IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1966

MANUEL PARDO, JR.,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

On June 11, 1986, Defendant, along with codefendant Rolando Garcia, was charged by indictment, in Eleventh Judicial Circuit Case No. 86-14719A, with (1) the first degree murder of Michael Millot and (2) the possession of a firearm while engaged in a criminal offense. (R. 1059-60A)[1] These crimes were alleged to have been committed on January 28, 1986. *Id.*

On March 11, 1987, Defendant, along with codefendant Rolando Garcia, was charged by indictment, in Eleventh Judicial Circuit Case No. 86-12910A, with (1) the first degree murder of Mario Amador, (2) the first degree murder of Robert Alfonso, (3) the armed robbery of Amador, (4) the possession of a firearm while engaged in a criminal offense, (5) the first degree murder of Luis Robledo, (6) the first degree murder of Ulpiano Ledo, (7) the armed robbery of Robledo, (8) the possession of a firearm while engaged in a criminal offense, (9) the first degree murder of Sara Musa, (10) the first degree murder of Fara Quintero, (11) the armed robbery of Musa, (12) the armed robbery of Quintero, (13) the possession of a firearm while engaged in a criminal offense, (14) the first degree murder of Ramon Alvero, (15) the first degree murder of Daisy Ricard, and (16) the

[1]In this brief, the symbol AR.@ will refer to the record on direct appeal, which includes the transcripts of the proceedings.

possession of a firearm while engaged in a criminal offense. (R. 16-34A) The crimes charged in counts 1, 2, 3 and 4 were alleged to have been committed on January 22, 1986. *Id.* The crimes charged in counts 5, 6, 7 and 8 were alleged to have been committed on February 27, 1986. *Id.* The crimes charged in counts 9, 10, 11, 12 and 13 were alleged to have been committed on April 22, 1986. *Id.* The crimes charged in counts 14, 15 and 16 were alleged to have been committed on April 23, 1986. *Id.*

Both indictments were consolidated, and the matter proceeded to trial on March 31, 1988. (R. 46) On April 15, 1988, the jury found Defendant as charged on all counts from both indictments. (R. 939-56) The court adjudicated Defendant guilty on all counts in accordance with the verdicts. (R. 957-58, 1146-47)

The penalty phase proceedings were held on April 20, 1988. (R. 83) The jury recommended death sentences by a vote of 8 to 4 for the murders of Amador, Musa, and Millot, by a vote of 9 to 3 for the murders of Alfonso, Robledo and Ledo, and by a vote of 10 to 2 for the murders of Quintero, Alvero and Ricard. (R. 990-98) The court followed the jury=s recommendation and imposed death sentences for each of the murders. (R. 999-1006, 1148) The court imposed concurrent 15 year sentences for each of the non-capital convictions. (R. 1007-08, 1149-50) The court later

amended the sentences for the possession of a firearm while engaged in a criminal offense charges to suspend entry of sentence and the sentences for the armed robberies to add a three year minimum mandatory provision. (R. 1017, 1157)

The court found the cold, calculated and premeditated aggravating factor applicable to each of the murders, the pecuniary gain aggravating factor applicable to the Amador murder and the hinder governmental function aggravator applicable to the Millot murder. (R. 1151-55) As mitigation, the court found that Defendant had no significant criminal history, that he was under the influence of extreme mental or emotional distress, that he had saved the life of child, that his family loved him and that he had served in the military. (R. 1151-55)

The historical facts of the case are:

> Pardo and a codefendant were indicted for the nine murders, which occurred in five separate episodes between January and April of 1986. After the defendants' trials were severed, Pardo went to trial on all nine counts. Against the advice of counsel, Pardo, a former police officer, took the stand and admitted that he intentionally killed all nine victims. He said he should avoid culpability, however, because he believed all the victims to be drug dealers, who "have no right to live." (FN1) The jury found Pardo guilty and recommended the death penalty in each case, by votes ranging from eight-to-four to ten-to-two. (FN2)

The trial judge found a total of three aggravating circumstances but found that only one of them applied to all the killings: that each was done in a cold, calculated, and premeditated manner without a moral or legal justification. The court found two other aggravating factors applicable to individual murders. The judge found that the purported drug informant was killed to hinder or disrupt the exercise of a governmental function and that another killing was committed for pecuniary gain. The court specifically rejected the state's argument that the final four episodes of killing could qualify as prior capital felonies under section 921.141(5)(b), Florida Statutes (1987).

As to mitigation, the court found that Pardo had no prior significant criminal history (section 921.141(6)(a), Florida Statutes (1987)), and was under an extreme mental or emotional disturbance (section 921.141(6)(b), Florida Statutes (1987)). The judge also said he considered some nonstatutory mitigation, including Pardo's military service, the fact that he had once saved the life of a child, and that he had the love and affection of his family. After weighing the aggravating and mitigating factors, the court imposed the death penalty.

* * * *

When trial counsel requested that experts be appointed to examine Pardo and determine his sanity at the time of each episode, the court asked if counsel wanted experts also appointed to determine competency and offered to hold a hearing on the subject. Counsel stipulated that his client was competent and repeated that he only wanted a determination of sanity. The court-appointed experts examined Pardo, found him to have been sane, and also determined that he was competent to stand trial.

* * * *

The defense put on an expert witness who testified that Pardo was psychotic, but stated that he did know that murder was illegal and wrong. The state

> presented three witnesses who testified that Pardo met the Florida standard for sanity.
>
> * * * *
>
> The first two murders took place on January 22, 1986, and purportedly involved a drug "rip-off." The next episode occurred January 28; the victim was the man who had made Pardo's silencer and who supposedly was an informant. The third episode, on February 27, was another probable drug rip-off. The fourth, on April 22, involved two women acquaintances who had angered Pardo and his accomplice. The final one was on April 23, the victims being an alleged drug dealer (Pardo's alleged boss) and his woman companion.
>
> * * * *
>
> FN1. The state's theory was that some, though not all, of the victims were drug dealers but that Pardo was also a drug dealer and that his motive was robbery. The state argued that one victim was killed because he was a confidential informant for federal authorities, and that two women were killed because they had taken money from Pardo and his accomplice to buy a video cassette recorder, but had not done so.
>
> FN2. The jury also found Pardo guilty of assorted lesser crimes including robbery and use of a firearm in the commission of a felony.

Pardo v. State, 563 So. 2d 77, 78-79, 80-81 (Fla. 1990), *cert. denied*, 500 U.S. 928 (1991).

Defendant appealed his convictions and sentences to this Court raising 4 issues:

> I.
>
> THE TRIAL COURT ERRED IN NOT CONDUCTING FORMAL HEARING TO ASCERTAIN APPELLANT=S COMPETENCE TO STAND TRIAL.

II.

APPELLANT IS ENTITLED TO ACQUITTAL AS THE STATE DID NOT OVERCOME THE REASONABLE DOUBT RAISED BY HIM AS TO HIS SANITY AT THE TIME OF ALL OF THE OFFENSE FOR WHICH HE WAS CHARGED.

III.

THE TRIAL COURT ERRED IN DENYING APPELLANT/CROSS-APPELLEE=S MOTION FOR MISTRIAL WHERE PREJUDICIAL COMMENTS DEROGATORY OF HIS INSANITY DEFENSE WERE MADE BY THE PROSECUTOR DURING THE CLOSING ARGUMENT IN THE GUILT PHASE.

IV.

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH.

A. The State Failed to Show Beyond A Reasonable Doubt That The Murder of Mario Amador Was Committed For Pecuniary Gain.

B. The State Failed To Show Beyond A Reasonable Doubt That The Murder Of Michael Millot Was Committed To Disrupt Or Hinder The Lawful Exercise Of Any Governmental Function.

C. The State Failed To Show Beyond A Reasonable Doubt That The Murders Of All Nine Murder Victims Were Committed In A Cold, Calculated, And Premeditated Manner Without Any Pretense Of Legal Or Moral Justification.

D. The Court Should Not Have Rejected As A Mitigating Factor That The Capacity Of The Appellant to Appreciate The Criminality Of His Conduct Or To Conform His Conduct To The Requirements Of The Law Was Substantially Impaired.

Initial Brief of Appellant, Florida Supreme Court Case No. 72,463. The State cross appealed raising 2 issues:

I.

THE TRIAL COURT ERRED IN NOT FINDING THE APRIOR VIOLENT FELONY@ AGGRAVATING FACTOR AS TO ANY OF THE NINE MURDERS.

II.

THE TRIAL COURT ERRED IN FINDING THAT MITIGATING FACTOR OF ANO SIGNIFICANT PRIOR CRIMINAL HISTORY@ AS TO EACH AND EVERY MURDER.

Answer Brief, Florida Supreme Court Case No. 72463.

This Court affirmed Defendant=s conviction and sentences. *Pardo*, 563 So. 2d at 81. The Court found that there was no need for the trial court to hold a competency hearing and that such a hearing would not have benefited Defendant. *Id.* at 79. The Court stated that there was competent, substantial evidence to support the jury=s rejection of Defendant=s insanity defense. *Id.* The Court held that the motion for mistrial based on the comments in closing was properly denied. *Id.* The Court held that the aggravating factors found by the trial court were proper, and that the trial court had properly rejected the capacity to conform mitigating factor. *Id.* at 79-80. With regard to the State=s cross appeal, the Court held that the trial court had erred in rejecting the prior violent felony aggravating circumstance and in finding the no significant criminal history mitigating circumstance. *Id.* at 80-81.

Defendant then sought certiorari review in the United States Supreme Court. The Court denied certiorari on May 13, 1991. *Pardo v. Florida*, 500 U.S. 928 (1991).

After Defendant was convicted, Rolando Garcia, the codefendant, was tried for six of the murders with the murders of Sara Musa and Fara Quintero having been severed. *Garcia v. State*, 816 So. 2d 554, 557 (Fla. 2002). Garcia was acquitted of the murders of Luis Robledo and Ulpiano Ledo. *Id.* This Court reversed Garcia=s convictions on the other four counts. *Garcia v. State*, 568 So. 2d 896 (Fla. 1990).

