O'Berry was a childhood friend of Ponticelli's. (R837). She recalled that Ponticelli was "quiet, shy, intimidated very easily. He was picked on a lot because he was

heavy." (R838). A few years later, Ponticelli became "distant, arrogant, basically avoided me." Shortly thereafter, he confided in her that "it was the first time in months that he was not doing any drugs at that point and he wanted to get clean." She had no previous knowledge that he had been using drugs other than neighborhood rumors. (R839-40). After Ponticelli had been arrested for the murders in this case, she received a letter from him that "basically sounded like a suicide note." She stated, "The reason he wrote me the letter was because God came to him and told him to write Connie a letter." (R842). Although Ponticelli did not mention he was in jail at the time, she recalled, "I never knew Anthony to be religious." (R843). She had never been contacted by Ponticelli's trial attorney but would have been willing to discuss Ponticelli with him and testify on his behalf.(R843-4, 848).

Patty Leonard, a former girlfriend of Ponticelli's, dated him in 1987. (R850). She said he was "very easygoing, calm. He was very kind. Just a relaxed easygoing person." (R850-1, 858). While they were dating, she did not think Ponticelli used drugs. (R852, 857). After they were no longer dating, she knew Ponticelli had gone back to New York for a visit and "he went from being an easygoing, calm, relaxed person to just the total opposite ... very pacey, jittery, didn't talk to anybody ...

just very alienated, nervous." (R851, 853). Subsequently, she learned of his arrest and corresponded with him through the mail. (R853, 859). His letters "were very long and a lot of it was about - - religious." (R854). She had not been contacted by Ponticelli's trial attorney but would have been willing to talk to him and testify on Ponticelli's behalf. (R855). Had he chosen to do so, Ponticelli could have given her name to his trial attorney. (R860).

Peer John Starr has been employed for over three years as an investigator with Capital Collateral Regional Counsel, Northern District. (R864-5). He explained to the court the methods he used to locate various witnesses that were unavailable to testify on Ponticelli's behalf during post-conviction proceedings. These potential witnesses included Warren Brown, Keith Dotson, and Joey Porcillo. (R865-6, 868). Starr also attempted to locate Joey Porcillo and Joey Leonard, who was currently incarcerated in the Halifax County, Virginia Jail on a serious charge. (R856, 868, 869). Although Starr initially spoke with John Jackson, a former inmate at the Marion County Jail, he was no longer able to locate him for the present hearing. (R871).

John Tomasino represented Ponticelli during this post-conviction hearing. He was responsible for coordinating

witnesses and speaking with out-of-state attorneys in order to locate other witnesses and ensure their availability for this hearing. (R873). Subsequently, he got admitted to the West Virginia Bar in order to secure witnesses for this hearing. (R875).

Kenneth Moody, who is currently incarcerated in Mayo Correctional, knew Ponticelli from "around the streets, hang out in the same area" in Silver Springs Shores, Florida, in 1987. (R884-5). In 1988, he spent time with Ponticelli in the county jail and said Ponticelli was "buggy” - - "somebody that ain't right, in their mind they ain't right ... can't comprehend like a normal person.” (R885-6). He explained, "he use to talk to God ... he thought God was going to save him ... he's stand there and stare out the window and talk to God ... things a normal person wouldn't do." (R886). He recalled he had spent between two and six months with Ponticelli in jail. (R887). Although he had not been approached by Ponticelli's trial attorney, he would have been willing to speak with him to provide this information. (R888).

On cross-examination, Moody testified that Ponticelli used to purchase drugs from him, "cocaine, acid." He said, "we did drugs at my place ... we did cocaine at the little bar in Silver Spring Shores ... and I did a lot of drugs myself ..." (R892-3).

He knew Ponticelli "was doing large amounts of cocaine" because "I did it with him." (R894). He never discussed the facts of this case with Ponticelli because Ponticelli "wouldn't talk to nobody but God and his bible." (R898, 899). He further stated, "He was out there. Anybody looks out the window and talks to God. Yeah, he had to be vacant." (R901).

Wilbur Bleckinger was formerly incarcerated with Ponticelli at the Marion County Jail, before Ponticelli was sentenced. He noticed that Ponticelli " ... was into the bible a lot ... talking to hiself." (R904). He further testified, "He'd have his bible in his hand ... I'd walk by and he'd be at his desk talking and reading the bible or he'd be walking in his cell pacing." He recalled seeing him read but did not remember seeing him writing. (R907). Bleckinger stated that he would have spoken to Ponticelli's trial attorney and any mental health experts on his behalf. (R912).

Joe Burgos testified that he and Ponticelli hung out in a lot of the same places and partied in 1985 or 1986 in Ocala, Florida. (R914). In early 1988, Burgos and Ponticelli were cellmates at the Marion County Jail. He stated that Ponticelli was "different ... kind of displaced ... disoriented in comparison to when I knew him on the streets ... he was in his own little world at that time." (R915). He further testified

Ponticelli spent a lot of time reading the bible, and that he walked around with a towel on his head and did a lot of praying. (R916). Burgos was never contacted by Ponticelli's attorney but would have talked with any mental health experts on Ponticelli's behalf. (R916-7).

On cross-examination, Burgos said he was involved with marijuana and cocaine around the time he knew Ponticelli. (R919). Although Ponticelli was older, they would see each other throughout the week where everybody hung out and shot basketball. Burgos stated, "I perceived him as a middle to upper class type of individual ..."(R921). He further explained, "... he seemed like a decent person ... he didn't carry himself as a bully ... he was just a pretty normal kid ... " (R922). Although he saw Ponticelli drink and smoke marijuana, he was not aware if he was involved in cocaine because that was something "kept under cover." (R924).

Robert Meade became a friend of Ponticelli's in 1986 when they met in Silver Spring Shores, Florida. (R926). He described Ponticelli as " a very quiet, friendly guy who was willing to help people. He'd go out of his way to help people ... he was just a very soft spoken easy-going person." (R927). After Ponticelli returned from a trip to New York, "... he didn't like to hang around with us anymore ... he was very expectant, very

nervous ... he didn't want to stay in contact with us .... it would be sporadic ... " (R928). After the New York trip, but prior to the murders, Meade saw Ponticelli snort and cook cocaine but did not see him smoke it. (R929). He said, " ... He would get very irrational and very uppity, very unpredictable ... just moves around too much ... and would make short statements that really didn't mean anything and just not Tony. It wasn't the normal Tony." (R929-30). Ponticelli had told him he was buying and using cocaine. (R930). On the night of the murders, Meade was living in a house with Joey Leonard. He said, "I had just gotten off work ... we were sitting in the bedroom ... he came and knocked on the windows. We went outside, he handed Joey his pistol back and said he did Nick. He was very nervous, very pale, very skitterish, he was jumpy. He handed the gun to Joey ..." (R931, 932, 938-9). Had Ponticelli's trial attorney asked him more specific questions, he would have told him about Ponticelli's increased drug use. (R934).

On cross-examination, Meade said that Ponticelli was "very irrational, very psychosis, very crazy" the night of the murders. (R937).

John Turner testified that, when he gave several statements to Investigator Bruce Munster, Munster was "intimidating." He further stated, " ... some of the things that he said to me

about what would happen to me, what was gonna happen to me ... it was very intimidating." Munster threatened him with prosecution. (R954). He felt Munster tried to minimize the drug use by Ponticelli and himself. (R955). Turner testified at the trial that he and Ponticelli were "hooked " on cocaine. (R961). He believed that, " ... Tony was in worse shape than me ... I kind of had to take care of him ..." He further testified, " ... I got to see things no one else can see ... the times that we sat in a room and smoked all day ... we drove around and smoking crack and freebasing all day long ..." (R965). He observed Ponticelli, "wigging," a term he described as looking " ... under the bed fifteen or twenty times to make sure there's nobody there, when you hide in a corner when you peek out the windows, out the blinds, when you can't stand to have anything on, no television, no radio, no loud noises ... because you want to hear everything going on around you ... that's wigging." (R969). On Thanksgiving night, 1987, he remembered being at Keith Dotson's house with Dotson, Ponticelli and a man from West Virginia. They rode with Ponticelli to get cocaine, "I'm assuming from Nick and Ralph."(R974-5). They smoked the cocaine until " ... early morning ... 2 or 3." (R977). Ponticelli exhibited "paranoia ... the same thing we went through every day." (R978). He did not have an independent recollection of

being questioned by the prosecutor or defense attorney (during Ponticelli's trial) regarding Thanksgiving night, 1987. (R986, 989).

On cross-examination, Turner read his trial testimony into the record and agreed that it was "probably accurate." (R992). He agreed that he had testified in the jury's presence that he and Ponticelli had smoked cocaine every day for three straight weeks prior to the murders. (R993). He admitted that he had an attorney present and representing him when he gave a statement to Investigator Munster in 1987. Although he had immunity, he still felt threatened. (R995, 1007, 1009).

Turner further testified that Investigator Munster interviewed him a few times when his attorney was not present. (R1017). In addition, Ponticelli had money and "coke" that he did not have prior to the Grandinetti murders. He said, "As far as I know, he got it from Nick."(R1023).

Bruce Munster, now a detective with the Marion County Sheriff's Office, was the lead investigator in Ponticelli's case in 1987. (R1029). He recalled interviewing Tim Keesee, the victims' roommate. Keesee told him that, the night of the murders, he and his brother Roger " ... left the trailer because there was cocaine dealing going on ... he didn't want his brother to be around it because he was in the military ... "

(R1030). Keesee also told him they were using cocaine in the trailer as well. (R1031). During the trial, he assisted the prosecutor but did not recall giving her any suggestions for cross-examination of witnesses. (R1032). He did not believe that he had a psychological impact on witnesses that he had previously interviewed and who ultimately testified at trial. (R1036).

Munster recalled that several witnesses testified at trial that they had met Ponticelli for the first time on the day of the homicides. (R1058). Had these same witnesses told him about doing cocaine with Ponticelli the night before the murders, he would have put it in his report. (R1061-2).

On cross-examination, Munster stated that he recalled John Turner's attorney representing him at his deposition, and that Turner received use immunity. (R1063). He further testified that both Tim Letson and John Turner could have testified at the trial regarding cocaine usage with Ponticelli. Ponticelli himself could have told his own trial attorney. (R1076-7).

Sarah Ritterhoff Williams, formerly Sarah Balius, was the prosecutor in this case. (R1084-5). Prior to the trial, she was aware that Ponticelli had not been talking to his attorney, that "he had basically decided he was turning his case over, it was all in God's hands, and he wasn't going to be involved anymore."

(R1090). She recalled that Dr. Robin Mills had informed her that, in his opinion, Ponticelli was psychotic when he saw him at the jail, and it was possibly drug-induced. (R1097, 1098). She recalled filing a motion *in limine* to exclude toxicology reports that indicated both victims had cocaine in their blood "... because such evidence was not relevant, material, probative of any facts in issue or defense in the case." (R1102). She recalled that John Turner had testified at trial that after the murders, he and Ponticelli had gone "to a motel and did a bunch of cocaine together and sometime afterwards he burned his clothes at his house." (R1123). Williams agreed that all of the "West Virginia" witnesses testified at trial that they did not consume any cocaine with Ponticelli and did not take any of his money. (R1129). She recalled arguing in closing that there was no evidence that Ponticelli was under the influence of cocaine at the time of the homicides. (R1130). She recalled that Dennis Freeman, an important witness at Ponticelli's trial, had information for the State: "a map and names, and phone numbers of people the police didn't even have." (R1131-2). She argued to the jury that Ponticelli had told Freeman that he had not been using cocaine at the time of the offenses. (R1133). She further stated, "I didn't have any problem with Dennis Freeman's credibility ... he gave us a name ... a map ... a bunch of stuff

we didn't have ... we took what Dennis Freeman gave us ... went out and investigated it, and it all turned out to be true. This was information that came from no one but the defendant to Dennis Freeman ... I felt very comfortable and very confident with Dennis Freeman in spite of his twenty-six felony convictions." (R1134). There was no formal deal on the record prior to his testimony, and Freeman had been promised nothing for his testimony. She stated, " ... I don't think he got anything." (R1137).