On May 26, 1992, Defendant filed his initial motion for post conviction relief. (PCR1. 62-98) This motion asserted that Defendant could not file a proper motion for post conviction relief because his public records requests remained outstanding. *Id.* The motion then listed 15 heading for claims. *Id.* However, the parties agreed that the post conviction proceedings could not continue at that juncture because Garcia was not yet final and the records regarding the cases were exempt from public records disclosure. (PCR1. 1387)

In 1996, the State agreed to disclose records even though Garcia was not yet final. (PCR1. 1387-88) On March 8, 1997, Defendant filed public records requests pursuant to Fla. R. Crim. P. 3.852 to the City of Miami Police Department, Florida Highway Patrol (FHP), Florida Department of Law Enforcement (FDLE), Florida Department of Corrections, Sweetwater Police Department and the Miami Beach Police Department. (PCR1. 106-

28) That same day, Defendant filed a motion to compel the production of public records from the Office of the Attorney General, FDLE, the Dade County Jail, the Dade County Sheriff=s Department, the Clerk of the Circuit Court, the Department of Corrections, the Medical Examiner=s Office, the Hialeah Police Department, Sweetwater Police Department, the City of Miami Police Department, the Metro Dade Police Department, the Miami Beach Police Department, the Broward County Sheriff=s Office, FHP, the Office of the Circuit Court Clerk, the Office of the State Attorney for the Eleventh Judicial Circuit, the Office of the State Attorney for the Seventeenth Judicial Circuit and the Titusville Police Department. (PCR1. 129-34)

The City of Miami Beach Police responded that it had no records. (PCR1. 153) FHP and the City of Miami Police filed objections to the requests. (PCR1. 156-58, 162-63) Florida Department of Corrections and FDLE responded by producing some records and objecting to other requests. (PCR1. 168-85, 186-88)

On May 27, 1997, Defendant filed additional public records requests to Florida Department of Corrections, Office of the Medical Examiner of Dade County, Dade County Jail, Broward County Sheriff’s Office, the Clerk of the Eleventh Judicial Circuit, Office of the State Attorney of Palm Beach County, Office of the State Attorney of Broward County, Sweetwater

Police Department, FDLE, Metro-Dade Police Department, Hialeah Police Department, Miramar Police Department and Office of the State Attorney of Dade County. (PCR1. 196-81) These requests sought records regarding 103 named individuals, as well as Defendant, Garcia and the victims. *Id.* On May 28, 1997, Defendant also sent public records requests to individual officers with the Miramar Police and Hialeah Police. (PCR1. 817-93) The State Attorney's Office filed objections to this request. (PCR1. 1637-39)

On May 28, 1997, the court held a hearing on motion to compel. (PCR1. 1384-1421) At the hearing, the State waived its right to claim that the records were exempt because the trials of the codefendant had not been completed. (PCR. 1387-88) The State Attorney=s Office noted that it had fully complied with Defendant's request and was submitting the materials that it withheld from its public records compliance. (PCR1. 1390-92) Defendant asserted that he had not received all of the records from the State Attorney=s Office. (PCR1. 1392-99) The court ordered that the State Attorney=s Office records custodian give testimony under oath on this issue. (PCR1. 1402)

The Attorney General=s Office argued that Defendant=s motion to compel production of its records was improper because it had agreed to make its records available for inspection. (PCR1.

1411) However, Defendant never came to inspect the files. (PCR1. 1411-12) The court denied the motion to compel. (PCR1. 1413, 977-78)

On June 4, 1997, Defendant filed still more additional public records requests regarding Dudley Dixon, the Hialeah Gardens Police Department, the Sunrise Police Department, the Clerk of Courts for the Fifteenth Judicial Circuit, and the Clerk of Courts for the Seventeenth Judicial Circuit. (PCR1. 924-54)

On June 10, 1997, Defendant filed a supplemental motion to compel regarding FDLE. (PCR1. 979-81) The following day, Defendant filed a supplement motion to compel regarding the Department of Corrections and a separate motion regarding FDLE. (PCR1. 984-86, 987-89) On June 17, 1997, Defendant filed a supplemental motion to compel regarding the Florida Highway Patrol. (PCR1. 990-92)

The City of Miami Police, the Clerk of the Eleventh Judicial Circuit, the Florida Department of Corrections, the Metro-Dade Police and FDLE filed objections to Defendant's request. (PCR1. 993-94, 995-97, 1014-16, 1084-85, 1096-97, 1648-50)

On July 18, 1997, the court held another hearing on public records. (PCR1. 1465-1539) At this hearing, Luis Nieves, the

records custodian from the State Attorney=s Office, testified that he had the records from Defendant=s case copied and sent to Defendant. (PCR1. 1470-74) The State Attorney=s Office then resubmitted its materials for in camera inspection. (PCR1. 1475-77) Defendant also requested that the court review the exempt materials from the Attorney General=s Office, and the Attorney General=s Office agreed to provide that material to the court. (PCR1. 1477-78)

The State then began to argue about Defendant=s supplemental requests. (PCR1. 1478-80) The court interrupted and inquired of Defendant who the individuals named in the public records requests were. (PCR1. 1480-81) Defendant responded that he was merely seeking every record that might even be tangentially related to this matter. (PCR1. 1481) After a great deal of discussion on the requirements of Fla. R. Crim. P. 3.852 (1997), the court ordered the filing of memoranda on whether the requests should be considered under the rule or Chapter 119 of the Florida Statutes and the requirements of the rule. (PCR1. 1481-1513) The court also ordered that the requests be reviewed by the Capital Collateral Regional Counsel for the Southern Region to determine if they would be pursued. (PCR1. 1534-36)

On July 28, 1997, the State filed its memorandum, asserting that Fla. R. Crim. P. 3.852 was the only appropriate method for

obtaining publics to be used in pursuing post conviction relief and that Defendant bore the burden of showing that the records requested were relevant or calculated to lead to the discovery of relevant information. (PCR1. 1106-10) However, the State indicated that Defendant could request records for other purposes under Chapter 119, Florida Statutes. *Id.* Defendant responded that Chapter 119 gave him unfettered access to public records and that he was entitled to *Brady* material. (PCR1. 1119-27) Defendant's memo did not claim that Fla. R. Crim. P. 3.852 was unconstitutional or that it did not require him to show relevance. *Id.* On September 18, 1997, Defendant filed still more requests for additional public records directed to the Clerk of the Seventeenth Judicial Circuit. (PCR1. 1135-47)

On November 7, 1997,[2] the court again held a hearing on public records. (PCR1. 1427-35) At this hearing, the court found that it had to rule on the relevance and the burdensomeness of the public records requests. (PCR1. 1430-32) The court then requested that Defendant file a status report on public records, indicating which requests it was pursuing. (PCR1. 1432-33) Thereafter, the trial court stated that it

[2] The hearing was originally set for September 4, 1997. However, the hearing was continued because of the restructure of CCR. (PCR1. 1424-25)

would hear the issues of whether the remaining requests were relevant. (PCR1. 1433-34)

On January 9, 1998, another hearing on public records was held for Defendant to file his statute report and the trial court to hear the remaining issues. (PCR1. 1436-56) In this status report, Defendant acknowledged that his public records requests to the Hialeah Gardens Police Department, the Broward County Medical Examiner, the Metro-Dade Corrections, the Miami Beach Police Department, the Sweetwater Police Department, the Sunrise Police Department, and the Clerk of the Palm Beach County Court had been fulfilled. (PCR1. 1142-55) Defendant alleged that the Clerk of the Broward County Court had provided some records and needed additional identifying information to provide the rest. *Id.* He asserted that a hearing was needed on the objections and claims of exemptions from the Office of the State Attorney of the Eleventh Judicial Circuit, the Metro-Dade Police Department, the Miami Police Department, the Office of the Attorney General, the Department of Corrections, FDLE, the Clerk of the Dade County Court and the Florida Highway Patrol. *Id.* He also asked for a hearing on the costs of the records from the Hialeah Police Department, the Metro-Dade Police Department, the Dade County Medical Examiner and FDLE. *Id.* With regard to the Hialeah Police Department, Defendant also

asked that he be permitted to withdraw some of his requests with leave to reassert them. Defendant asked for an evidentiary hearing with regard to the assertion by the Office of the State Attorney of the Fifteenth Judicial Circuit that it had no responsive records. *Id.* Defendant alleged that he had received no responses from the Office of the State Attorney of the Seventeenth Judicial Circuit and the Broward County Sheriff's Office and only a partial response from the Miramar Police Department. *Id.* As such, Defendant requested that the court compel complete responses from these three agencies. *Id.*

At the hearing, the State asserted that the purpose of the hearing was to determine if the requests were being pursued, and if they were, whether they were proper. (PCR1. 1439-40) Defendant responded that the requests were all still being pursued. (PCR1. 1440) The State then outlined the history of the public records litigation regarding the State Attorney's Office and asked the trial court rule on its prior objections. (PCR1. 1441-45) Defendant contended that the agencies had to search for all of their records and produce them before they may claim that the request is not calculated to lead to the discovery of relevant information or unduly burdensome. (PCR1. 1445-50) During the course of the argument, Defendant acknowledged he had the burden of showing relevance. (PCR1.

1446-47) The court ruled that Defendant had the burden of showing that the request was calculated to lead to the discovery of relevant information before he would overrule the objections. (PCR1. 1452-53) Defendant asserted that he was unprepared to state the relevance of his requests, and the court reset the matter for Defendant to determine why the information he sought was calculated to lead to the discovery of relevant information. (PCR1. 1453-55)

On March 6, 1998, the court held a hearing on the outstanding public records issues. (PCR1. 1192-1219) At the hearing, Defendant was not even able to identify who the individuals about whom requests had been made other than Defendant, the codefendant and the victims were in relation to this matter. (PCR1. 1205-10) As such, the court determined that Defendant had not met his burden and denied the requests. (PCR1. 1210-11, PCR1-SR. 263) The court entered a written order denying the requests. (PCR1. 1298-1303) In its written order on the subject, the court granted a protective order for the Metro-Dade Police Department, the City of Miami Police Department, the Department of Corrections, FDLE, the Clerk of the Eleventh Judicial Circuit and the Florida Highway Patrol. *Id.*

Defendant sought to appeal this order. However, the appeal was dismissed, as the order was not an appealable order. *Pardo v. State*, 753 So. 2d 565 (Fla. 1999).

When the matter returned to the court, the Broward County Sheriff:s Office, and the City of Hialeah Police Department provided what records they had. FDLE provided the records responsive to all of the requests except for those related to the 102 unidentified individuals.

The court completed the in camera review of the information from the State Attorney:s Office and found that materials were not subject to disclosure. (PCR2-SR. 303) The court found that the charges for public records from the medical examiner and the Metro-Dade Police were reasonable and ordered the production of the records on payment of the charges.

With regard to the Miramar Police Department, the court accepted the testimony of the records custodian that all of the public records in its possession except for the personnel files of the officers had been disclosed. The court ordered the disclosure of the personnel files.

After all of the records were disclosed, Defendant moved to compel, asserting that certain records had not been provided. Specifically, Defendant alleged that he had not received tapes of the polygraph of Carlos Ribera, statements of Frank

Zuccerello, transcript of a recording or a copy of the recording made by Ernest Basan, tapes of the surveillance and search of Defendant=s home and the personnel records of officers from the Hialeah Police Department. Defendant was then provided with the tapes of the polygraph and a deposition of Zuccerello by the State Attorney=s Office. The Hialeah Police Department provided the personnel records. All of the agencies certified that there was no tape of the surveillance or search of Defendant=s home.