Ponticelli could have told his defense attorney that he had, in fact, used cocaine until the early morning hours the day of the murders. (R1142).[4] The results of the evaluations performed by Dr. Krop, Dr. Mhatre and Dr. Poetter all found Ponticelli to be competent and sane prior to the start of his trial. (R1167).

Dr. Mills was the only expert pretrial to conclude that Ponticelli was incompetent to stand trial. (R1176). Ponticelli told all four doctors different things about his drug use, and would not discuss drug use at the time of the offenses. (R1177). Ponticelli never admitted his guilt regarding the murders to anyone in law enforcement. (R1182).

Dr. Barry Crown is a psychologist and a "certified forensic

[4]Williams read the doctors' evaluations into the record. (R1143-1167).

evaluator." (R1199, 1201). He examined and tested Ponticelli for approximately five hours on May 19, 1995. (R1206, 1216). He testified that Ponticelli's "IQ equivalences" were between ninety and a hundred, a score that is within the average range. However, Ponticelli's "conceptual quotient" (the ability to process the information) scored a sixty-nine. Crown explained, "When we adjust that for age and education we can bring it up to eighty. That's still one statistical standard deviation, one statistically significant difference between him and the average." (R1221). In addition, he found an impairment in memory functions. (R1222). He stated, "Overall I found that in terms of brain function he is impaired, was impaired on the date that I saw him, in terms of activities of the brain that are primarily anterior ... his deficits were particularly related to executive functions ..." (R1234). In sum, he concluded that Ponticelli was "moderately impaired." (R1235, 1270).

On cross-examination, Dr. Crown stated that his evaluation of Ponticelli determined his "brain status" as of the time of the tests, including information that Ponticelli and his attorneys provided to him. (R1251). He did not interview any of the witnesses from West Virginia or New York, including Ponticelli's birth mother and adoptive family. He did not interview anyone that had contact with Ponticelli at or about

the time of the murders nor did he consult any other mental health experts. (R1253-4). He and Ponticelli discussed drinking and drugs in a "general format" but did not discuss the facts and circumstances of Ponticelli's life on the day he committed the homicides. (R1255). Using "three highly likely probable indicators," Dr. Crown made an "educated guess" as to the determination that Ponticelli has "brain damage." (R1256). He explained, "one of those three is birthing ... a perinatal injury ... which was labeled at the time as cyanotic ...” In relying on this indicator, he utilized a document prepared by a Certified Social Worker from the Adoption Placement Agency, Angel Guardian. (R1257-8). Dr. Crown stated that the second criteria he used to determine brain damage was drug use during the development period. (R1260). Ponticelli's history of drug use had been provided to him through Ponticelli himself as well as his attorneys. The third criteria Dr. Crown utilized to determine brain damage was "lead exposure toxicity." (R1261). However, it was his opinion that Ponticelli had brain damage from birth. (R1262). He did not consider Ponticelli's behavior from the time of the crimes in November 1987 to the time of his testing in May 1995. In addition, he did not consider the records from the Marion County Jail during Ponticelli's incarceration prior to trial. (R1278). He did not give any

consideration to the Department of Corrections' records in conducting his assessment of Ponticelli. (R1287). He said that Ponticelli's behavior was "goal-oriented" prior to the Grandinetti murders. (R1289-90, 1291). He further stated, " ... he is certainly not a vegetable ... He's capable of making decisions." (R1310). Dr. Crown agreed that Ponticelli exhibited "executive functioning capability" when his actions included a plan to have an alibi after having committed a crime. (R1310-11). He was aware that evaluations conducted by Drs. Mhatre, Poetter and Krop all found Ponticelli's brain function was normal during the period of time when these crimes were committed. (R1319-20).

Upon further examination, Dr. Crown stated, " ... it's not unusual amongst people who have perinatal injuries or early childhood insults to do very well in their elementary years ... and then start to fall apart and decline in junior high and high school when things become more complex, less simple ... " Accoring to Crown, Ponticelli, " ... needs an unusually long consolidation period to figure things out; he can't solve problems on the fly. He needs time to work things through." (R1327). In sum, Dr. Crown agreed that, if a qualified neuropsychologist had tested Ponticelli around the time of his arrest and trial, the tests would have been the best evidence of

brain function at that time, "very beneficial." (R1334).

Dr. Michael Herkov is a psychologist at the University of Florida. (R1338-9). He conducts psychological, neuropsychological, and forensic assessments. (R1340). In addition to reviewing historical data, trial transcripts, competency reports, and neuropsychological data, Dr. Herkov interviewed witnesses and evaluated Ponticelli for approximately six hours on September 8, 1999. (R1345-7, 1348). In his opinion, Ponticelli was not competent to stand trial in August 1988. (R1351). He stated, " ... Ponticelli's refusal to cooperate or to speak to his attorney about the offenses ... is unusual; especially somebody who's up for first degree murder and may be facing the death penalty ... " (1352). He further stated, " ... as you look closer and closer at his behaviors at that time, you see more and more things that would suggest that his decision was based on a psychosis or a delusion rather than a simple Judeo-Christian belief about trusting in God." (R1353). He agreed that it is possible for a person to be psychotic from abusing drugs for an extended period of time, going through withdrawal, and, "... it can sometimes be delayed ... I've seen people ... who can actually develop psychoses after they're off the drugs ..." (R1363). During his evaluation of Ponticelli, the defendant told him that if he read any legal material " ... that

he would be ... by doing something in his own case it would be abandoning, ... calling God a liar." (R1369). In Herkov's opinion, Ponticelli was voluntarily intoxicated at the time of the offenses but was not insane. (R1372-3). In addition, he believed Ponticelli was suffering from extreme emotional or mental disturbance and was not able to conform his behavior with the requirements of the law. (R1374). Based on interviews, Dr. Herkov believed Ponticelli " was a very severe cocaine **B** - dependant cocaine addict." (R1387). On the night of the murders, he believed Ponticelli was "undernourished, under rested, and exhibiting signs of severe cocaine addiction." (R1388). However, Ponticelli "clearly has an understanding in terms of M' Naughton of what he had done, and no reason to be believe he didn't know it was wrong ..." (R1396). Finally, he believed that the amount of cocaine Ponticelli used shortly before the homicides affected his ability to plan and premeditate. (R1408).

On cross-examination, Dr. Herkov said that Ponticelli's behavior, including hallucinations, was "self reported" by Ponticelli himself, approximately thirteen years after the murders. (R1415-6). He agreed that Ponticelli's trial attorney would have been aware of an expert's opinion that Ponticelli might have been intoxicated from his cocaine use around the time of the offenses. (R1423). When asked to forecast how Ponticelli

would react eighteen hours after having quit consuming cocaine, he opined, " ... it would be highly likely that Mr. Ponticelli's neurotransmitters ... within a reasonable degree of certainty, ... were, in fact, altered and would have been altered eighteen hours after the last cocaine use easily." (R1445-6). In his opinion, Ponticelli's mental status would have been impaired, as well. (R1448). Although he found Ponticelli was incompetent to stand trial approximately thirteen years after the offenses, Drs. Poetter, Mhatre, and Krop all found Ponticelli competent at the time of trial and sane at the time of the offenses. (R1449).

Upon questioning from the Court, Dr. Herkov stated that cocaine can stay in a person's system for weeks. He said, "In a single user, the cocaine may be out of their system in three days. In a chronic user you can find it in several weeks." (R1486). In addition he said that Ponticelli's "delusional disorder had abated" during the early 1990's when he showed interest in legal matters pertaining to his case. (R1488).

During his rebuttal testimony, Dr. Herkov stated that, in his opinion, there were several factors that affected Ponticelli's test results, including a head injury sustained in the prison and arthritis. (R2355, 2356). In his opinion, Ponticelli was incompetent because he was psychotic due to "evidence of delusions, hallucinations, ideas of reverence ...”

(R2415).

Dr. Harry Krop is a licensed psychologist in Florida. (R1499). He interviewed Ponticelli for approximately two hours in 1988. (R1502). At that time, he found Ponticelli "was a very difficult individual in terms of coming up with opinions in terms of the psychological issues. He presented in a very unusual manner." (R1505-6). He further stated, "It is not unusual for an individual who is charged with a serious offense to become religious. Whether it is used for psychological coping or whether it is simply a superficial, artificial manipulative kind of thing is often difficult to tell." (R1506). He informed Ponticelli that he could not form an opinion as to his mental health at the time of the offense unless Ponticelli was forthcoming with his thought processes at the time. Dr. Krop said, "Basically, ... he calmly informed me consistently that he would not talk to me about the offense; and that he would not ... assist Mr. Reich with regard to talking about the case ... I believe he approached the other professionals in the same manner." (R1507). Ponticelli did not exhibit any hostility or express any resentment. Although he made "vague religious kind of references," Ponticelli did not exhibit anger or resentment toward his trial attorney. (R1508). He further stated, "... I still did not feel that I had sufficient information to say that

Mr. Ponticelli was suffering from any kind of mental illness even though the homicide ... was pretty much out of character for him in terms of whatever history I did obtain." (R1508-9). In addition, Dr. Krop felt that Ponticelli made choices of his volition. In his opinion, he believed "within a reasonable degree of psychological certainty that he was competent." (R1509). After he re-interviewed Ponticelli in 1999 for approximately three hours, he formed a different opinion regarding competency. (R1511). He believed that Ponticelli's ability to communicate with his attorney as well as his ability to challenge witnesses was compromised. In addition, it was his opinion that Ponticelli would not have been able to testify about relevant matters. (R1525). Since he felt that these three criteria were compromised, he believed Ponticelli was incompetent to stand trial. (R1526). He currently believes that Ponticelli was delusional about his religion in jail, and was suffering from a psychotic disorder, NOS, not otherwise specified. (R1528-9). He said, "This is the first time that I can recall ... where I was originally involved in that I have changed my opinion, as far as the competency issue and some other of the psychological issues." (R1530). In addition, based on his interview with Ponticelli, the testimony of witnesses at the evidentiary hearing, and background materials, Dr. Krop

believed that Ponticelli was suffering from an extreme emotional or mental disturbance at the time of the offense. (R1546-7). Although he believed that Ponticelli was intoxicated by cocaine at that time, Dr. Krop still believed that Ponticelli was not insane at the time of the offense. (R1549).

On cross-examination, Dr. Krop stated that his original report of Ponticelli reflected a statement by his parents that Ponticelli "did not exhibit any significant medical problems or difficulties at birth." (R1555). He was evaluated by four different trained evaluators for competency and sanity prior to the start of his trial. (R1563). Dr. Mills, who examined Ponticelli for approximately fifteen minutes, was the only evaluator to find him incompetent to stand trial. (R1564). Ponticelli denied any history of physical, emotional or sexual abuse. In addition, Ponticelli's father told Dr. Krop that his son was not a behavior problem in school or at home but after high school, he believed his son "started hanging around with a crowd ... oriented toward drugs". After they moved to the Ocala, Florida area, his father believed he associated "with individuals who were part of a drug culture."(R1566-7). Dr. Krop thought Ponticelli minimized his drug use when he evaluated him. (R1569). He had never had any major surgery or serious illnesses, seizures or serious headaches. In addition, there was

no evidence that Ponticelli was a heavy alcohol user. (R1570). He felt that Ponticelli "interacted well" other than him not speaking to his attorney about the case. Dr. Krop agreed that Ponticelli was an alert, well-oriented individual who understood the nature and purpose of the evaluation. (R1572). Dr. Krop was aware that Ponticelli provided facts from his history to three different evaluators on three different days. (R1585). When he did his evaluation in September 1999, he said, "I would have to say that he was competent." (R1597). Dr. Krop further stated, "It's not unusual for a defendant to report some amnesia with regard to the actual act, itself." (R1601). Ponticelli did, however, tell him he had gotten a gun a few weeks prior to the murders. (R1602). He did not dispute that Ponticelli had stated, on the night of the murders, that he was going to kill the Grandinetti brothers and take their money and cocaine. (R1602-3). He believed Ponticelli's behavior at the time of the murders was "goal-directed." (R1608, 1612). In addition, Dr. Krop did not feel he could give an opinion as to the extent of Ponticelli's intoxication on cocaine within "a reasonable degree of psychological certainty" in the time leading up to the murders. (R1618).

Dr. Marc Branch, a Professor of Psychology at the University of Florida, was the next witness. His activities at the

university include "mainly research and teaching; research on behavioral pharmacology, teaching in behavioral pharmacology and experimental psychology." (R1636-7). His research includes the study of "the long term effects of cocaine on behavioral performance in non-human animals." (R1637). Dr. Branch utilizes rats, pigeons, and squirrel monkeys for his research because of the neurophysiological similarities with humans as well as the ethical reasons involved. Although his testimony was proffered during the guilt phase of Ponticelli's trial, the trial judge did not allow him to testify. He stated, "... the information available to me at the time and my conclusions about the possible state of the defendant were based on essentially assumptions about what he might have been doing on the fateful night." (R1646). Dr. Branch is not a licensed clinical psychologist nor does he practice as a forensic psychologist. He is not a medical doctor and cannot offer any formal diagnosis. (R1648-9). According to the information he had received at the time of trial, Dr. Branch thought Ponticelli had been using mainly crack cocaine for a two-week period prior to the crimes. (R1653). It was Dr. Branch's opinion that Ponticelli was exhibiting "delusional psychotic behavior" based upon the testimony of John Como and Michael Barnes, when describing the "restaurant incident." (R1658). In addition, Dr. Branch also

reviewed the reports of the experts on competency who agreed that Ponticelli exhibited psychotic symptoms while he was incarcerated during the trial. (R1659). The testimony he had read from previous hearings indicated that Ponticelli was "a fairly good person" when he wasn't on cocaine. (R1660). Based on the information he currently had, it was also his opinion that Ponticelli was exhibiting psychotic symptoms at the time of the homicides, was experiencing extreme emotional or mental disturbance, and his ability to conform to the requirements of the law was substantially impaired. (R1667, 1672). His opinions would have been the same at the penalty phase had he been called as a witness. (R1673).

On cross examination, Dr. Branch agreed that he had written defense attorney Reich a letter in July 1988, stating, "... it is outside the bounds of my expertise and experience to try to offer anything that sounds like a diagnosis." He further wrote, " ... I'm not qualified to make an inference in an individual case" and "I cannot offer an expert opinion" as to "whether Mr. Ponticelli was suffering from such a state." He said he was mistaken for writing those statements in that letter. And finally, he wrote, "... although cocaine psychoses are more prevalent in regular freebase users, overall they are not very common." (R1676-7, 1678). However, Dr. Branch currently "offered

an expert opinion that he was suffering from delusions." (R1679).

He did believe, however, that Ponticelli knew right from wrong. (R1685). In his opinion, every time Ponticelli took cocaine and perceived any type of threat, he would have experienced a psychotic episode. (R1738). He also agreed that Ponticelli's behavior both prior and subsequent to the murders, was goal-oriented. (R1739-40). He agreed that Ponticelli could have told his defense attorney about his drug use as well as given names of witnesses that could have testified on his behalf. (R1756).

James Reich, an attorney for thirty years, was appointed as Ponticelli's trial counsel - - this was his first death case. (R1765, 1767). Although it may have been an informal request, he recalled asking the trial court, Judge McNeal, for co-counsel in assisting in part of the defense. Although Eddie Scott, a recent law school graduate, assisted in some respects, he did not have co-counsel for the trial. (R1767-9, 1771). He said, "From the start of this case, I knew that there was only one possibility that I had for any hope of a not guilty, any hope of an acquittal, and that was on an insanity defense ..." He did consider an intoxication defense as well. (R1772). While he was preparing for trial, Ponticelli did not tell him anything about his drug use, or what happened the night of the murders.

(R1775). He recalled filing a motion for a psychiatric evaluation, questioning his client's competence. (R1777). When he questioned Ponticelli about his refusal to respond to his request for help, Ponticelli told him, "God told me not to." (R1779, 1784). He recalled a few instances where Ponticelli showed indications of incompetency during the trial. At one point, Reich stated, " ... I heard some mumbling ... Tony was sitting on the cot, or bunk ... holding his bible and he was muttering or mumbling to himself very quickly, very rapidly ... he didn't acknowledge my presence. It was as if he ... wasn't there or I wasn't there. His mind was somewhere else. And I spoke to him a couple of times, and it took two or three times before he would even acknowledge me." (R1787). On the second day of trial, after a day of testimony against Ponticelli, court had recessed and Ponticelli was returned to his cell. Reich recalled, "... I walked back there, and Tony is just ... as happy as he can be." He recalled Ponticelli told him, "You've got no faith. You've got no faith." (R1788-9). During the penalty phase, he heard Ponticelli mumbling in his cell. Reich testified, "He's got his bible in his hand open to something. His face is flushed again ... I don't know what it is. And his eyes are transfixed. He's not watching where he's walking ... he's pacing back and forth, muttering, reading from this page

... I could not get his attention. I could not distract him from reading that bible." He did not bring his concerns to the court's attention. (R1789-90). Since his client had been uncooperative, he "kind of ignored him" during the trial. He said, "Some lawyers are jury watchers. I can't watch a jury. I'm too focused up here." As he recalled, Ponticelli did not ask a single question during the trial. (R1792).

Reich said that if Timothy Keesee had made statements to Sarah Balius, the prosecutor, regarding using cocaine with Ponticelli the night before the murders, he would have utilized that information. (R1811). He recalled reading a transcript from an earlier hearing where Investigator Munster had testified Keesee told him they (the Grandinettis and he) had, in fact, done cocaine together, prior to their murders. (R1816). When he interviewed the "West Virginia Boys" before the trial, they consistently told him that they did not do any cocaine with Ponticelli after the homicides. (R1824, 1826). After reviewing the testimony from the previous evidentiary hearings, Reich believed his view of Ponticelli's drug use was "very inaccurate." (R1832). He now believed that when Ponticelli was in a "closed-in situation," (the back seat of the Grandinettis car), he became paranoid. (R1833). He would have used this

information and the restaurant incident,[5] to utilize as part of a cocaine intoxication psychosis defense and to establish that he had extreme paranoid reactions to cocaine. (R1834, 1835).

Reich stated that it was his theory in his motion to suppress Ponticelli's statements to Investigator Munster that "he had invoked his right to counsel ... he didn't voluntarily waive counsel .. And that Munster told him they couldn't be used against him ... if he made a statement it wouldn't be used against him." (R1843-4). Although his motion was denied pre-trial, the audiotape of the statement made to Investigator Munster, Ponticelli's first statement, was suppressed at the trial. Ponticelli's subsequent three statements were allowed in. (R1845). Reich testified that he was not "confessing error" as to any portion of the trial, but he said, "I would do it much differently now ... I would have been able to do it much differently had Tony talked to me or had Sarah (the Prosecutor)and Bruce (the Investigator) not hidden things from me." (R1854-5). He did not contact John Como, a friend of Ponticelli's to testify on Ponticelli's behalf, nor did he receive a release from Ponticelli to obtain school and medical records. (R1856-7). He was not aware that Ponticelli was a "blue baby, at birth" but did know that he had been adopted. (R1857).

[5] See R732-734.

Reich had never obtained any employment records for Ponticelli and was not aware that he had been exposed to high levels of lead when he worked at Dayco. (R1858). Reich released Dr. Branch after he had been excluded in the guilt phase, and he chose not to retain him as a mitigation witness. (R1858). He stated, " ... his value would have been very limited and more or less undermined by the limitations that Judge McNeal would have put on him." (R1859). In addition, he did not try to locate any other expert that had a clinical practice that treated cocaine users. (R1859). Further, he was not aware in 1988 that it was his obligation, as Ponticelli's defense attorney, to investigate and present mitigation where his client presented a mental deficiency. (R1861). **Had he known about the cocaine use**, including the "Thanksgiving night party," he would not have conceded premeditation as he did during the trial. (R1864).

On cross examination, Reich stated he did not know why Ponticelli did not tell him about his drug use. He said, "I don't know why he didn't tell me. That's the reason I needed experts to tell me why he didn't tell me. All I know is he didn't tell me and he had this weird look on his face." (R1874). He reiterated that Ponticelli told him that God would handle the case. (R1875). He spoke with Ponticelli's parents prior to the

penalty phase who put him in contact with family and friends. (R1889-90, 1899). He recalled that Eddie Scott assisted him "just with trial strategy, some organizational stuff." (R1892). He prepared a sentencing memo addressing the premeditation issue and went to West Virginia to take depositions in order to develop evidence favorable to Ponticelli. (R1908-09). In his sentencing memorandum, he wrote about chronic and heavy cocaine use and the fact that Ponticelli was substantially impaired arguing for statutory mitigation based on Fla. Stat. ' 921.141. (R1909-10). He agreed that the jury heard an abundance of testimony regarding Ponticelli's use of cocaine for two to three weeks prior to the murders. However, he also agreed that the jury did not hear that Ponticelli may have been doing cocaine all night before the murders, for approximately sixteen hours. (R1919, 1925). Reich had hoped that the trial court would have given an instruction on voluntary intoxication. He believed this would have allowed him to argue that Ponticelli did not have specific intent for a first degree murder conviction. (R1937).

Reich stated that the intent of his trip to West Virginia was to investigate the guilt phase, not the penalty phase. (R1949). In addition, had he been aware of the letters Ponticelli had written to friends and family in New York prior to trial, he would have used this information in the competency

hearing. (R1952).

Dr. Thomas Conger, a clinical psychologist, was the State's first witness. (R2009). He reviewed a vast amount of material in this case, including five statements made by Ponticelli prior to his arrest. (R2011, 2086). Regarding Ponticelli's statement on taking a cab ride, Dr. Conger only relied "on a piece of it" in determining Ponticelli's competency at the time of the offenses. (R2024, 2025).