With regard to the Basan recording, the Miramar Police Department stated that it did not have a copy of this recording. The State Attorney=s Office explained that Basan had made this recording on his own and not at the behest of any law enforcement agency. The State Attorney=s Office explained that the codefendant=s counsel had a transcript of this tape that he had received from Basan directly and that it did not have a copy of the transcript or the tape. (PCR2-SR. 255) As such, this court denied the motion to compel. (PCR2. 397)

On June 25, 2001, Defendant finally filed his amended motion for post conviction relief, raising 11 claims:

> I.
>
> ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT=S] CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT. AND FLA. R. CRIM. P. 3.852, THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE

EIGHTH AMENDMENT AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. [DEFENDANT] CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIAL AND BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.

II.

[DEFENDANT] WAS DENIED AN ADVERSARIAL TESTING AT HIS CAPITAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION. THE SINGULAR AND COMBINED EFFECTS OF TRIAL COUNSEL=S ACTUAL CONFLICT OF INTEREST, THE STATE=S WITHHOLDING OF IMPEACHMENT EVIDENCE OF ITS STAR WITNESS, INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, AND NEWLY DISCOVERED EVIDENCE UNDERMINE CONFIDENCE IN THE RESULT OF [DEFENDANT=S] CAPITAL PROCEEDINGS.

A. TRIAL COUNSEL=S ACTUAL CONFLICT OF INTEREST.
B. UNDISCLOSED IMPEACHMENT EVIDENCE AS TO CARLOS RIBERA.
C. FAILURE TO SEEK SUPPRESSION OF EVIDENCE BASED ON SEARCHES WHICH LACKED PROBABLE CAUSE.
D. FAILURE TO SEEK SEVERANCE OF COUNTS.
E. COUNSEL=S AFFIRMATIVE INTRODUCTION OF DAMAING INFORMATION ABOUT [DEFENDANT].
F. UNDISCLOSED AND NEWLY DISCOVERED IMPEACHMENT EVIDENCE OF LEAD DETECTIVE.
G. FAILURE TO INVESTIGATE AND CHALLENGE [DEFENDANT=S] GUILT.
H. FAILURE TO REQUEST COMPETENCY DETERMINATION.
I. FAILURE TO MOVE FOR A CHANGE OF VENUE.
J. FAILURE TO INVESTIGATE UNDERLYING CAUSE FOR [DEFENDANT=S] INSANITY DEFENSE.

III.

[DEFENDANT] WAS INCOMPETENT TO STAND TRIAL AND UNDERGO CAPITAL SENTENCING. TRIAL COUNSEL=S FAILURE TO OBJECT TO [DEFENDANT] BEING FORCED TO STAND TRIAL DESPITE OBVIOUS INDICATIONS THAT [DEFENDANT] WAS INCOMPETENT VIOLATED [DEFENDANT=S] RIGHT TO DUE PROCESS AND WAS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. THE COMPLETE FAILURE OF BOTH THE DEFENSE AND COURT-APPOINTED MENTAL HEALTH EXPERTS TO DIAGNOSE A SEVERE PHYSICAL ILLNESS RENDERING [DEFENDANT]

INCOMPETENT VIOLATED [DEFENDANT:S] SUBSTANTIVE RIGHTS TO DUE PROCESS.

IV.

[DEFENDANT] WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERTS WHO EVALUATED HIM DURING THE TRIAL COURT PROCEEDINGS FAILED TO CONDUCT PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATIONS, AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE.

V.

[DEFENDANT] IS DENIED HIS FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POST-CONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING [DEFENDANT:S] LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

VI.

THE PROSECUTOR:S ARGUMENTS AT THE GUILT/INNOCENCE AND PENALTY PHASES PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, ANDWERE INFLAMMATORY AND IMPROPER, DEPRIVING [DEFENDANT] OF A FAIR TRIAL AND OF A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. DEFENSE COUNSEL:S FAILURE TO RAISE PROPER OBJECTIONS WAS DEFICIENT PERFORMANCE WHICH PREJUDICED [DEFENDANT] AND DEPRIVED HIM OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

VII.

THE TRIAL COURT:S RULINGS LIMITING THE CROSS-EXAMINATION OF A KEY STATE WITNESS AND LIMITING THE MATTERS ABOUT WHICH THE DEFENSE MENTAL HEALTH EXPERT COULD TESTIFY DEPRIVED [DEFENDANT] OF HIS RIGHTS TO CONFRONTATION AND TO PRESENT A DEFENSE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TO THE EXTENT DEFENSE COUNSEL FAILED TO

OBJECT, TO ARGUE EFFECTIVELY OR TO MAKE A PROFFER, COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

VIII.

[DEFENDANT=S] SENTENCES OF DEATH VIOLATE THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO [DEFENDANT] TO PROVE THAT DEATH WAS INAPPROPRIATE. FAILURE TO OBJECT OR ARGUE EFFECTIVELY RENDERED DEFENSE COUNSEL=S REPRESENTATION INEFFECTIVE.

IX.

FLORIDA=S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND FOR VIOLATING THE CONSTITUTIONAL GUARANTEE PROHIBITING CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, FOURTEENTH AMENDMENTS.

X.

AGGRAVATING CIRCUMSTANCES WERE OVERBROADLY AND VAGUELY ARGUED AND APPLIED, IN VIOLATION OF MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

XI.

[DEFENDANT=S] TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

(PCR2. 32-137) The State filed a response to the amended motion. (PCR2. 138-212)

On March 25, 2002, the lower court conducted a *Huff* hearing on Defendant's amended motion for post conviction relief. (PCR2. 227-68) At the hearing, Defendant requested an

evidentiary hearing on Claims II, III, IV, VI, VII and VIII. (PCR2. 230) Regarding the public records claim, the only argument asserted was that the State had a continuing duty to provide *Brady* material. (PCR2. 230-31) Defendant did not contest any of the State's factual allegations concerning the course of the public records litigation. *Id.* At the conclusion of that hearing, the Court granted Defendant an evidentiary hearing on three claims: (1) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose a videotape of a polygraph given to Carlos Ribera, (2) trial counsel was ineffective for withdrawing Defendant's motion to sever counts, and (3) trial counsel had a conflict of interest because he had entered into a media contract for the rights to Defendant's story that influenced his strategic decisions in this matter. (PCR2. 263-65)

The evidentiary hearing was originally set for June 13 and 14, 2002. (PCR2. 267) Based on the termination of the employment of Todd Scher with CCRC-South, the evidentiary hearing was reset.

During the pendency of the post conviction proceedings in this matter, Rolando Garcia was tried and acquitted of 3 additional counts of first degree murder: Michael Millot, Ramon Alvero and Daisy Richard. *Garcia*, 816 So. 2d at 558. Garcia

was convicted of the murders of Mario Amador and Robert Alfonso and sentenced to death. *Id.* On appeal, this Court reversed these convictions. *Garcia v. State*, 816 So. 2d 554 (Fla. 2002).

On remand, Garcia entered into a plea agreement with the State regarding the Amador and Alfonso murders and the Musa and Quintero murders.[3] (PCR2-SR. 4) Pursuant to the plea agreement, Garcia was convicted of second degree murder and sentenced to 25 years imprisonment. (PCR2-SR. 4)

On July 27, 2002, Defendant=s present counsel received permission to file an amendment to his amended motion for post conviction relief. Defendant also sought additional public records from the Office of the State Attorney. (PCR2-SR. 4) Over the State=s objection, the Court permitted Defendant to inspect the State Attorney=s file. (PCR2-SR. 4, 265, 278-301)

On September 12, 2002, Defendant filed his first supplement to his motion, adding a claim under *Ring v. Arizona*, 536 U.S. 584 (2002). (PCR2-SR. 27-47) After reviewing the entire State Attorney=s file, Defendant filed his second supplement. (PCR2-SR. 318-26)[4] This supplement added two claims: Garcia=s sentences constitutes newly discovered evidence bearing on the

[3]The Musa and Quintero murders had not been tried. *See Garcia v. State*, 816 So. 2d 554, 558 n.5 (Fla. 2002).

[4] The State has filed a motion to supplement the record with this and other documents. As such, the page number is an estimate.

proportionality of Defendant=s death sentences and the State Attorney=s Office has withheld public records regarding Garcia=s plea. *Id.*

The State filed a response to these supplemental claims. (PCR2-SR. 3-26) After a ***Huff*** hearing on these supplemental claims, the trial court denied these claims. (PCR2-SR. 259-69) The evidentiary hearing was finally conducted on June 25, 2003 and June 30, 2003. Prior to the evidentiary hearing, Defendant filed a written waiver of his right to be present at the evidentiary hearing. (PCR2. 271)

At the evidentiary hearing, Defendant presented the testimony of Richard Seres. (PCR2-SR. 55-89) Mr. Seres testified that in 1988, he and Ron Sachs were involved in a company named Global Projects, Inc. (PCR2-SR. 56-57) Global Projects was in the business of developing stories for movie production. (PCR2-SR. 56-57)

After seeing Defendant's penalty phase testimony on videotape, Mr. Seres and Mr. Sachs became interested in developing the story of Defendant's life and crimes into a movie of the week. (PCR2-SR. 58-59) As a result, Mr. Seres and Mr. Sachs contacted Ron Guralnick, Defendant's trial counsel by telephone. (PCR2-SR. 60) A meeting was set up between Mr. Seres, Mr. Sachs and Mr. Guralnick. (PCR2-SR. 60) Mr. Seres

did not remember exactly when the telephone call or the meeting occurred, but he did know that it was after Defendant had been sentenced. (PCR2-SR. 60) He also remembered that the meeting took place within a couple of weeks after the telephone call. (PCR2-SR. 62)

On May 18, 1988, Global Projects entered into an option agreement for the story rights to Defendant's life story. (PCR2-SR. 62-65) As a result of this agreement, Global Projects paid $5,000 to Ron Guralnick. (PCR2-SR. 71) Mr. Seres believed that this money was to be conveyed to Defendant's wife and daughter. (PCR2-SR. 82)

Through Mr. Guralnick, an interview was arranged between Defendant and Global Projects. (PCR2-SR. 67) Mr. Seres, Mr. Sachs, Mr. Guralnick and Defendant were present at this interview. (PCR2-SR. 67) The interview took place at the Dade County Jail before Defendant was transferred to state prison. (PCR2-SR. 67) Mr. Seres did not recall when this meeting occurred. (PCR2-SR.67)

Mr. Seres met with Defendant one additional time. (PCR2-SR. 68) This meeting occurred within a year of the first meeting and occurred in the state prison. (PCR2-SR. 68-69) The purpose of the meeting was so that the local version of a Current Affair could interview Defendant. (PCR2-SR. 69) Mr.