Dr. Conger stated that he did not form an opinion as to competency or sanity based on Ponticelli's first statement, which was taken approximately a week after the murders at John Turner's house. (R2034). (Subsequently, the trial court found Dr. Conger's opinion was not derived from either of the December 3, 1987, statements.) (R2037).

Dr. Conger evaluated Ponticelli on July 7, 2000, and continued on July 8, 2000, for a total of approximately eight hours. (R2089, 2090). He performed a battery of tests on Ponticelli, to determine his thinking abilities and any level of impairment or normalcy that is available. (R2091-2). During the evaluation, Ponticelli divulged to Dr. Conger that he, "... studied a lot. Had to read things over and over to remember them ... skipped classes in high school ... goofed off ... using pot and alcohol ... wasn't interested in school. He was passed anyway. " In addition, Ponticelli told Dr. Conger that he worked on and off during the school year as well as the summer months. After high school, he worked in construction, but "was doing drugs heavy and wasn't interested in maintaining a full-time job." (R2097-8). Ponticelli further told him that he attempted to "get away from trouble" when he first moved to Florida, doing odds jobs, but felt guilty for getting paid "for not really doing what they were supposed to do." (R2098). Subsequently, Ponticelli took a job at Dayco working in the "lead area," smoked pot, drank, and began to lose weight and hair. Dr. Conger stated, "He spent all of his money on drugs." (R2098). Ponticelli also reported a few minor physical injuries he had as a youngster, as well as two motor vehicle accidents as a teenager. (One was minor, and he "laughed it off," said Dr.

Conger.) Ponticelli had no history of "psychotrophic medication" nor did he receive counseling. He admitted to drinking regularly around the age of "12 to 13" and smoked marijuana as well. Ponticelli told Dr. Conger he never used heroin or needles but "smoked angel dust regularly since high school." (R2100). In addition to trying various other drugs, he started cocaine "as an early teenager, and it became more regular than anything else." Ultimately, he became a heavy user of cocaine, but hid this fact from his family. He told Dr. Conger that he started using cocaine daily for a couple of months prior to the murders. The night before the murders, Ponticelli claimed he used cocaine with his friends into the early morning hours, went home, and stayed in his room by himself. He told Dr. Conger that he was “kind of paranoid.” (R2101).

After Ponticelli gave Dr. Conger his background, Dr. Conger began his testing and interviewed Ponticelli further the next day. (R2103). During the interview, Ponticelli indicated that he had walked to a motel to call a cab. He recalled doing cocaine at a motel and remembered going to a bank with his friend, John Turner. He did not recall washing his clothes, but said "some guys from out of State washed his clothes." (R2104). Subsequently, his friends burned his clothes and told him to "get rid of everything." (R2105).

Ponticelli told Dr. Conger that after his arrest, "he had an out-of-body experience and heard a voice asking him if he accepted Jesus." He indicated he thought the voice was coming from inside his head, not an external source. This was important because "it removes it from being a hallucination, [w]hich is an outside projection.” (R2107). He was a loner in jail, and there were times when he chose not to eat.(R2108). Ponticelli told Dr. Conger that he did not speak to his attorney because he had a headache which was a sign that he should not talk with defense counsel because he believed "it would be a sin against God.” (R2109).

After Dr. Conger conducted his tests, he felt the results "were not valid” due to the pattern of the scores. He said, "because of the particular pattern in scores, and the sort of decline in some of the subtests from prior testing made no sense to me as a neuropsychological issue." He further stated that he would have expected "a stabilized cross-pattern.” There was a significant decline in the results he had received from the results obtained by Dr. Crown when he tested Ponticelli in 1995. Dr. Conger said, "... it could not be reflective of brain trauma.” (R2113). He believed Ponticelli was not trying to do his best, but was malingering. (R2114). He further stated, "With the many years of clinical experience I've had in testing and so

forth, Mr. Ponticelli came across as a normal functioning individual. There was no evidence of any significant cognitive dysfunction that I could see in my interviewing and interaction with him." (R2116).He was aware of the three proposed possibilities of brain damage offered by the defense: 1) anoxia-blue baby at birth, insufficient oxygen during the birthing process 2) lead toxicity-from working at Dayco 3) cocaine-chronic substance abuse. He was aware that it was Dr. Crown's opinion that the anoxia birth was the most likely reason or cause of any brain damage attributable to Ponticelli. (R2117). However, Dr. Conger said, "... I could find no evidence that would suggest the anoxia birth resulted in significant impairment." (R2119). He did not believe that Ponticelli was delusional at any time just prior to, or at the time of, the commission of the offenses. Nor did he believe Ponticelli was delusional while incarcerated at the Marion County Jail.(R2142-3).

Dr. Conger was asked to describe a diagnosis using Dr. Crown's raw data after he evaluated Ponticelli. Using that material, he described Ponticelli as having "an antisocial personality disorder: an individual who does not necessarily comply with the requirements of the law and adventure seeking without any particular concern for rules and regulations."

(R2144). Dr. Conger did not see any clear evidence that Ponticelli experienced hallucinations or delusions with the exception of his "self-reporting.” (R2147-8). Dr. Conger did not understand Dr. Mills' conclusion and analysis that Ponticelli was incompetent to stand trial in 1988. He said, "... I actually don't understand the analysis ... As I read the record, I believe he spent a total of fifteen minutes with Mr. Ponticelli. And Basically got nothing of substance from Mr. Ponticelli at that time. So I don't understand how he could draw a conclusion on such little information." (R2150). In addition, there were instances when Ponticelli participated in the proceedings during his trial. (R2152). Ponticelli exhibited appropriate courtroom behavior during the trial and there was no evidence that indicated he could not have testified in a relevant manner. (R2159-60). Further, he believed Ponticelli was sane at the time of the crimes and any intoxication of the defendant at that time did not affect him to the point where he was not able to reason effectively. (R2172, 2178). In sum, Ponticelli made "attempts to avoid detection and to establish alibis for the time period surrounding the offense. They showed reasonable thinking in an attempt to avoid detection. And he also showed remorse for the murders after the fact. Which would show that he certainly knew what he did was wrong." (R2184).

On cross examination, Dr. Conger stated that he made a "clinical observation" as to any fatigue exhibited by Ponticelli during his evaluation and testing. (R2204). He did not find any level of brain damage to a significant level that would have established that Ponticelli was incompetent or insane at the time of trial.(R2222-3). In his opinion, Ponticelli showed "purposeful goal-oriented behavior ... which would rule out the possibility ... of extreme mental impairment." (R2278). He did believe, however, that Ponticelli was a long-term drug user and cocaine addict and had a history of paranoid reactions to cocaine use. (R2283).

The Circuit Court entered its order denying the Fifth Amended Motion to Vacate on November 1, 2002. After a Motion for Rehearing was denied, Ponticelli timely filed a Notice of Appeal on January 3, 2003.

SUMMARY OF THE ARGUMENT

The trial court's findings upon which the denial of the *Brady/Giglio* claims are based are supported by competent substantial evidence, and should not be disturbed. The "exculpatory" evidence was known to the defendant, but he refused to reveal it to trial counsel – - he can hardly be heard to complain.

The trial court correctly denied relief on Ponticelli's

ineffective assistance of counsel claims relating to the penalty phase of his capital trial. The over-arching fact is that Ponticelli refused to assist counsel by providing the names of potential witnesses. The defendant should not be heard to complain when his own actions affected the presentation of the defense.

The guilt stage ineffectiveness claims are meritless, and, like the penalty phase claims, were affected by Ponticelli's refusal to cooperate with his attorney. The trial court properly denied relief.

The *Ake v. Oklahoma* claim is actually a claim of ineffective assistance of expert witness –- Ponticelli failed to carry his burden of proof because he presented no evidence that contradicted the evidence introduced at trial.

Finally, the various claims that were summarily denied are procedurally barred, and summary denial was proper.

In addition to this appeal, Ponticelli has a contemporaneously-filed petition for writ of habeas corpus and another appeal from the denial of Rule 3.851 relief pending before this Court. Both the habeas petition and the other Rule 3.851 appeal assert that Ponticelli's death sentences are invalid under *Ring v. Arizona*, 536 U.S. 584 (2002). The law is now well-settled that *Ring* is not retroactive to final cases like this one. *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Johnson v. State,* 904 So. 2d 400 (Fla. 2005).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DECIDED PONTICELLI'S *BRADY/GIGLIO* CLAIM, AND, IN SO DOING, APPLIED THE CORRECT LEGAL STANDARD.

On pages 52-65 of his brief, Ponticelli argues that he is entitled to relief based upon an alleged violation of *Brady v. Maryland*, as well as based upon what is apparently a separate claimed violation of *Giglio v. United States.* Contrary to Ponticelli's assertions, the trial court's denial of relief is supported by competent substantial evidence, and should not be disturbed.

In denying relief on the *Brady* claim, the Circuit Court made the following findings of facts and conclusions of law:

> ... Defendant alleges that the State withheld evidence that Defendant had used cocaine with Timothy Kesee and the victims on the night of the murders, and that he had used cocaine with Edward Brown and Brian Burgess on the late evening of November 26, 1987 extending into the early morning hours of November 27, 2987 (the day of the murders).
>
> Upon consideration of the evidence presented at hearing, this court finds the following facts in relation to this claim:
>
> 1. Investigator Munster's December 1987 Supplemental Report mentioned "cocaine usage" at the Grandinetti's trailer on the day of the murders. This report was supplied to Trial Counsel; however, he had no way of knowing that the reference meant that Defendant was

using cocaine at the trailer the night of the murders.

2. Investigator Munster's field notes, which were not disclosed to the defense until 1997, provide further evidence of cocaine use at the Grandinetti's trailer on the night of the murder. The State simply overlooked this information. There is no way of knowing whether Trial Counsel would have gathered from those field notes that Defendant was using cocaine at the trailer the night of the murders.

3. Investigator Munster testified that Tim Kesee told him about cocaine use at the Grandinetti's trailer the night of the murders. This information was not turned over to the defense.

4. Prosecutor Balius' interview notes with Tim Kesee may indicate that Defendant was using cocaine at the Grandinetti's trailer on the night of the murder. These notes were not turned over to the defense. Again, it appears that the State simply overlooked this information. There is no way of knowing whether Trial Counsel would have gathered from those interview notes that Defendant was using cocaine at the Grandinetti's trailer on the night of the murders.

5. Investigator Munster's field notes indicate that Defendant went to the Grandinetti's trailer on the night of November 26, 1987 with "two boys from West Virginia," presumably to purchase cocaine. These field notes were not turned over to the defense until 1997.

6. The Defendant failed to establish that the State violated *Brady*. In order to establish a *Brady* violation, the Defendant must demonstrate not only that the State possessed and suppressed favorable evidence which reasonably could have changed the outcome of his trial, but also that **he did not possess the evidence himself.** The Defendant cannot do this, as he clearly knew about his use of cocaine on November 27, 1987, but chose not to tell Trial Counsel about it. Trial Counsel made clear to Defendant that his drug use was the cornerstone of his defense;

therefore, Defendant knew that evidence regarding his cocaine use on November 27, 1987 was vitally important to his case. Despite this fact, Defendant made the decision not to cooperate with Trial Counsel.