Seres, Defendant and a film crew from A Current Affair were present at the meeting. (PCR2-SR. 69-70) Mr. Seres did not recall if Mr. Guralnick or Mr. Sachs were present. (PCR2-SR. 85) The only person who received any payment as a result of this interview was Mr. Seres, who received a finder's fee for initiating the meeting. (PCR2-SR. 84)

At one of these two meetings, Mr. Seres had Defendant execute a waiver of privacy rights. (PCR2-SR. 66, 70) The waiver was executed on June 3, 1988. This waiver was to protect Global Projects. (PCR2-SR. 66, 81) Mr. Seres never discussed movie rights with Defendant personally because of the Son of Sam Laws. (PCR2-SR. 68, 72, 82)

Mr. Seres and Global Projects attempted to sell Defendant's story to a movie production company for some period of time. (PCR2-SR. 78) However, Mr. Seres was never successful because Defendant was an unsympathetic character. (PCR2-SR. 79) After a while, Mr. Seres lost interest in selling Defendant's story. Global Projects disbanded, and Mr. Seres placed his files in storage. (PCR2-SR. 73) Mr. Seres' files included materials he had received from Mr. Guralnick. (PCR2-SR. 61)

Based on the State's stipulation that the tape of the polygraph examination was in the possession of the Hialeah Police, was not provided to Defendant until after trial and was

authentic, the tape of the polygraphs was admitted. (PCR2-SR. 87-113) However, the State did not stipulate that the tape would have been admissible at trial. *Id.* The State insisted that Defendant had to lay a predicate to show that the tape would have been admissible at trial. *Id.* Defendant refused to call Mr. Ribera to lay the predicate for the admissibility of the tape at trial. *Id.*

The State also did not stipulate that the tape could not have been discovered through an exercise of due diligence on Defendant's part. *Id.* Instead, the State argued that the tape could have been discovered by asking either Ribera or the polygrapher if there had been a recording. *Id.* The State admitted the deposition of Mr. Ribera, in which the polygraph was discussed but no question regarding the recording of the polygraph was asked. (PCR2-SR. 113-15)

Ron Guralnick testified that he was Defendant's trial counsel. (PCR2-SR. 125-26) Mr. Guralnick had been admitted to practice in 1968, and had always concentrated his practice in criminal defense and personal injury/wrongful death. (PCR2-SR. 124) Mr. Guralnick had handled other first degree murder cases before he represented Defendant. (PCR2-SR. 124-25) Mr. Guralnick had handled hundreds of criminal cases. (PCR2-SR. 125)

Mr. Guralnick was retained by Defendant in this matter. (PCR2-SR. 126) Mr. Guralnick knew Defendant and had previously represented him successfully in a police brutality case. (PCR2-SR. 125-26) Defendant only paid Mr. Guralnick a nominal sum. (PCR2-SR. 187-88) However, Mr. Guralnick stated that he did not always charge clients for the full value of his services. (PCR2-SR. 187) In fact, he sometimes represented defendants on a pro bono basis. (PCR2-SR. 187) Mr. Guralnick stated that one of the reasons that he agreed to take a reduced fee in this case was that he personally liked Defendant and had many things in common with Defendant. (PCR2-SR. 187)

Mr. Guralnick did not recall asking to be appointed as a special assistance public defender in this matter but believed he must have done so since the county filed a written objection to such appointment. (PCR2-SR. 184-86) Mr. Guralnick recognized an unsigned draft of a motion to withdraw as counsel in this case because he could not afford to continue to represent Defendant but did not know if he ever filed it. (PCR2-SR. 188-92)

Mr. Guralnick denied contacting the media about selling Defendant's life story. (PCR2-SR. 235) Instead, Mr. Guralnick stated that the media contacted him after trial was over. (PCR2-SR. 235-36) Mr. Guralnick did not recall discussing media

rights with Defendant. (PCR2-SR. 194) However, he would have done so because he entered into the media rights contract. (PCR2-SR. 194) Mr. Guralnick stated that the media rights contract was made after trial. (PCR2-SR. 192-93) Mr. Guralnick stated that the $5,000 he received as part of this contract was funneled to Defendant's family. (PCR2-SR. 193, 236)

Mr. Guralnick knew Diane Jacques as a former client. (PCR2-SR. 195-96) Ms. Jacques has expressed an interest in producing a movie about Mr. Guralnick. (PCR2-SR. 197) Mr. Guralnick did not know if Defendant's case would have been a part of the movie but it may have been. (PCR2-SR. 197, 199) Mr. Guralnick did not know if he ever talked to Defendant about his case being part of the movie about Mr. Guralnick. (PCR2-SR. 197-98)

Mr. Guralnick recalled severance being an issue that was discussed. (PCR2-SR. 183) Mr. Guralnick stated that he decided to have all the murders tried together for a reason. (PCR2-SR. 232) The reason was that he thought that Defendant's best chance of being acquitted on an insanity defense was to try all the murders together. (PCR2-SR. 232-33)

Mr. Guralnick stated that there was a considerable period of time between Defendant's arrest and trial. (PCR2-SR. 127) During this period, Mr. Guralnick considered what defense to

present. (PCR2-SR. 127-28) Mr. Guralnick stated that his choice of an insanity defense evolved during the pendency of the case. (PCR2-SR. 127-28) Mr. Guralnick stated that this evolution occurred a substantial period of time before trial. (PCR2-SR. 203) Mr. Guralnick described this period as more than days or weeks. (PCR2-SR. 203) Mr. Guralnick recognized an order appointing Dr. Merry Haber to evaluate Defendant entered on March 14, 1988. (PCR2-SR. 128) Mr. Guralnick also recognized a transcript of a pretrial hearing at which the State was objecting that the notice of insanity was filed late. (PCR2-SR. 129-30, 142-44) However, Mr. Guralnick insisted that he had been thinking of asserting an insanity defense well before he filed the notice. (PCR2-SR. 239) Mr. Guralnick also stated that the doctor he used to support his insanity defense was Syvil Marquitt; not Merry Haber. (PCR2-SR. 210)

Mr. Guralnick decided to use an insanity defense because he thought that was the best defense in the case. Mr. Guralnick stated that he would not have defended this case on the basis of reasonable doubt because the State had overwhelming evidence against Defendant. (PCR2-SR. 144, 212-13) Included in the evidence was an admission by Defendant to Rudy Arias, a Miami River cop and fellow inmate, physical evidence and Ribera's testimony. (PCR2-SR. 233-34) Ribera's statements were

corroborated by the fact that .22 caliber weapons were used in all of the murders but the Millot murder, the articles Ribera claimed to have seen were in Defendant's diary and the body count was also in the diary. (PCR2-SR. 214-16)

Mr. Guralnick stated that he relied on discovery in preparing his case. (PCR2-SR. 149) However, Mr. Guralnick does not rely upon the State's representations that it has complied with its discovery obligations in determining whether he had full discovery. (PCR2-SR. 152) Mr. Guralnick stated that whether material provided in discovery was important depended on the nature of the material and what other information he had discovered. (PCR2-SR. 149)

In this case, Mr. Guralnick had his investigator look into Mr. Ribera's background. (PCR2-SR. 146) Through this investigation, he was aware that Mr. Ribera was considered a liar. (PCR2-SR. 147) Mr. Guralnick also had discovery about Mr. Ribera that included information about the polygraphs Mr. Ribera had taken. (PCR2-SR. 216-20) Mr. Guralnick took a voluminous, three day deposition of Mr. Ribera. (PCR2-SR. 147-48) He also had the sworn statements that Mr. Ribera had given to the police. (PCR2-SR. 216-17, 221, 237)

Mr. Guralnick had not watched the allegedly withheld tapes or read the transcripts of those tapes. (PCR2-SR. 130-31, 154)

As such, he could not say what effect having these tapes would have had on his trial preparation or strategy. If the tapes contained inconsistent statements, Mr. Guralnick may have used the statements. (PCR2-SR. 156) However, using any inconsistency would depend on the entirety of the case and the nature of the inconsistency. (PCR2-SR. 157-65, 178-81) If the tapes had shown that any material statement in the affidavit for the search warrant were false, Mr. Guralnick may have filed a motion to suppress. (PCR2-SR. 171-72) When confronted with alleged inconsistencies about Mr. Ribera's schooling, his description of Ramon Alvero's car, and his having seen a news report about the Musa/Quintero murders, Mr. Guralnick stated that he might have used this information but he might not have done so. (PCR2-SR. 157-65, 178-81) Mr. Guralnick stated that he would have wanted to know that the polygrapher called Mr. Ribera a liar and stated that he wanted Mr. Ribera to pass the polygraph. (PCR2-SR. 176-77)

Defendant presented no other evidence. (PCR2-SR. 241) The State did not present any testimony. However, it admitted into evidence the transcript of Ribera's trial testimony, the transcripts of Ribera's deposition and the transcript of Ribera's initial sworn statement. (PCR2-SR. 237-38)

After receiving post hearing memoranda from both parties, (PCR2. 322-67), the trial court denied the motion for post conviction relief on August 26, 2003. (PCR2. 368-88) This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly summarily denied the competency and alibi claims because they were insufficiently plead. The lower court also properly denied the *Brady* claim. Defendant failed to prove that the tape could have been used in any manner. Moreover, many of the uses that Defendant speculates the tape could have been used for were not possible. Moreover, there is no reasonable probability that Defendant would not have been convicted if he had the tape.

The lower court also properly denied the claim regarding severance. Trial counsel made a reasonable strategic decision to have the crimes tried together. The lower court also properly ruled on the public records issues.

ARGUMENT

I. THE LOWER COURT PROPERLY DENIED DEFENDANT'S FACIALLY INSUFFICIENT CLAIMS.

Defendant first asserts that the trial court erred in denying some of his claims without an evidentiary hearing. Specifically, Defendant asserts that he was entitled to an evidentiary hearing on his claim that counsel was ineffective for failing to request a competency hearing,[5] his claims regarding Defendant's competency, his claims that *Ake v. Oklahoma*, 470 U.S. 68 (1985), was violated and that counsel was ineffective for allowing it to be and his claim that counsel was ineffective for failing to investigate an alleged alibi regarding two of the murders. However, the claims were properly denied as facially insufficient.

Defendant first assails the trial court for not attaching portions of the record that refute his claims. However, this Court has held that a trial court does not have to attach portions of the record if it explains its rationale for denying the claims. *Patton v. State*, 784 So. 2d 380, 388 (Fla. 2000).