7. The Trial Court found Defendant competent to stand trial in 1988 after three out of four mental health experts who examined him testified to his competency. The Trial Court's finding of competency was upheld on appeal.[6]

8. Because Defendant had full knowledge of all of the exculpatory evidence he argues was not turned over to Trial Counsel by the State, and because he was competent to stand trial and to assist with his defense, he has not established a violation of *Brady v. Maryland.*

9. The evidence of the Defendant's guilt was overwhelming. This Court finds that no reasonable probability exists that the evidence regarding drug usage found in investigator Munster's field notes and Prosecutor Balius' interview notes would have changed the outcome of the guilt or penalty phase of Defendant's trial.

Therefore, Defendant has failed to demonstrate that the State violated *Brady v. Maryland.*

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[6]The trial court's order refers to footnote 11 to that order, which reads as follows: "Defendant's Post Conviction Counsel presented testimony at evidentiary hearing, and argued at length at the close of evidentiary hearing, that Defendant was incompetent to stand trial in 1988. The Trial Court decided in 1988 that Defendant was competent to stand trial, and the Trial Court's decision was upheld on appeal. Therefore, the Defendant is procedurally barred by Fla. R. Crim. P. 3.850(c) from raising the issue here. See also, *Zeigler v. State*, 654 So. 2d 1162 (Fla. 1995); *Oats v. Dugger,* 638 So. 2d 20 (Fla. 1994); *Chandler v. Dugger,* 634 So. 2d 1066 (Fla. 1994); *Lopez v. Singletary,* 634 So. 2d 1054 (Fla. 1993); *Koon v. Dugger,* 619 So. 2d 246 (Fla. 1993); *Johnson v. State*, 593 So. 2d 206 (Fla. 1992), *cert. denied*, 113 S.Ct. 119 (1992)."

(R1752-54). [emphasis in original].

The basis upon which Ponticelli argues for reversal is his claim that the Circuit Court's:

> order denying Mr. Ponticelli's claim is flawed in that the lower court did not apply the correct standard to analyze Mr. Ponticelli's claim. Initially, the lower court ignored the United States Supreme Court and this Court's jurisprudence on the elements of a *Brady* claim. In *Cardona v. State*, this Court, relying on United States Supreme Court precedent, identified the three elements required in order to prove a *Brady* claim and indicated that diligence was not required. [citation omitted].
>
> However, the lower court, in denying Mr. Ponticelli's *Brady*, claim, specifically applied a diligence requirement upon Mr. Ponticelli and his trial counsel in analyzing his claim. [citation omitted]. The lower court's order is in error because there is absolutely no requirement that either Mr. Ponticelli or his trial counsel act diligently.

Initial Brief, at 54-55. Ponticelli's argument is based upon an incorrect interpretation of the *Brady* standard, as well as upon a misleading "interpretation" of the Circuit Court's order.

In its order denying relief, the Circuit Court stated:

> Because Defendant had full knowledge of all of the exculpatory evidence he argues was not turned over to Trial Counsel by the State, and because he was competent to stand trial and to assist with his defense, he has not established a violation of *Brady v. Maryland.*

(R1754). Contrary to Ponticelli's assertion, and regardless of the role diligence has in assessing a *Brady* claim, there is no

authority for the proposition that evidence **known** to the defendant can be "suppressed" within the meaning of *Brady.* In fact, the cases upon which Ponticelli relies to support the notion that "diligence" has been removed from the *Brady* test speak squarely to the issue contained in this case. For example, in *Occhicone v. State*, where the charged *Brady* violation was factually similar to the one in this case, this Court stated:

> In fact, as conceded by Occhicone, these witnesses are allegedly material precisely because they were with him during the hours before the murders. **Therefore, no one better than Occhicone himself could have known about these witnesses.** Moreover, in several evaluations conducted by mental health experts appointed in this case, Occhicone stated that he had visited Shooter's Bar the days before the murders and discussed some of the people he had visited with. [footnote omitted] Therefore, this serves as further proof that Occhicone knew he had visited Shooter's Bar before the murders and was aware of these people. Additionally, some of these witnesses now complained about testified at trial; therefore, Occhicone clearly was aware of them. As noted by the trial court, Occhicone has failed to even allege that he did not know of these witnesses. **Although the "due diligence" requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.**

Occhicone v. State, 768 So. 2d 1037, 1041-42 (Fla. 2000).

[emphasis added].[7] If there was no *Brady* error in *Occhicone*, and the law is that there was not, then there is no such error in this case, either. Likewise, in *Way v. State*, this Court discussed the different character of "exculpatory" evidence that is **known** to the defendant:

> In previous cases, this Court has broadly stated that evidence was not "suppressed" where it was equally available to the State and the defense. See *Roberts v. State,* 568 So.2d 1255, 1260 (Fla.1990); *James v. State,* 453 So.2d 786, 790 (Fla.1984). However, **in those cases, the defendant was aware of the exculpatory information.** *See Roberts,* 568 So.2d at 1260 (**defendant aware of evidence that would show he was under the influence of drugs or alcohol during the crime**); *James,* 453 So.2d at 790 (defendant was aware of existence of photographs contained in confidential juvenile records).

Way v. State, 760 So. 2d 903, 911 (Fla. 2000). [emphasis added].[8] Likewise, in yet another case remarkably similar to this one, this Court held ". . . we find no error in the trial court's conclusion that Carroll was in the best position to provide information as to whether or not he knew Rank and whether he consumed drugs with Rank on the day in question."

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[7] *Occhicone* is cited by Ponticelli for the proposition that there is no "diligence" component to *Brady*, and that the Circuit Court was therefore in error. That claim is simply incorrect.

[8] *Way* is also relied upon by Ponticelli for the proposition that there is no diligence component to *Brady*, even though *Way*, like *Occhicone*, is clear that evidence known to the defendant, like that at issue in this case, cannot have been "withheld"

Carroll v. State, 815 So. 2d 601, 619 (Fla. 2002). Ponticelli's attempt to argue that the Circuit Court was in error when it found that evidence known to Ponticelli could not support a *Brady* violation is foreclosed by settled law, and should not be disturbed. Rather than applying an incorrect standard, the Circuit Court properly recognized that matters **known** to the defendant cannot be withheld from him. That result is consistent with settled law and common sense.[9] Any other interpretation of *Brady* and its progeny would lead to a wholly absurd result which placed form over substance and would

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within the meaning of *Brady*.

[9]Less than two months after *Way* was released, this Court held:

> However, "[t]here is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence." *Provenzano v. State,*616 So. 2d 428, 430 (Fla. 1993). *Accord Roberts v. State,* 568 So. 2d 1255 (Fla. 1990); *James v. State,* 453 So. 2d 786 (Fla. 1984).

Freeman v. State, 761 So. 2d 1055, 1062 (Fla. 2000). *See also, Maharaj v. State,* 778 So. 2d 944 (Fla. 2000). Regardless, it makes no sense at all to suggest that facts known to the defendant can ever supply the basis for relief based on a claimed *Brady* violation. The rule Ponticelli argues for would literally provide the defendant an automatic issue by simply not utilizing information known to the defendant.

encourage defendants to withhold information from counsel, as Ponticelli did.

The Circuit Court should be affirmed in all respects.

THE *GIGLIO* SUBCLAIM

To the extent that Ponticelli also raises a *Giglio v. United States* claim, that claim was also correctly decided by the Circuit Court. There are three components to a *Giglio* claim:

> 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. *Ventura v. State,* 794 So. 2d 553, 562 (Fla. 2001); *see also Rose v. State,* 774 So. 2d 629, 635 (Fla. 2000).

Guzman v. State, 28 Fla. L. Weekly S829 (Fla. 2003). [emphasis added]. Unless the defendant meets all three criteria, his claim fails. With respect to the interlocking *Giglio* claim, the trial court made the following findings:

> The Defendant alleges that the State knowingly allowed Timothy Kesee, Edward Brown and Brian Burgess to present false testimony at trial, and that this false testimony undermines his conviction.
>
> Upon consideration of the evidence presented at hearing, this Court finds the following facts in relation to this claim:
>
> 1. Timothy Kesee testified during Defendant's trial that he was not aware of any cocaine use at the Grandinetti's trailer on the night of the murders (November 27, 1987).

2. Timothy Kesee testified at the evidentiary hearing that there was cocaine use at the Grandinetti's trailer on the night of the murders, that he used cocaine on that night, and that he saw the Defendant snort one line of cocaine.

3. This Court finds that Timothy Kesee presented false testimony at trial.

4. Brian Burgess and Edward Brown testified at trial that they met Defendant on the evening of November 27, 1987, the day of the murders. They denied, under cross examination, that they used drugs with the Defendant.

5. Brian Burgess and Edward Brown testified at the evidentiary hearing that they actually met Defendant on the evening of November 26, 1987, the day before the murders, and that they used drugs with the Defendant, both before and after the murders.

6. This Court finds that Brian Burgess and Edward Brown presented false testimony at trial.

7. **This Court does not find that the prosecution either knowingly presented, or allowed to be presented, perjured testimony at trial.** References to drug use found in Investigator Munster's and Prosecutor Balius' notes are vague. **Kesee, Brown and Burgess were adamant at deposition and at trial that they did not use drugs with the Defendant**. Brown and Burgess were adamant at deposition and at trial that they did not meet Defendant until the evening of November 27, 1987, and that they did not use drugs with Defendant. It is understandable that Balius and Munster could have overlooked vague statements in their notes when faced with this testimony. [FN]

> [FN] It appears that Kesee, Brown and Burgess' presented false testimony because they feared prosecution for drug use and possession, not because of some scheme entered into with the State to mislead the Defendant.

8. Even if the Prosecution had knowingly presented Brown, Burgess and Kesee's false testimony, there is **no reasonable likelihood that this false testimony affected the jury's decision to convict Defendant of first-degree murder**. **The evidence of Defendant's guilt was overwhelming, and no expert - including Defendant's new expert, Dr. Herkov - ever expressed the opinion that Defendant met the legal definition of insanity at the time of the murders**.

9. Even if the Prosecution had knowingly presented Kesee, Brown and Burgess' false testimony, this false testimony would not raise due process concerns sufficient to put the penalty phase of the trial in doubt. This is because the Defendant knew that he had used drugs with Kesee, Brown and Burgess, and chose not to tell his Trial Counsel. With this knowledge, Trial Counsel could have effectively cross-examined Kesee, Brown and Burgess at trial and confronted them at deposition. All three stated that if they were asked directly by Trial Counsel regarding their use of drugs with the Defendant, they would have told the truth.

10. The Trial Court found Defendant competent to stand trial in 1988 after three out of four mental health experts who examined him testified to his competency. The Trial Court's finding of competency was upheld on appeal. [footnote omitted].

Therefore, Defendant has failed to demonstrate that his Judgment and Conviction should be set aside because the Prosecution intentionally presented perjured testimony.

(R1754-57). [emphasis added].

In *Guzman,* this Court clarified the standard that applies to the evaluation of the "materiality" component" of *Giglio:*

the proper question under *Giglio* is whether there is any **reasonable likelihood** that the false testimony

> could have affected the court's judgment as the factfinder in this case. If there is any reasonable likelihood that the false testimony could have affected the judgment, a new trial is required.