[5] Counsel mentions his claim that counsel was ineffective for the manner in which he presented the insanity defense. However, counsel makes no argument regarding presenting the insanity defense. Instead, he discusses the separate issue of his competency. Since Defendant has not presented any argument regard sanity, this issue has been waived. *See Anderson v. State*, 822 So. 2d 1261, 1268 (Fla. 2002)(failure to brief issue is a waiver of the issue).

Here, the trial court explained its rationale for denying the claims:

> G. FAILURE TO INVESTIGATE AND CHALLENGE [DEFENDANT'S] GUILT.
>
> Defendant next alleges that Mr. Guralnick provided ineffective counsel when he acknowledged that Defendant killed the nine people he was charged with murdering. As noted by collateral counsel, despite pleading not guilty, Defendant told the jury he killed all nine victims. (R. 3564) Defendant now alleges his wife could have provided him with an alibi for the Musa/Quintero homicides. Defendant does not allege what the alibi was or how the alibi could have changed the probability that he be convicted.
> Defendant testified that he killed all nine victims. (R. 3564) Even if his wife had testified and he had an alibi, given the fact that he confessed on the witness stand, the Defendant cannot now show that a different result would have been reached or show he was prejudiced. *Strickland*, *supra*.
> The claim is denied.
>
> H. FAILURE TO REQUEST COMPETENCY DETERMINATION.
> Defendant next alleges that Mr. Guralnick was ineffective in failing to have him evaluated for competency. Defendant alleges that when counsel gave notice of his intent to rely on the insanity defense, he stipulated to Defendant's competency. Prior to the Defendant testifying during the penalty phase, it is alleged that Mr. Guralnick stated that the Defendant was not competent to understand the effects of his statement. Defendant argues Mr. Guralnick should have immediately moved for a competency hearing.
> Defendant was evaluated for insanity and was also evaluated for competency by numerous experts. Dr. Marquit, the defense expert, testified that the Defendant was competent to stand trial. (R. 3509) the court appointed experts, Dr. Haber, Dr. Jacobson, and Dr. Miller, all found Defendant competent. (R. 3666, 3800, 3866)
> The issue was previously addressed by the Florida Supreme Court and rejected:

> Mr. Guralnick stipulated that his client was competent, and reiterated he only wanted a determination of sanity. The court-appointed experts examined Defendant, found him to be sane, and also determined that he was competent to stand trial. Thus, not only was there no reason for the court to have ordered a competency hearing, but also there was no prejudice to Defendant, as the hearing would not have benefited him.

Pardo v. State, 563 So. 2d at 79.

As Defendant was evaluated for competency, and the Supreme Court has already addressed this issue and determined that a competency hearing would not have benefited the Defendant, the claim is denied.

* * * *

J. FAILURE TO INVESTIGATE UNDERLYING CAUSE FOR [DEFENDANT'S] INSANITY.

Defendant alleges that days before trial, Mr. Guralnick submitted his motion to rely upon the insanity defense, based on Defendant's behavior and a doctor's report. The court then appointed Dr. Leonard Haber, Dr. Jacobson, and Dr. Miller, to evaluate the Defendant. Although they were appointed to determine sanity, they all concluded and testified that the Defendant was competent. According to the Defendant, while the doctors found him to be competent, the reports and testimony contain tell-tale signs of a hormonal and thyroid disorder, that were in fact alluded to, but dismissed with no further investigation. It is alleged that Mr. Guralnick failure to investigate the cause of Defendant's insanity was prejudicially deficient performance.

Mr. Guralnick, however, did investigate. When he determined that the Defendant's behavior was unusual, Mr. Guralnick had Defendant evaluated by Dr. Marquit. Mr. Guralnick reasonably relied upon the findings of Dr. Marquit, an expert in the field of mental health. Defendant points to the report and testimony of Dr. Jacobson, a medical doctor and psychiatrist. If a medical doctor did not diagnose a physical disorder, it can not be reasonably said that counsel was ineffective in failing to further investigate the cause of Defendant's insanity.

Mr. Guralnick sought expert assistance when he saw a problem with the Defendant's behavior. Defendant was then evaluated by other experts. Defendant cannot meet either of the prongs enunciated in *Strickland*, *supra*.

The claim is denied.

CLAIM III

[DEFENDANT] WAS INCOMPETENT TO STAND TRIAL AND UNDERGO CAPITAL SENTENCING. TRIAL COUNSEL'S FAILURE TO OBJECT TO [DEFENDANT] BEING FORCED TO STAND TRIAL DEPSITE OBVIOUS INDICATIONS THAT [DEFENDANT] WAS INCOMPETENT VIOLATED [DEFENDANT'S] RIGHT TO DUE PROCESS AND WAS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. THE COMPLETE FAILURE OF BOTH THE DEFENSE AND COURT-APPOINTED MENTAL HEALTH EXPERTS TO DIAGNOSE A SEVERE PHYSICAL ILLNESS RENDERING [DEFENDANT] INCOMPETENT VIOLATED [DEFENDANT'S] SUBSTANTIVE RIGHT TO DUE PROCESS.

Defendant alleges that he suffers from a severe thyroid disorder which manifested itself in physical changes that were apparent. His thyroid disorder was the cause of a severe mood disorder and clinical depression which rendered Defendant incompetent.

The Florida Supreme Court already addressed the issue of Defendant's competency. As previously noted:

> The court-appointed experts examined Defendant, found him to be sane, and also determined that he was competent to stand trial. Thus, not only was there no reason for the court to have ordered a competency hearing, but also there was no prejudice to Defendant, as the hearing would not have benefited him.

Pardo v. State, 563 So. 2d at 79.

This claim is procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

CLAIM IV

[DEFENDANT] WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMTNS, BECAUSE THE MENTAL HEALTH EXPERTS WHO EVALUATED HIM DURING THE TRIAL COURT PROCEEDINGS FAILED TO CONDUCT PROFESSIONAL COMPETENT AND

APPROPRIATE EVALUATIONS, AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE.

Defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to the proceeding. *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985). It is alleged that Mr. Guralnick failed to provide Defendant with a competent psychiatrist to conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense. It is alleged that the psychologist who testified as a defense expert, as well as the three experts appointed by the court, all failed to conduct proper evaluations.

It is undisputed that when sanity is an issue, a defendant is entitled to a mental health evaluation.

> [W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination.

Ake, 105 S. Ct. at 1096.

For this reason, the Supreme Court determined:

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose

> we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

Ake, 105 S. Ct. 1096.

A similar claim was made in *Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1994).

> Card claims that Ingles was ineffective because he did not provide background materials to the appointed mental health experts, including information from Card's mother and sister. Specifically, Card claims that Dr. Hord, as well as the other mental health experts who examined Card, erred in failing to conclude that Card suffered from organic brain damage and schizophrenia, and that the cause of this error was counsel's failure to provide the experts with materials from which such a diagnosis could be made. Card further claims that the conclusions of the experts, based on the information that was before them, were inadequate and reflected professional incompetence. He argues that had mental health experts been provided with the background information, and had they been competent, significant mental health mitigation would have been forthcoming.
>
> Card claims that counsel was deficient in failing to provide the following types of evidence, among others, to the mental health experts: (1) school records demonstrating Card's academic difficulties and poor performance; (2) juvenile court records; (3) records from various correctional institutions where Card was incarcerated; (4) Army records; (5) medical records from a medical center in Nevada; and (6) records from a VA hospital in Nevada. He further claims that counsel should have provided the experts with more detailed information from family members.
>
> Assuming arguendo that counsel did not in fact obtain these materials and provide them to the mental experts, we find that his failure to do so does not amount to

deficient performance within the meaning of *Strickland*. At the time that Card's sentencing hearing took place, Ingles had at least the following information relating to Card's mental health: (1) a September 31, 1981 report from Dr. Berland, a psychologist, finding Card competent to stand trial and concluding that he was sane at the time of the offense and appeared to have known the difference between right and wrong; (2) a September 23, 1981 report from Dr. Cartwright, a psychologist, resulting from four hours of evaluation, detailing the results of psychological tests, concluding that Card suffers from sociopathic personality and behavior problems, but finding that he was competent to stand trial and that at the time of the alleged offense, he was not insane, but knew the difference between right and wrong; (3) two written reports from October 10, 1981 and November 26, 1981, from Dr. Wray finding the defendant competent to stand trial, detailing aspects of his background, including his criminal record, violence, and infliction of self injury; and (4) one oral report from Dr. Wray concerning his interview with Card's parents and other information later contained in the January 27, 1982 letter. In addition, Dr. Hord himself conducted his own examination of Card, administered various tests, talked with family members, and consulted with Ingles before testifying at the penalty hearing.

There is no indication that the experts felt incapable of basing their conclusions on the information they obtained through their own testing and examinations. Nor is there any reason that, after receiving the experts' reports, counsel was obligated to track down every record that might possibly relate to Card's mental health and could affect a diagnosis. The reports of four mental health experts were unanimous in their conclusion

> **that Card had been sane at the time of the offense, and one report specifically discounted the existence of schizophrenia. Thus, counsel was not on notice that further investigation was warranted.** *See Strickland*, 466 U.S. at 690-91, 104 S. Ct. at 2066 (counsel may make reasonable decision that makes particular investigations unnecessary); *Foster*, 823 F.2d at 407 (where counsel has no cause to suspect that additional medical evidence would lead him to reassess his conclusion, counsel's decision not to pursue additional medical evidence was reasonable); *Funchess v. Wainwright*, 772 F.2d 683, 689 (11th Cir.1985), *cert. denied*, 475 U.S. 1031, 106 S. Ct. 1242, 89 L. Ed. 2d 349 (1986) (same). *Card*, 911 F.2d at 1512. (footnotes omitted, emphasis added.)
>
> This claim is denied.

(PCR2. 375-76, 378-82) Since the trial court adequately explained why it denied the claims, the fact that it did not attach portions of the record provides no grounds for reversal.

Moreover, Defendant attempts to convolve a variety of claims together to claim that assert that the lower court improperly denied claims competency. However, these claims concern separate issues that are evaluated under separate legal requirements. Defendant appears to be claiming that he was tried while actually incompetent, that his counsel was ineffective for failing to request a competency hearing and that *Ake* was violated and that counsel was ineffective for allowing it to be.

To establish a substantive incompetence claim that the defendant was in fact tried while incompetent, a defendant must alleged and prove that the defendant did not have a rational and factual understanding of the proceeding against him and could not assist his attorney. *Dusky v. United States*, 362 U.S. 402 (1960). In considering such a claim, the court is not limited to record evidence. However, a prior determination of competency is a finding of fact. *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990)("A state court's determination on the merits of a factual issue are entitled to a presumption of correctness on federal habeas corpus review. . . . We have held that a state court's conclusion regarding a defendant's competency is entitled to such a presumption."); *Maggio v. Fulford*, 462 U.S. 111, 117 (1983)(same). As such, to state such a claim sufficiently, a defendant must allege "'clear and convincing evidence [raising] a substantial doubt' as to his or her competency to stand trial." *James v. Singletary*, 957 F.2d 1562, 1572 (11th Cir. 1992). In determining whether the evidence is sufficient, it must be remembered that "neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial." *Medina v. Singletary*, 59 F.3d 1095, 1107 (11th Cir. 1995).