Guzman v. State, 868 So. 2d 498 (Fla. 2003). In *Guzman*, the trial court had potentially mixed the *Giglio* and *Brady* standards, and this Court remanded the *Giglio* component of the case for reconsideration. *Id.* No such questions are present in this case, because the Circuit Court clearly and unequivocally held that there was "no reasonable likelihood" that the false testimony affected the result given that Ponticelli has **never** presented testimony to support the idea that he was "insane" at the time of the murders . (R1756). The Circuit Court applied the proper standard in finding that the testimony at issue was not "material" for *Giglio* purposes, and, because that is so, there is no basis for relief.[10]

In addition to failing the "materiality" prong of *Giglio*, Ponticelli fails the "knowing presentation" prong, as well. The Circuit Court made specific findings with respect to the "knowing presentation" component, and found, as fact, that the State did not knowingly present or allow false testimony. (R1755). In the face of those factual findings, which were made

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[10]Ponticelli does not address the materiality component of

after the Circuit Court had the opportunity to observe the testimony of the various witnesses, Ponticelli's argument is nothing more than his disagreement with the factual findings of the trial court which were made following a full and fair hearing. Ponticelli has failed to satisfy either the "knowing presentation" or "materiality" prongs of ***Giglio*** -- because that is so, his claim fails.[11]

Finally, the ***Giglio*** claim raised by Ponticelli is unique because the "false testimony" at issue concerned matters about which Ponticelli had direct knowledge. As the Circuit Court found:

> Even if the Prosecution had knowingly presented Kesee, Brown and Burgess' false testimony, this false testimony would not raise due process concerns sufficient to put the penalty phase of the trial in doubt. **This is because the Defendant knew that he had used drugs with Kesee, Brown and Burgess, and chose not to tell his Trial Counsel.** With this knowledge, Trial Counsel could have effectively cross-examined Kesee, Brown and Burgess at trial and confronted them at deposition. All three stated that if they were asked directly by Trial Counsel regarding their use of drugs with the Defendant, they would have told the truth.

(R1756). Because that is so (and Ponticelli does not dispute

Giglio in his brief.

[11]Ponticelli's failure to satisfy **either** prong is a sufficient basis, standing alone, to deny relief based on ***Giglio***.

this finding), this case presents a bizarre claim for relief that is based upon "false testimony" which a competent defendant **knew** to be false, but which he did nothing to correct or call to the attention of his trial counsel. No rule of law allows a defendant to remain mute while "false testimony" is presented, and then, following conviction, claim that constitutional error entitles him to relief when he could simply have told his attorney the truth and, by so doing, provided his attorney with knowledge that would have assisted in cross-examination. While seemingly complex at first blush, the ***Giglio*** claim is not a constitutional claim at all -- it is an attempt to force a square peg into a round hole of Ponticelli's own making. His **choice** not to tell his attorney that he had used drugs with Kesee, Brown and Burgess establishes that this is not a ***Giglio*** violation at all, but rather a contrived claim of "ineffectiveness of **client**" -- regardless, there is no basis for relief.

II. THE INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL CLAIM.[12]

In his Supplemental brief, Ponticelli argues that the

[12] Ponticelli's original argument on this claim comprised 15 pages of a 101-page brief. He has replaced that argument with a 48-page argument. His brief is overlength under this Court's briefing order.

Circuit Court erroneously denied relief on his penalty phase ineffective assistance of counsel claim. Ponticelli's original *Initial Brief* addressed the inadvertent omission of this claim from the Circuit Court's order. However, rather than consider an appeal from an order that did not dispose of all issues before the Circuit Court, this Court relinquished jurisdiction to allow for the entry of an order that addressed the penalty phase ineffective assistance of counsel claims. The Circuit Court entered that order on September 9, 2004.[13]

The focus of Ponticelli's supplemental brief seems to be a critique of the Circuit Court's written order. For example, Ponticelli finds fault with the court's citation to *Strickland v. Washington* without additional citation to other decisions, and suggests that reliance on *Strickland* is a basis for rejection of the lower court's findings of fact and conclusions of law. Of course, *Strickland* is the leading (and controlling) case which sets out the two-part standard under which ineffective assistance of counsel claims are evaluated and decided. Fault can hardly be found with the Circuit Court for relying on binding precedent. And, to the extent that Ponticelli

[13] Ponticelli seems to still argue that this Court somehow erred in relinquishing jurisdiction. Given that this Court has ruled, that argument makes no sense.

cites to *Williams v. Taylor*, 529 U.S. 362 (2000) and *Wiggins v. Smith*, 539 U.S. 510 (2003), neither of those cases worked any change in the principles announced in *Strickland*, and, in fact, both of those decisions are based squarely on *Strickland v. Washington*, a fact which is hardly remarkable. The Court stated:

> . . . we emphasize that Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of Strickland, 466 U.S., at 689, 104 S.Ct. 2052. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." Id., at 690-691, 104 S.Ct. 2052. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." Id., at 691, 104 S.Ct. 2052.

Wiggins v. Smith, 539 U.S. 510, 533 (2003).

Despite the tone of Ponticelli's brief, the Circuit Court entered a 29-page order which discussed the various claims of ineffectiveness in detail, and rejected each one of them finding that Ponticelli had failed to establish the prejudice prong of the two-part *Strickland* standard. To the extent that Ponticelli implies that the trial court found that trial counsel's

performance was deficient, that averment is based on an out-of-context quotation from the conclusion of the trial court's order. What the trial court actually did was state that counsel did not discover certain things -- however, the court then quoted a lengthy portion of counsel's penalty phase closing argument, and concluded that:

> [t]he Defendant was able to call numerous new witnesses to testify at the post-conviction relief hearing and was able to construct a more comprehensive penalty phase case with the benefit of hindsight and time. The Court finds that penalty phase counsel presented much the same picture of the Defendant and his drug usage at trial despite his struggle with a client who stubbornly refused to assist him.

(R1964). The fundamental, over-arching fact is that Ponticelli refused to cooperate with his attorney, and, while he refuses to recognize it, that fact undermines his ineffectiveness claim.[14]

In denying relief on the penalty phase claims, the trial court held:

> Discussion of the Lay Witness Testimony
>
> The lay witnesses offered at the post-conviction hearing were all well known to the Defendant. Unfortunately, the Defendant, who was competent, capable of assisting counsel, and knew how to contact

[14] Of course, an ineffectiveness claim does not lie when the client kept the facts upon which the claim is based from his attorney. *Cherry v. State,* 781 So. 2d 1040 (Fla. 2000); *Marquard v. State/Moore*, 850 So. 2d 417 (Fla. 2003).

the lay witnesses, stubbornly refused to assist counsel even after being informed that he faced the death penalty. Even if penalty phase counsel erred in failing to discover the lay witnesses offered at the post-conviction proceedings, the Defendant did not establish that he was prejudiced by counsel's failure to offer their testimony.

Many of the trial witnesses sanitized their own drug activity at trial,[FN2] but their post conviction relief testimony remained constant regarding the material details of the Defendant's involvement in the murders. The testimony at both the trial and the post-conviction relief hearing was also consistent regarding the Defendant's severe drug addiction.

At trial, Turner and Leonard testified to the Defendant's drug usage and reaction to cocaine, including the Defendant's paranoia. The Defendant was able to offer post-conviction testimony confirming that the Defendant used drugs late the prior night or early the morning of the murder and that the Defendant consumed a small amount of cocaine with the victims the night of the murders. The lay witnesses, however, did not improve much on the picture painted at the trial of the Defendant's drug usage the night of the murder because that knowledge was held exclusively by the Defendant and perhaps the deceased victims. The bulk of the Defendant's drug usage the night of the murder likely occurred near or after the murder when the Defendant had access to the victims' cocaine.

In fact, the lay witnesses only further buttressed trial counsel's arguments during the penalty phase that the Defendant was a bright young man, adopted by a good family, who led a relatively happy and uneventful childhood until he began to use drugs. If anything, these witnesses establish that the Defendant escaped the horrendous effects of a drug addiction during his late teenage years when he left New York to live in Silver Springs Shores only to return to his addiction after leading a quiet productive life in Florida.

The lay witnesses would also negate the

Defendant's argument at the penalty phase that the Defendant had no prior criminal history and that his drug activity after he returned from New

> [FN2] The Defendant knew the witnesses were testifying falsely at trial and could have corrected that testimony. The lay witnesses' incentives to sanitize their drug usage had diminished with time because they were more mature and no longer had to answer to their parents and/or no longer faced criminal penalties.

York was an aberration in the life of a person who was quiet, kind and lived a life of integrity. At trial, counsel made a very compelling argument: "I do not see how you can take somebody who, prior to September of 1987, had no history, not only no criminal history-no criminal history, based on what his father told you, but no history of cocaine use, and then say, because of the cocaine use continued for three to four weeks, that you can disregard 20 years of essentially noncriminal behavior and say that you should ignore or that you should find, as unworthy of consideration, the mitigating factor that he had no significant criminal history .... I submit to you that the kind of person who was described to you by his friends and by his father, Tony Ponticelli, that the kind of person Tony Ponticelli was prior to the fall of 1987, is somebody who, without the influence of cocaine, without the involvement that he had, that that is a life that is worth saving; that that life can have meaning." While in Florida the Defendant had the support and love of his parents and had established himself with friends and employment. Instead of being a young man who naively experimented with drugs for short period of time, the lay witnesses presented at the evidentiary hearing portray the Defendant as a man who escaped the ill effects of drugs for a substantial period of time in Florida and then returned to a habit he knew was evil.

Nor did counsel's failure to provide the information known by the lay witnesses to the penalty phase expert, Doctor Mills, prejudice the Defendant. As will

be seen in the discussion of the mental health experts, Doctor Mills knew of the Defendant's drug addiction and testified that the Defendant would have still suffered from the same effects of the drugs even if he had taken no drugs the day of the murder.

. . .

Discussion of the Mental Health Testimony

In its written closing argument, the State of Florida argues that the written reports of the four experts who examined the Defendant prior to trial continue to speak volumes today regarding the Defendant's mental health status at the time of the offenses and at the time of trial. The Court agrees. The reports demonstrate that the Defendant's memory was vivid and accurate at the time of trial and the reports are replete with statements Defendant made to the experts indicating he met the competency criteria, did not suffer from brain damage or mental impairment; had the ability to communicate; and had the ability to assist penalty phase counsel if he chose to do so.

At the post-conviction proceeding, the State of Florida offered the testimony of Doctor Thomas Wayne Conger who testified as an expert in clinical psychology, neuropsychology and forensic psychology. The Doctor has had a clinical practice for over thirty years and evaluated persons on a daily basis. The Doctor reviewed the expert reports generated at the time of trial and much of the evidence and conducted a neuropsychological evaluation of the Defendant over a period of two days.[FN4]

> [FN4] At the evidentiary hearing, the Defendant suggested through questioning that the Doctor failed to take into consideration factors that rendered the testing conditions inadequate. The Defendant showed no signs of stress or fatigue and was even able to make small talk and joke with the evaluator and others. The Court finds that the facility and the conditions for testing were adequate.

The Court agrees with Doctor Conger's findings and conclusions, including the Doctor's findings that the Defendant was functioning well intellectually and cognitively. There was no evidence of any significant cognitive dysfunction that the Doctor could see when interviewing and interacting with the Defendant. The Doctor also noted that the Defendant's IQ is within normal limits, that was there no evidence that the Defendant had any significant behavioral problems as a child; and that the Defendant was a good student up to that point in school when he admittedly quit putting forth effort. The Doctor discounted the Defendant's claims of brain impairment including his claims of anoxia and lead poisoning. The Court agrees with Doctor Conger and finds that the Defendant does not suffer from brain impairment, is of average intellect and functions within normal limits intellectually and cognitively.