To allege a claim of ineffective assistance of counsel regarding a claim of incompetence, a defendant must allege specific factual deficiencies of counsel's performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). Because a finding of incompetence will result in the trial not being held until the defendant is restored to competency, the defendant must allege and prove that there is a reasonable probability that the trial court would have found the defendant incompetent but for counsel's alleged deficiency. *Futch v. Dugger*, 874 F.2d 1483, 1487 (11th Cir. 1989).

Moreover, *Ake* held that a defendant was entitled to appoint of an expert to assist in his defense when his mental state is in issue. However, this Court has acknowledged that competency experts are court experts. *Miami-Dade County v. Jones*, 793 So. 2d 902, 905 (Fla. 2001); *Parkin v. State*, 238 So. 2d 817, 821 (Fla. 1970); *accord United States v. Rinchack*, 820 F.2d 1557, 1565 n.10 (11th Cir. 1987)(independent competency experts are court witnesses); *United States v. Pogany*, 465 F.2d 72, 78-79 (3d Cir. 1972)(competency expert is a court witnesses). As such, *Ake* is not implicated.

Moreover, this Court has held that counsel is not ineffective for failing to see that *Ake* is not violated where

experts were appointed and defendant did not allege any additional steps counsel should have taken to prepare experts for evaluations. Moreover, this Court has held that counsel is not ineffective for failing to see that *Ake* is not violated where experts were appointed and defendant did not allege any additional steps counsel should have taken to prepare experts for evaluations. As such, Defendant needed to allege what counsel failed to do to prepare the experts for their evaluations in order to state a facially sufficient claim. This is true because "'counsel is not required to 'shop' for a psychiatrist who will testify in a particular way.'" *Card v. Dugger*, 911 F.2d 1494, 1513 (11th Cir. 1990)(quoting *Elledge v. Dugger*, 823 F.2d 1439, 1447 n. 17(11th Cir. 1987)).

With regard to the substantive incompetence claim, it was properly denied because Defendant did not allege clear and convincing evidence that he was in fact in competent at the time of trial. Defendant was evaluated by four doctors at the time of trial, who all found him competent. (R. 3509, 3666, 3800, 3866) Based on these evaluations, this Court rejected a claim on direct appeal that the trial court erred in failing to hold a competency hearing. *Pardo*, 563 So. 2d at 79. Retrospective competency evaluations are disfavored. *See Tingle v. State*, 536 So. 2d 202, 204 (Fla. 1988). As such, the fact that Defendant

has a new doctor who will opine at this late date that he has an "altered mental state" is insufficient to create a real, substantial and legitimate doubt regarding Defendant's competency. Since the claim was insufficiently pled, it was properly denied. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

With regard to the claim that counsel was ineffective for failing to request a competency hearing, this claim was properly denied. On March 22, 1988, Defendant filed a notice of intent to rely upon the defense of insanity. (R. 1433-34) Counsel indicated that he had not raised the issue previously because he had no reason to question his client's mental health. (R. 1436-37) On March 2, 1988, Counsel requested an evaluation based on Defendant's recent actions and filed the notice as soon as he had received the evaluation. (R. 1436-37)

When the State responded that the filing of the notice rendered Defendant no longer available for the trial that was scheduled to begin on March 28, 1988, Defendant asserted that he was not asserting that Defendant was incompetent. (R. 1437-38) The State contended that it needed time to have Defendant evaluated to counter the insanity defense. (R. 1437-38) The trial court then stated that it would expedite the evaluations and would hold a competency hearing on March 25, 1988. (R.

1438) Counsel responded that he was not alleging Defendant was incompetent, that his expert had found Defendant competent and that he was stipulating to Defendant's competency. (R. 1438-39)

The State continued to argue that the trial could not be conducted at the scheduled time because it had not seen the reports of Defendant's experts, had not had the opportunity to depose these experts and did not have time to have its experts evaluate Defendant. (R. 1439-40) The trial court responded by appointing Drs. Leonard Haber, Sanford Jacobson and Lloyd Miller to evaluate Defendant. (R. 1440) The trial court overruled the State's objection to Dr. Haber and refused to continue the case. (R. 1440-41) The trial court also ordered that reports be provided to the State and that the defense experts be made available for deposition. (R. 1441) Defendant responded that he did not have any reports but agreed to make the experts available for deposition. (R. 1441-42)

During trial, Dr. Marquit, the defense expert, testified that Defendant was competent to stand trial. (R. 3509) Defendant testified that Dr. Marquit was not the only expert to evaluate him. (R. 3599-3600) Drs. Haber, Jacobson and Miller, the court appointed experts agreed that Defendant was competent. (R. 3666, 3800, 3866)

As can be seen by the forgoing, counsel did have Defendant evaluated for competence. When Dr. Marquit found Defendant competent, counsel chose not to present that issue in an attempt to force the State to go to trial at a time when it was unprepared to counter his insanity defense. The mere fact that Defendant has now found a new doctor who is willing to testify that Defendant is incompetent does not show that counsel was ineffective. *Card v. Dugger*, 911 F.2d 1494, 1513 (11th Cir. 1990)("'counsel is not required to 'shop' for a psychiatrist who will testify in a particular way.'")(quoting *Elledge*, 823 F.2d 1439, 1447 n. 17(11th Cir. 1987)). This is particularly true because post hoc evaluations of competency are disfavored. *See Tingle v. State*, 536 So. 2d 202, 204 (Fla. 1988). As such, the claim was properly denied.

With regard to the *Ake* claim, the claim was properly denied. Defendant is not claiming that the trial court refused to appoint experts to assist him with defense. In fact, the trial court did appoint such experts. Instead, he is complaining about court appointed experts on competency. As such, *Ake* is not implicated.

With regard to the claim that counsel was ineffective for failing to see that the experts conducted proper evaluation, the claim was properly denied. Defendant did not assert below and

has not asserted here anything that counsel should have done to prepare the experts for their evaluations. As such, the claim was facially insufficient and properly denied. *See Thompson v. State*, 759 So. 2d 650, 655 (Fla. 2000). The fact that Defendant now has a new doctor who is willing to issue a different opinion does not show that counsel was ineffective. *Card v. Dugger*, 911 F.2d 1494, 1513 (11th Cir. 1990)(quoting *Elledge*, 823 F.2d 1439, 1447 n. 17(11th Cir. 1987)). The claim was properly denied.

Defendant next contends that the lower court improperly denied his claim that his counsel was ineffective for failing to challenge Defendant's guilt in the Musa and Quintero murders. However, the lower court properly denied this claim as facially insufficient. In asserting this claim, Defendant never alleged what the supposed alibi was or how presentation of this alleged alibi would have affected the outcome of the trial. (PCR2. 83-84) Instead, he merely asserted in a conclusory fashion that an alibi existed through his wife. However, such conclusory pleadings are insufficient to state a claim for relief. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998); *see also Nelson v. State*, 875 So. 2d 579 (Fla. 2004). The claim was properly summarily denied.

Moreover, it should be remembered that Defendant stated that he did kill Musa and Quintero. The scope of counsel's duty

to investigate is largely controlled by the information provided by the client. *Strickland*, 466 U.S. at 691. Where the defendant has informed his attorney that he in fact committed the crime, counsel is not ineffective for failing to investigate an alibi defense. *See Williamson v. Moore*, 221 F.3d 1177, 1180-81 (11th Cir. 2001). Moreover, given Defendant's confession in front of the jury, there is no reasonable probability that Defendant would not have been convicted even if counsel had presented the alleged alibi. *Strickland*. The claim was properly denied.

II. THE LOWER COURT PROPERLY DENIED THE *BRADY* CLAIM.

Defendant next asserts that the trial court erred in denying his *Brady* claim regarding the tapes of a polygraph examination of Carlos Ribera. Defendant asserts that the tape would have provided a basis for a motion to suppress and could have been used as impeachment at trial. However, the lower court properly denied this claim.

Initially, the State would note that Defendant misstates the standard of review. Defendant claims that "the third prong of Brady, whether the appellant was prejudiced by the non-disclosure of the favorable evidence, is a legal question which is subject to independent appellate review. State v. Rogers, 782 So. 2d at 377 (Fla. 2000); Way v. State, 760 So. 2d at 913 (Fla. 2000)." Appellant's Brief at 24. However, this Court has stated, "determining whether a reasonable probability exists that the disclosure of the suppressed evidence would have changed the outcome of the trial is **a mixed question of law and fact.**" *Rogers v. State*, 782 So. 2d 373, 377 (Fla. 2000)(emphasis added); *accord Allen v. State*, 854 So. 2d 1255, 1260 (Fla. 2003); *Way v. State*, 760 So. 2d 903, 913 (Fla. 2000)("[T]he ultimate question of whether evidence was material resulting in a due process violation is a mixed question of law and fact.") In reviewing a mixed question of law and fact, this

Court gives deference to the trial court's factual findings while reviewing its legal conclusions de novo. *Stephens v. State*, 748 So. 2d 1028, 1032-33 (Fla. 1999).

Moreover, to prove that a Brady violation occurred, a defendant must show not only that the allegedly suppressed evidence was material but also that the evidence was exculpatory or impeaching and that the State suppressed the evidence. *Way*, 760 So. 2d at 910. The question of whether the evidence is exculpatory or impeaching is a question of fact, as is the question of whether the State suppressed the evidence. *Allen*, 854 So. 2d at 1259. Questions of fact are reviewed to determine if they are supported by competent, substantial evidence. *Way*, 760 So. 2d at 911. Failure to disclose information that is not admissible does not support a *Brady* violation. *Wood v. Bartholomew*, 516 U.S. 1 (1995). Mere speculation that knowledge of inadmissible material might have affected the outcome is insufficient to show a *Brady* violation. *Id.* While some courts have considered *Brady* violated where the undisclosed information was not itself admissible, they have required proof that other evidence would have been found that would have been admissible or that another strategy would have been pursued in a specific manner. *Ellsworth v. Warden, N.H. State Prison*, 333 F.3d 1, 4-6 (1st Cir. 2003); *Hutchison v. Bell*, 303 F.3d 720, 744 (6th Cir.

2002); *Felder v. Johnson*, 180 F.3d 206, 211-12 (5th Cir. 1999); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999); *United States v. Dimas*, 3 F.3d 1015, 1017-20 (7th Cir. 1993).