The Court also agrees with Doctor Conger's findings that the Defendant's behavior the night of the murder demonstrated logical and sequential thinking which was motivated by the Defendant's personal self-interests. Doctor Conger based this finding on the fact that the Defendant showed the gun to others and told them that he was planning to kill the victims and to take their drugs and money in advance of the murders; the Defendant feigned cocaine sales in a ruse to placate the victims prior to the murders; the Defendant asked for a phone number from one group of young men and later used a pay phone to call his friend Joey Leonard to arrange a ride and place to go in advance of the murders; the Defendant drove the victims' automobile to a remote location, tossed the keys in the woods and later disposed of the murder weapon by giving it to his friend Leonard; the Defendant went to Dotson's house and requested assistance in washing the clothes he wore during the murder; the Defendant inquired whether a person could survive with a shotgun wound to the head; the Defendant told one of young men that he beat one of the victims who was still moaning after the bullets were spent; the Defendant asked Dotson if he had spoke to others about the murder or was going to turn him in; the Defendant discussed an alibi; the Defendant

telephoned his mother to tell her he was with friends and would be late; and the Defendant was able to give the young men who gave him a ride directions to his parents' house. Both the Doctor, and the Court, also found it especially telling that although the Defendant appeared to be "buzzed", he was able to communicate sensibly with the young men. The Defendant not only had the ability to plan, he had the fluidity to change those plans when the situation required it. Even after the murders were committed and the Defendant continued to operate under the influence of drugs, the Defendant had the ability to reflect on his deeds and his situation and to continue to inquire and to plan alternatives. He attempted to avoid detection and escape punishment by burning his clothes, discussed the possibility of fleeing the country and inquired whether the surviving victim (whom he referred to as the "alligator") had died.

The Defendant's experts made much of the Defendant's religiosity and behavior in jail and concluded that the Defendant was delusional and/or psychotic and hallucinating while imprisoned, but Doctor Conger rejected this finding.[FN5] The Defendant was religiously preoccupied and those who had contact with him noticed that preoccupation. The Defendant, however, was introduced to religion by his father during a very intense period of his life and his response to that religious influence was understandably intense as well. While the Court understands that the Defendant's religious beliefs and practices appeared to be unreasonable and abnormal[FN6] to seasoned professionals, the Court believes that the Defendant's search for God and the Defendant's beliefs and practices, while immature, were a genuine part of the Defendant's faith which he openly shared with others. Despite his religiosity, the Defendant still had the ability to scheme and plan and cover his deeds (see prisoner, Dennis Freeman's trial testimony regarding the Defendant's production of the map) and still had the ability to assist counsel when he chose to. The Court agrees with Doctor Conger and finds that the Defendant's religiosity was not the result of a mental defect/disorder, psychosis, delusions or hallucinations.

[FN5] The Defendant did not establish accurate time frames when the letters were written and the behaviors were observed in relation to the Defendant's trial.

[FN6] While the Court will not discuss every nuance in the testimony of the lay witnesses, the Court was not disturbed by that testimony regarding the Defendant's audible prayers and conversations with God. While most persons are probably more private than the Defendant, mankind has prayed and conversed with their gods since the beginning of time. Nor was the Court disturbed by the fact that the Defendant wore a towel on his head (which is no different than other religious customs and practices such as wearing a cross or kneeling to pray); the fact that the Defendant saw Christ in the moon (grown men have been making out shapes of animals, persons or objects in the stars, the moon and the clouds since the beginning of time); or the fact that the Defendant had numerous Bibles (which the Defendant likely acquired to share or to use to witness to others).

Doctor Conger found that the Defendant's ability to think was not compromised and that the Defendant was competent, was able to assist counsel and did assist counsel during the proceedings when he chose to. The Doctor noted that the Defendant had the ability to manifest appropriate courtroom behavior and that there was no evidence he acted inappropriately during the mental health evaluations or at trial. The Doctor found that the evidence did not reflect an extreme emotional or mental condition and that the Defendant had the capacity to appreciate the criminality of his conduct and to control his conduct to the requirements of the law.[FN7] The Doctor based this finding on the fact that the Defendant had an established plan to kill the victims, sought to avoid detection and engaged in goal-oriented behavior before, during and after the homicides. Both the

> Doctor and the Court found that if there was any brain damage it was not at a level which would affect the Defendant's competency to proceed, sanity or the statutory mitigators.
>
> > [FN7] Although the Court agrees with the Doctor's conclusions, when cross-examined, it was clear that the Doctor did not have a working knowledge and was unable to define the statutory mitigating factors.

(R1949-51, 1957-61).

Those findings of fact and conclusions of law are supported by competent substantial evidence, are in accord with settled Florida law, and should not be disturbed.

III. THE GUILT STAGE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

On pages 80-92 of his brief, Ponticelli argues that he received ineffective assistance of counsel during the guilt stage of his capital trial. The Circuit Court conducted an evidentiary hearing on the various ineffective assistance of counsel claims, and, following the conclusion of that hearing, denied all relief.

A. The competency to stand trial issue.

On pages 81-83 of his brief, Ponticelli argues that trial counsel was ineffective in investigating “information relating to [his] competency to proceed at the time of trial.” The

substantive incompetency claim was raised on direct appeal and decided adversely to Ponticelli. This Court held:

> Ponticelli first claims that the trial court erred in finding him competent to stand trial because one of the three experts appointed to examine him testified that in his opinion Ponticelli was incompetent. Although Dr. Mills testified that Ponticelli was not competent to stand trial because he suffered from delusional thought processes, both Dr. Poetter and Dr. Krop testified that he was competent.
>
> It is incumbent upon the trial court, as finder of fact in competency proceedings, to consider all the evidence presented and to render a decision based on that evidence. *Carter v. State,* 576 So. 2d 1291 (Fla. 1989), *cert. denied,* 502 U.S. 879, 112 S.Ct. 225, 116 L.Ed.2d 182 (1991). However, where there is conflicting expert testimony on competency, it is the court's responsibility to resolve the disputed factual issue. *Fowler v. State,* 255 So. 2d 513, 514 (Fla. 1971); *King v. State,* 387 So.2d 463 (Fla. 1st DCA 1980). Absent a showing of abuse of discretion, the decision of the trial court on such matters will be upheld. 576 So.2d at 1292. The record contains sufficient evidence that Ponticelli understood the charges against him and could assist in his defense to support the trial court's ruling.

Ponticelli v. State, 593 So. 2d 483, 487 (Fla. 1991).

Ponticelli raised a substantive claim of incompetency as Claim XII of his postconviction motion, and the Circuit Court denied that claim on procedural bar grounds because it was raised and addressed on direct appeal to this Court. (R1683). In an effort to relitigate this claim, Ponticelli has recast it as a claim of ineffectiveness of counsel. However, Florida law is well-settled that a procedurally barred claim cannot be recast as a claim of ineffective assistance of counsel and thereby

avoid the preclusive effect of a procedural bar. *Kight v. Dugger*, 574 So. 2d 1066 (Fla. 1990); *Medina v. State,* 573 So. 2d 293 (Fla. 1990)*; Kelley v. State,* 569 So. 2d 754 (Fla. 1990); *Clark v. State*, 460 So. 2d 886 (Fla. 1984); *Johnson v. Wainwright*, 463 So. 2d 207 (Fla. 1985). The collateral proceeding trial court found that Ponticelli presented no evidence during the postconviction proceeding which called the competency determination into question, stating:

> Plaintiff's new expert on cocaine intoxication, Dr. Herkoff, testified at the evidentiary hearing that given all of the new evidence on Defendant's alleged use presented at the evidentiary hearing, he could not express the opinion that Defendant was insane at the time of the murders.

(R1740). If there is nothing to call the previous competency determination into question, and that is the finding of fact by the Circuit Court, then the ineffective assistance of counsel claim fails for lack of evidentiary support. Moreover, Ponticelli refused to divulge his drug history to trial counsel, as the Circuit Court found.[15] **(**R1741-43). And, there was no evidence presented at the evidentiary hearing to support the idea that Ponticelli was suffering from "cocaine psychosis" -- in fact, Ponticelli's hand-picked expert testified that he could

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15 Ponticelli cannot base an ineffective claim on facts that he concealed from counsel. *Cherry, supra*; *Marquard, supra.*

not express the opinion that Ponticelli was suffering from cocaine psychosis at the time of the murder. (R1741). The ineffective assistance of counsel claim relating to Ponticelli's competency to stand trial has no factual basis, and is not a basis for relief.

B. The "trial defense" sub-claims.

On pages 83-92 of his brief, Ponticelli argues that trial counsel failed, in numerous ways, to provide effective assistance of counsel at the guilt stage of his capital trial. To the extent that Ponticelli claims that trial counsel was ineffective in the presentation of a voluntary intoxication defense, the collateral proceeding trial court made the following findings of fact:

> (1) Trial Counsel testified during the evidentiary hearing that he considered presenting a voluntary intoxication defense. However, because he had no evidence that the Defendant was under the influence of drugs or alcohol at the time of the murders, or that he had used drugs or alcohol on the day of the murders, he was unable to present the defense.
>
> (2) Trial Counsel in fact had no evidence available to him that the Defendant was under the influence of drugs or alcohol at the time of the murders, or that he had used drugs or alcohol on the day of the murders.
>
> (3) Defendant could have, but chose not to, inform Trial Counsel of his alleged drug use on the day of the murders.
>
> (4) Defendant was found competent to stand trial by

> the Trial Judge in 1988 after three out of four mental health experts found Defendant competent. [footnote omitted]
>
> (5) Trial Counsel had insufficient evidence to support the defense because of Defendant's refusal to cooperate with him to establish that Defendant was so intoxicated at the time of the murders that he was unable to form the intent necessary to commit first degree murder. [footnote omitted]

(R1742). Those findings are supported by the record, and should not be disturbed. To the extent that further discussion is necessary, it stands reason on its head to suggest that counsel can be "ineffective" for not presenting facts that were affirmatively kept from him by his client. *Cherry, supra; Marquard, supra*.

Ponticelli also claims that counsel was ineffective for presenting "inconsistent" defenses based on theories of reasonable doubt and voluntary intoxication. The collateral proceeding trial court found as fact that trial counsel did not concede Ponticelli's guilt. (R1739). In addition to the findings set out above, the Court also found that:

> (5) Based upon the evidence available to him, Trial Counsel made the tactical decision to present the seemingly inconsistent defenses of reasonable doubt and insanity.
>
> (6) Plaintiff's new expert on cocaine intoxication, Dr. Herkoff, testified at the evidentiary hearing that given all of the new evidence on Defendant's alleged cocaine use presented at the evidentiary hearing, he

> could not express the opinion that Defendant was insane at the time of the murders.
>
> (7) Even if Trial Counsel's actions were deficient for presenting the seemingly inconsistent defenses during opening statement, those actions -- based upon the testimony of Defendant's own expert -- could not be considered prejudicial.

(R1740). Under the facts of this case, counsel had no choice but to attempt to walk the line between two seemingly inconsistent defenses. Counsel was forced, by Ponticelli's own actions, to walk a tightrope -- there was no deficient performance by counsel, nor did Ponticelli suffer any prejudice. *Cherry, supra; Marquard, supra*.