In this case, Defendant asserts that the trial court should have found that he had proven that the failure to disclose the videotape of Ribera polygraph examination violated *Brady*. He asserts that he showed that disclose of the tape would have resulted in the suppression of evidence seized pursuant to a warrant to search Defendant's apartment. He also contends that the tape could have been used to impeach Ribera's testimony at trial and could have changed counsel's trial strategy and resulted in Defendant choosing not to testify. However, the lower court properly rejected this claim.

At the evidentiary hearing, Defendant did little more than place the tape in the record without even attempting to show that it would have been admissible at trial. The only additional evidence that he presented in support of the claim was Mr. Guralnick's testimony about the tape. However, Mr. Guralnick had never reviewed the tapes and was able to state little more than that he may have used the tape depending on the contents of the tapes. (PCR2-SR. 130-31, 154, 157-65, 171-72, 157-65, 178-81) However, Defendant bore the burden of proving his claim. *See Smith*

v. State, 445 So. 2d 323, 325 (Fla. 1983), *cert. denied*, 467 U.S. 1220 (1984). As the Court made clear in *Wood*, that burden is not carried by presenting inadmissible information and then relying upon speculation about how that information might have been useful. *Wood*, 516 U.S. at 6-8; *accord Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000). Since Defendant did not carry his burden of proof, the denial of this claim should be affirmed.

It appears that Defendant believes that the tape could have been used to impeach Ribera's credibility. However, the methods by which a witness may be impeached are limited by §§90.608, 90.609 & 90.610, Fla. Stat. Defendant has not really identified which of these limited methods would have allowed him to use the tape either in the trial court or in this court. In the lower court, it appears that Defendant was suggesting that the tape could have been used as a prior inconsistent statement under §90.608(1), Fla. Stat. However, before a prior inconsistent statement can be used to impeach, a proper predicate must be laid, including giving the witness the opportunity to explain or deny the prior statement. §90.614, Fla. Stat.; *Garcia v. State*, 351 So. 2d 1098, 1099 (Fla. 3d DCA 1977); *Urga v. State*, 104

So. 2d 43, 45 (Fla. 2d DCA 1958); *see also Brumbley v. State*, 453 So. 2d 381, 385 (Fla. 1984).

Here, Defendant never attempted to lay such a predicate. He did not call Ribera at the evidentiary hearing. Defendant, in fact, refused to lay any predicate even though the State argued that Defendant needed to show that the evidence would have been admissible at trial and the lower court agreed. (PCR2-SR. 87-113) As such, he failed to carry his burden of proof, and the lower court properly denied the claim. It should be affirmed.

The lack of a predicate is particularly important in this case. In his deposition, Ribera admitted that there were inaccuracies in his initial statements to the police. Exhibit 1, Vol. 2 at 110-11. He explained that these inaccuracies were the result of confusion resulting from the length of the interview. *Id.* As Defendant admits, Ribera was actually falling asleep during the interview on the tape. As such, it is entirely possible that given the opportunity, Ribera could have explained the alleged inconsistencies.[6] Moreover, had Ribera admitted making the inconsistent statements, Defendant could not have used the tape. *Jennings v. State*, 512 So. 2d 169, 172

[6] As noted, *infra*, many of the alleged inconsistencies do not actually exist. The answers are different because the questions were different.

(Fla. 1987). As such, Defendant's claim that they could have used the tape is entirely speculative without having demonstrated that he could in fact do so at the evidentiary hearing. Since Defendant refused to do so, he did not carry his burden of proof. *Wood*, 516 U.S. at 6-8; *accord Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000). The denial of the claim should be affirmed.

In addition, Defendant did not show that Ribera's demeanor during the interview, upon which Defendant extensively relies, could have been shown to the jury. Nothing in §§90.608, 90.069 & 90.610, Fla. Stat. permits the impeachment of a witness with his demeanor in giving a prior statement. Had Ribera admitted making the statements, Defendant could not have played the tape. *Jennings v. State*, 512 So. 2d 169, 172 (Fla. 1987). If Ribera denied making the statement, Defendant would only have been permitted to use those portions of the tape that were inconsistent with Ribera's trial testimony. *See Morton v. State*, 689 So. 2d 259, 262 (Fla. 1997)(to be admissible as impeachment, statement must be inconsistent); *Alexander v. Bird Road Ranch & Stables*, 599 So. 2d 229 (Fla. 3d DCA 1992)(same); *Jenkins v. State*, 586 So. 2d 1334 (Fla. 3d DCA 1991)(only inconsistent portions admissible). Defendant did not demonstrate how the jury would have been able to observe

Ribera's demeanor during brief statements that might have been inconsistent.[7] As such, he failed to prove that the tape could have been used in this manner. *Wood*, 516 U.S. at 6-8. The denial of the claim should be affirmed.

On appeal, Defendant adds that the tape might have been used to show that Ribera was on drugs at the time that he spoke to the police. However, this claim is not properly before this Court as Defendant did not make this assertion in the lower court. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003); *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988). As such, it provides no basis to reverse the lower court, which should be affirmed.

Even if this claim had been raised below, the lower court would still have properly denied the claim. In *Edwards v.*

[7] It is not even clear that a trial court would have allowed Defendant to show the brief snippets. The tapes have been transcribed. Since only the portion of the tape that was inconsistent could be used, the appropriate place on the tape would have to be located before it could be used. However, until Ribera actually testified, what inconsistent statements he would make could not be determined. Further, disputes regarding exactly how much of the deposition testimony must be read to put the impeachment in context are frequent. Thus, at the time of the impeachment, the jury would have to be excused. The proper tape would have to be found, and it would have to be cued to the proper location outside the presence of the jury. The tape would be played to only the point necessary for the impeachment and stopped. This procedure would interrupt the flow of the trial and result in unnecessary delays. As such, it seems more likely that a trial court would require use of the transcript.

State, 548 So. 2d 656 (Fla. 1989), this Court addressed the admissibility of evidence of a witness's drug use. This Court held that evidence of drug use for impeachment was only admissible if "(a) it can be shown that the witness had been using drugs at or about the time of the incident which is the subject of the witness's testimony; (b) it can be shown that the witness is using drugs at or about the time of the testimony itself; or (c) it is expressly shown by other relevant evidence that the prior drug use affects the witness's ability to observe, remember, and recount." *Id.* at 658. Here, Defendant's proffered use of the tape does not meet any of these conditions. In fact, Defendant does not even have evidence that Ribera was using drugs at the time the tape was made, which Ribera specifically denied on the tape. Exhibit F, Tape 1 at 27. Instead, Defendant is merely relying upon speculation about Ribera's condition. However, a defendant is not permitted to rely on such speculation after an evidentiary hearing. *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000). Since the assertion is based on unsupported speculation and does not meet the standard for admissibility under Florida law, the tape could not have been used in the manner Defendant suggests. The lower court would have properly rejected Defendant's claim had it been raised. It should be affirmed.

Even if Defendant had lay a proper predicate for using the tape as impeachment, the denial of the claim should still be affirmed because the tape could not have been used in the manner that Defendant suggests. Defendant asserts that he could have used the tape to show that the polygrapher questioned Ribera credibility on numerous occasions. However, Florida law does not permit one witness to comments on another witness's credibility. *Tingle v. State*, 536 So. 2d 202 (Fla. 1988). Since the polygrapher's accusations were not admissible, they cannot support *Brady* violation. *Wood*, 516 U.S. at 6-8. The denial of the claim should be affirmed.

Defendant also suggests that the tape could have been used in a motion to suppress. The theory upon which Defendant believes that a motion to suppress should have been litigated is not entirely clear. Defendant states numerous times that the affidavits for the search warrant lacked probable cause but cites to *Franks v. Delaware*, 438 U.S. 154 (1978), and its progeny regarding intentional misstatements in search warrant affidavits. However, the claim was raised based on using the tape.[8] As such, it appears that Defendant is not making a facial

[8] In his post conviction motion, Defendant asserted that his counsel was ineffective for failing to use the tape to raise a motion to suppress. (PCR2. 62-75) After the State responded that counsel could not be ineffective for failing to use the

claim to the search warrant but is raising the claim under *Franks* and its progeny.

However, Defendant did not prove that such a challenge could have been or would have been made. At the evidentiary hearing, Mr. Guralnick could only say that he might have moved to suppress if he had the tape. (PCR2-SR. 171-82) However, such speculation is insufficient to establish a *Brady* violation. *Wood*, 516 U.S. at 6-8; *accord Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000).

Moreover, Defendant had to establish that had the tape been disclosed, there is a reasonable probability that the result of the trial would have been different. *See Way v. State*, 760 So. 2d 903, 912 (Fla. 2000). Thus, contrary to Defendant's assertions, he needed to prove that had the tape been disclosed, a motion to suppress would have been made, at least a reasonable probability that it would have been granted and a reasonable probability that the result of the trial would have been different. Here, this did not occur. As such, the claim was properly denied, and the denial should be affirmed.

In order to raise a suppression issue under *Franks*, such that an evidentiary hearing is even required:

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tape if the tape was suppressed (PCR2. 170-73, the trial court allowed Defendant to "amend" his motion orally at the *Huff* hearing to state the claim as a *Brady* claim. (PCR2. 249)

> the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing.

Franks, 438 U.S. at 171-72. Moreover, once a hearing is granted, the defendant bears the burden of proving that the affiant made false statements in the affidavit knowingly, intentionally or with reckless disregard for the truth that were necessary to the finding of probable cause. *Id.* at 155-56. This Court has expanded *Franks* to omissions for a search warrant. *Johnson v. State*, 660 So. 2d 648, 655-56 (Fla. 1995). However, to raise a claim based on an omission, "the *Franks* standard applies to alleged omissions from probable cause affidavits except that (1) the reviewing court must determine whether the omitted material, if added to the affidavit, would

have defeated probable cause, and (2) the reviewing court must find that the omission resulted from intentional or reckless police conduct that amounts to deception. *Id.* at 656.

Here, it is unclear whether Defendant is asserting that the affidavit included false statement or omitted material or both. This is so because Defendant does not specifically identify those portions of the affidavit are false or missing. Instead, Defendant launches into a general attack on Ribera's credibility. Of course, Ribera was not the affiant for the search warrant; Det. Flutie was. (R. 140-50) Defendant has never alleged, and did not prove, that Det. Flutie made any of unspecified false statements or omissions knowingly, intentionally or with reckless disregard for the truth. For these reasons alone, Defendant failed to prove that the tape could have been used at a motion to suppress. *Franks*; *Johnson*. The claim was properly denied.