Ponticelli also asserts that trial counsel was ineffective because he "vouched" for the credibility of various State witnesses. The trial court resolved this issue adversely to Ponticelli, making the following findings:

> (1) Trial Counsel's statement regarding the West Virginia witnesses' credibility was made in conjunction with his argument that the blood they saw on Defendant came from a wound on his hand.
>
> (2) Trial Counsel did not know that the remainder of Edward Brown's or Brian Burgess' testimony was anything other than credible.
>
> (3) Defendant could have told Trial Counsel that Edward Brown's and Brian Burgess' testimony was not completely truthful, but did not.
>
> (4) The Trial Court found Defendant competent to stand trial in 1988 after three of the four mental health

> experts who examined him testified to his competency. [footnote omitted]
>
> (5) Because Trial Counsel had no way of knowing that Edward Brown and Brian Burgess' testimony was untrue on the issues of meeting the Defendant and drug use, his statement on closing argument about their credibility on an unrelated matter cannot be considered deficient.

(R1749-50). To the extent that Ponticelli claims that counsel "effectively" entered a guilty plea to murder, that claim has no basis. Likewise, *Nixon v. State*, 758 So. 2d 618 (Fla. 2000), *rev'd.*, *Florida v. Nixon*, 543 U.S. 175 (2004), does not compel a different result. Ponticelli's own actions hampered the presentation of his defense, and he has no basis for complaint.

Ponticelli also claims that counsel was ineffective for "allowing Inv. Munster to be excluded from the rule" of sequestration. The collateral proceeding trial court made the following findings:

> (1) Trial Counsel testified at evidentiary hearing that he did not object to Investigator Munster's presence at trial because he could find no reason to object and, if he did, it was likely the Trial Judge would allow his presence anyway.
>
> (2) Under the law on witness sequestration in effect in 1988, the Trial Court had broad discretion to allow witnesses to attend trial; detectives in particular were often allowed to attend trial to aid the prosecution in presentation of a case. [footnote omitted]
>
> (3) Trial Counsel made a tactical decision not to seek

Investigator Bruce Munster's exclusion from trial.

(4) Even if Trial Counsel's decision not to object to investigator Bruce Munster's presence at trial could be seen as deficient, this deficiency would not have prejudiced the outcome of Defendant's trial.

(R1743-44). In the face of those findings, Ponticelli can demonstrate neither deficient performance nor prejudice as required under *Strickland v. Washington.* To the extent that Ponticelli also claims that trial counsel "vouched" for Investigator Munster's credibility, the collateral proceeding trial court found, as fact, that counsel's statements were not "vouching" for the witness, and, moreover, even if they were, those statements represented neither deficient performance nor prejudice. (R1748).

With respect to the claim that trial counsel "conceded" guilt by "conceding" the accuracy of Freeman's testimony, that claim proves too much. The part of counsel's closing argument set out in Ponticelli's brief falls short of being a "concession" to anything, and, in any event, Ponticelli was well aware of what he had told Freeman, but apparently did not convey that information to his attorney. Counsel cannot have been ineffective when his client concealed facts from him, especially when those facts were uniquely within the defendant's knowledge.

Finally, on pages 91-92 of his brief, Ponticelli raises

various claims of ineffective assistance of counsel -- to the extent that an issue concerning questions to witnesses concerning their "feelings" following Ponticelli's inculpatory statements to them, those questions were not improper, as the trial court found. (R1679). With respect to the claim that counsel should have questioned one of the paramedics who treated Ponticelli's victims about his use of a drug called Narcan, no testimony was elicited on this issue at the evidentiary hearing, as the trial court found. (R1744). This claim was properly denied based upon a failure of proof. And, as the trial court found, the paramedic testified "that Narcan was administered to counteract the effects of narcotics," and the jury could infer from that testimony that the victim had narcotics in his system. (R1744).

With respect to the laundry list of alleged deficiencies on the part of counsel set out on pages 91-92 of Ponticelli's brief, the mere listing of claimed shortcomings does not suffice to properly brief those "issues" on appeal from the denial of collateral relief. The purpose of an appellate brief is to present legal argument and authority, not to merely list alleged errors and expect the Court to brief the issue for counsel. *Bryant v. State*, 901 So. 2d 810, 827-828 (Fla. 2005), *citing,*

Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990). This laundry list approach to appellate practice does not fairly present anything to this Court, and this Court should not consider these claims. In any event, Ponticelli has not demonstrated how any of these matters amount to error, and, because that is so, counsel cannot have been ineffective for "failing" to object to meritless claims.[16] *Thompson v. State*, 759 So. 2d 650, 665 (Fla. 2000).

IV. THE *AKE V. OKLAHOMA* CLAIM[17]

On pages 92-94 of his brief, Ponticelli argues that he did not receive "competent" assistance from his mental state expert.[18] This claim is not a basis for relief because Ponticelli has failed to carry his burden of proof -- the collateral proceeding trial court found that not even Ponticelli's new expert was of the opinion that Ponticelli was

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[16]The various claims concerning the suppression of various statements were litigated on direct appeal and decided adversely to Ponticelli. *Ponticelli v. State*, 593 So. 2d at 487-88.

[17] This is not a true *Ake* claim, which would require the defendant to show that a timely request for expert assistance had been unreasonably denied with the result that the proceeding was fundamentally unfair. *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Ake* is purely a due process decision that has no Sixth Amendment component. *See, infra,* n.19.

[18]This claim was raised as claim XXIV in Ponticelli's motion.

insane at the time of the murders (R1740), and that there has been no evidence presented that Ponticelli was suffering from cocaine psychosis at the time of the murders. (R1741). Finally, as the trial court further found, Ponticelli affirmatively kept his drug use history from trial counsel, even though he could have revealed those facts had he chosen to do so. (R1742). Ponticelli's own refusal to cooperate with counsel, not some act or omission on the **part** of counsel, influenced the case that was presented at trial. (R1742). Ponticelli is not entitled to relief.[19]

V. SUMMARY DENIAL OF VARIOUS CLAIMS WAS PROPER.

On pages 94-100 of his brief, Ponticelli claims that the collateral proceeding trial court erroneously decided various claims without an evidentiary hearing.

A. The competency to stand trial claim.

On pages 94-95 of his brief, Ponticelli argues that he was "incompetent" during trial and sentencing. This claim was raised and addressed on direct appeal, and this Court decided

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(R1432).

19 In any event, *Ake* has no Sixth Amendment component. *Ake v. Oklahoma*, 470 U.S. 68, 87 n. 13 (1985). That decision is based squarely and exclusively on the due process clause of the Eighth Amendment.

the issue adversely to Ponticelli. *Ponticelli v. State*, 593 So. 2d at 487. Because this claim has already been decided, it is procedurally barred from relitigation in a *Florida Rule of Criminal Procedure* 3.851 motion. *Ferrell v. State*, 30 Fla. L. Weekly S451, ___ (Fla. June 16, 2005); *Rodriguez v. State*, 30 Fla. L. Weekly S385, __ (Fla. May 26, 2005). Ponticelli has not even acknowledged that this claim was decided on procedural bar grounds by the trial court, and has advanced no reason to support his claim that the denial of relief on those grounds was incorrect.[20] The trial court properly entered a summary denial of this procedurally barred claim.

B. The "jailhouse agent" claim.

On pages 95-98 of his brief, Ponticelli argues that he was entitled to an evidentiary hearing on his claim concerning a "jailhouse agent." This claim was raised as Claim XVIII in Ponticelli's Rule 3.851 motion, and was summarily denied by the collateral proceeding trial court because this claim could have been but was not raised at trial or on direct appeal from Ponticelli's conviction and sentence. (R1685). That result

[20] To the extent that Ponticelli's brief contains assertions that various information concerning his drug use could have been discovered at the time of trial, that claim is rebutted by the findings of the trial court that Ponticelli refused to tell

follows long-settled Florida procedural bar law, and should be affirmed in all respects.

C. The *Caldwell v. Mississippi* claim.

On pages 98-99 of his brief, Ponticelli claims that he is entitled to relief based upon a "violation" of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This claim was raised as Claim XXIX in Ponticelli's Rule 3.851 motion, and is procedurally barred, as the trial court found, because it could have been but was not raised on direct appeal. That procedural bar finding is in accord with settled Florida law, and should not be disturbed.[21] *Elledge v. State/Crosby*, 30 Fla. L. Weekly S429, ____ (Fla. June 9, 2005); *Rodriguez v. State/Crosby,* 30 Fla. L. Weekly S 385, __ (Fla. May 26, 2005); and *Windom v. State*, 886 So. 2d 915, 930 (Fla. 2004).

D. The "burden shifting jury

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trial counsel about his drug use history. (R1739-41).

[21]To the extent that Ponticelli includes a one-sentence ineffective assistance of counsel argument, such is insufficient to brief such a claim, and, in any event, *Caldwell* is inapplicable under Florida's capital sentencing scheme. *Caldwell v. Mississippi,* 472 U. S. 320 (1985). Moreover, this claim is nothing more than the improper recasting of a barred merits claim as one of ineffective assistance of counsel. Such is, of course, improper. *Robinson v. State*, 30 Fla. L. Weekly S576, 579 (Fla. July 7, 2005); *Rodriguez v. State*, 30 Fla. L. Weekly S385, 393 (Fla. May 26, 2005).

instruction" claim.

On page 99 of his brief, Ponticelli argues that the penalty phase jury instructions "shifted the burden of proof" to him to prove that death was not the proper sentence. This claim is procedurally barred because it could have been but was not raised on direct appeal, as the collateral proceeding trial court correctly found. (R1689). Denial of this claim on procedural bar grounds is in accord with settled Florida law, and should not be disturbed.[22]

E. The "overbroad jury instruction" claim.

On page 100 of his brief, Ponticelli claims that the jury instruction given on the "murder for pecuniary gain" aggravator is invalid. This claim was raised as Claim XXXI in Ponticelli's motion. As the collateral proceeding trial court found, this claim is procedurally barred because it could have been but was not raised on direct appeal. (R1689). Ponticelli's alternative

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[22]To the extent that Ponticelli includes a one-sentence argument alleging ineffective assistance of counsel, such is insufficient to brief a claim of any sort, and, moreover, is nothing more than the improper re-pleading of a barred merits claim as one of ineffective assistance of counsel. *Robinson v. State*, 30 Fla. L. Weekly S576, 579 (Fla. July 7, 2005); *Rodriguez v. State*, 30 Fla. L. Weekly S385, 393 (Fla. May 26, 2005). Moreover, this claim has no legal basis. *Boyde v. California*, 484 U.S. 370 (1990); *Blystone v. Pennsylvania*, 494

ineffective assistance of counsel argument, which consists of one sentence, is insufficient to brief the issue, and, in any event, is nothing more than an attempt to cast a barred merits claim as one of ineffective assistance of counsel - - such an ineffectiveness claim was not raised in the 3.851 motion, and cannot be raised here for the first time (1472-73). And, without waiving the procedural bar, this claim has no merit. *Rodriguez v. State*, 30 Fla. L. Weekly S385, ____ (Fla. May 26, 2005).

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee respectfully requests that all requested relief be denied.

Respectfully submitted,

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U.S. 370 (1990).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to **Linda McDermott**, Esquire, McClain & McDermott, P.A., 141 N. E. 30th Street, Wilton Manors, Florida 33334, this 3rd day of October, 2005.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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