Defendant appears to imply that the statement in the warrant that "[m]ost of the details about the homicides that the source knew were never broadcast in any press or media accounts"[9]

[9] In the affidavit, Det. Flutie states that Ribera provided details about the homicides, such as the cause of the victims' deaths, the clothing of the victims, particular physical features of the victims, what was taken from the victims during the crimes and where Robledo's credit cards were used. (R. 140-50)

(R. 140) is false because Ribera stated on the tape that he learned that Musa and Quintero had been murdered on television. However, knowing that the victims had been killed from the media does not show that the statement regarding **details** of the homicides was false. *See Maharaj*, 777 So. 2d at 956 (describing requirements to show that statement is false). This is particularly true when one considers that on the tape, Ribera stated that he believed that Musa and Quintero had been killed because he saw a television report of a homicide that showed the exterior of their apartment building. Exhibit F, Tape 2 at 19, 46, Tape 4&5 at 26-27. He did not even hear the victims' names from the media. *Id.* Since the statement was not even false, it could not have been false knowingly, intentionally or with reckless disregard for the truth. As such, it would not have supported a motion to suppress. *Franks*. The claim was properly denied.

Defendant also appears to imply that Det. Flutie knowingly, intentionally or with reckless disregard for the truth omitted the circumstances of the polygraph. Defendant seems to contend that these circumstances would have shown that Ribera was coached in his statements by the polygrapher's offers to help Ribera tell the truth. However, Defendant fails to note that when the polygrapher accuses Ribera of lying and offers to help,

Ribera insists that he is telling the truth about his knowledge of the crimes,[10] and the polygrapher does not provide information to Ribera. Exhibit F, Tape 2 at 22-26,.29-36, 67-76, Tape 3 at 39-49. As such, Defendant does not explain how presenting this evidence would show that Ribera's statement was coached, much less that the addition of this information was a deliberate attempt to deceive the magistrate. As such, this information would not have supported a motion to suppress. *Johnson*. Thus, the claim was properly denied.

Moreover, the one incident of coaching that the tape reveals would not have defeated probable cause had it been added and had Defendant shown that its omission was a deliberate attempt to deceive the magistrate. The tape revealed that Ribera had believed that the room that Defendant entered to prepare to kill Ledo and Robledo was on a separate floor of their apartment but that Ribera had been told that the apartment was only one floor.[11] Exhibit F, Tape 1 at 89. The affidavit established that Ribera's credibility was determined by verifying information that Ribera had provided and by Ribera's knowledge of details of the crime that were not known to the

[10] Ribera did admit that he had wanted to get into drug trafficking. Exhibit F, Tape 2 at 30.

[11] It is possible that Ribera was confused because Alfonso and Amador were killed in a two story building.

public. (R. 140-50) This information would have been sufficient to establish probable cause even if the additional fact about the polygraph examination had been included. *See Illinois v. Gates*, 462 U.S. 213 (1983). As such, the claim the claim was properly denied. It should be affirmed.

While Defendant also asserts that the tape could have been used to impeach Ribera at trial, the lower court would properly have denied this claim even if Defendant had attempted to lay a predicate for doing so at the evidentiary hearing. Many of the inconsistencies that Defendant alleges exist simply do not. Instead, the difference in the answers is attributable to the difference in the questions. Since the answers are not inconsistent, they could not have been used for impeachment. *See Morton v. State*, 689 So. 2d 259, 262 (Fla. 1997)(to be admissible as impeachment, statement must be inconsistent); *Alexander v. Bird Road Ranch & Stables*, 599 So. 2d 229 (Fla. 3d DCA 1992)(same).

Defendant first asserts that there is an inconsistency between the tape and trial testimony concerning Ribera's level of education. However, at trial, Ribera was asked:

Q. Have you gone to school in Dade County, Florida?

A. Yes.

Q. How far did you go in school in Dade County?

A. Tenth grade.

Q. What school did you go to for tenth grade?

A. Miami Springs Senior High School.

(R. 2157) In the tape, Ribera was asked, "Education, how high have you gone in education." Exhibit F, Tape 1 at 22. Ribera responded that he had received his GED from Hialeah High. *Id.* In fact, Ribera explained during his deposition that he attended high school through the tenth grade at Miami Springs High School and received his GED fro Hialeah High School. Exhibit 1, Vol. 1 at 3, 115. Given that the questions were not the same and the reason why the answers appear different had been explained at deposition, it cannot be said that the alleged inconsistency could have been used to impeach Ribera. *Morton*; *Alexander*.

The same is true of the alleged inconsistency regarding where Ribera met Defendant. At trial, Ribera stated that he met Garcia at Rainbow Video and met Defendant at the same time. (R. 2158) He later stated that he was formally introduced to Defendant at his brother-in-law's son's christening. (R. 2161) In the tape, Ribera stated that he met Garcia and Defendant at Rainbow Video. (Exhibit F, Tape 1 at 29-32, Tape 2 at 39) Since Ribera admitted meeting Defendant at Rainbow Video at trial and merely stated that he was formally introduced to Defendant at a later time, the statements were not inconsistent.

As such, they could not have been used to impeach Ribera at trial. The claim was properly denied.

Regarding his employment at Rainbow Video, Ribera consistently states on the tape that he was clerking at the video store. Exhibit F, Tape 1 at 30, 39-40, 42. Ribera never claims to be involved in more than assisting to run the store. As such, there is no inconsistency. Ribera could not have been impeached. *Morton*; *Alexander*. The claim was properly denied.

Regarding the timing of being shown picture, Defendant ignores that Ribera stated that he was shown pictures on several occasions at several different places. He was shown some during meetings at Defendant home. He was shown others during a time when Garcia visited Ribera's home. Given that Ribera was shown photographs on different occasions, the fact that he stated this does not make the statements inconsistent. Since the statements were not inconsistent, they could not have been used to impeach Ribera. *Morton*; *Alexander*. The claim was properly denied.

Regarding the alleged inconsistency about being allowed in Defendant's home, the tape itself does not support a claim that Ribera made an inconsistent statement when read in context. Ribera is asked if he ever heard Defendant discuss Musa and Quintero's murder. Exhibit F, Tape 4&5 at 41. Ribera explains that he did not and explains his interaction with Defendant

concerning Musa and Quintero. *Id.* at 41-42. During this discussion, Ribera states that he was not allowed in Ribera's house and then immediately clarifies that this was true until recently when Defendant started to trust him. *Id.* at 42-43. Given the full context of the statement, it is clear that Ribera merely meant that he was not allowed in Defendant's home during his initial association with Garcia but had been in recent weeks. As such, the statement was not inconsistent and could not have been used to impeach Ribera. *Morton*; *Alexander*. The claim was properly denied.

Regarding the alleged discrepancy about when he "first" saw the credit cards, there is no discrepancy. Ribera never says that he first saw the credit cards in either location. Instead, he describes seeing credit cards at different locations at different times. Moreover, Ribera indicates that there is more than one credit card. As such, there is no inconsistency.

Regarding the alleged "flip-flop" about who was the killer, again the tape in context does not support the claim that a "flip-flop" exists. On the tape, Ribera describes Defendant as the "killing machine" and Garcia as the brains of the drug dealing. Exhibit F, Tape 1 at 52. Later, Ribera continues to insist that Defendant is the killer and Garcia the idea man but

that Garcia would not do anything without Defendant's approval. Exhibit F, Tape 2 at 22. As such, there is no discrepancy.

Moreover, even if Defendant had shown inconsistencies that he proved could have been presented at trial, Defendant would still not be entitled to any relief. Defendant was aware that Ribera had made the inconsistent statements at issue. Defendant was provided with an initial statement Ribera had given the police. Defendant also took an extensive three day deposition of Ribera. Through these, Defendant learned that Ribera had stated that the car driven by Ramon Alvero, El Negro, was a Buick, Cadillac or Oldsmobile. Exhibit 3 at 12, 14, 36. Ribera also stated that he had heard of the Musa/Quintero murder on television. Exhibit 3 at 48, 100-01. Ribera stated that Robledo's apartment had two stories. Exhibit 3 at 8-9. He discussed seeing different pictures at different times and different places. Exhibit 3 at 50-54. Ribera stated that he had received his GED from Hialeah. Exhibit 1, Vol. 1 at 3. He also stated that he attended school through tenth grade at Miami Springs Senior High before dropping out and receiving his GED. Exhibit 1, Vol. 1 at 115. He also said that he worked at Rainbow Video and being paid for the work. Exhibit 1, Vol. 1 at 7, Vol. 2 at 59, Vol. 3 at 34, 91-92, 107-08. Ribera testified in deposition that he met Defendant at Rainbow Video. Exhibit

1, Vol. 1 at 35, 44, 57, Exhibit 1, Vol. 3 at 46. However, Ribera stated that he did not speak to Defendant during this meeting. Exhibit 1, Vol. 3 at 46. Since Defendant already knew that Ribera had made these allegedly inconsistent statements, it cannot be said that the State violated *Brady* by failing to disclose them. *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000)(“Although the "due diligence" requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.”)(quoting *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000)). The claim was properly denied.

Moreover, even if Defendant had shown that he could have used the tape, the claim should still be denied. There is no reasonable probability that Defendant would not have been convicted. *See Way v. State*, 760 So. 2d 903, 912 (Fla. 2000). Defendant admitted committing all nine murders on the witness stand before the jury. Defendant’s diary included clipping and information about the murders he committed. Defendant’s car was shown to have blood and bullets consistent with the murder of Millot. Defendant was identified as being present when weapon

consistent with those used in the murders were purchased using one of the victim's credit cards. Moreover, Ribera was extensively impeached at trial. Det. MacArthur also testified that Ribera provided information about these murders that was incorrect. (R. 2412-13) Ribera was wrong about the type of car Millot drove and where it was dumped and which victim had a brother in the narcotics trade. *Id.* Under these circumstances, the limited additional impeachment that the tape may have provided would not have created a reasonable probability of a different result at trial. The claim was properly denied.

Defendant finally suggests that the important of the tape was that it might have affected counsel's trial strategy or Defendant's decision to testify. However, Defendant never presented any evidence that affected either the strategy or the decision. The only evidence presented was that Mr. Guralnick might have considered using the tape for impeachment and might have considered using it to support a motion to suppress. However, in *Wood*, the Court stated that such speculation is insufficient to prove a *Brady* claim. *Wood*, 516 U.S. at 6-8. As such, Defendant's speculation about what might have been is insufficient to support this claim. It was properly denied.

Moreover, Defendant's speculation is inconsistent with the evidence actually presented at the evidentiary hearing.

Defendant characterizes the decision to pursue an insanity defense as a last minute decision and that a reasonable doubt defense would have been pursued if the tape had been disclosed. However, Mr. Guralnick testified at the evidentiary hearing that the decision to pursue an insanity defense was not a last minute decision. It was a decision that evolved over a substantial period of time that was more that weeks or days. (PCR2-SR. 127-28, 203) Moreover, Mr. Guralnick stated that his decision not to pursue a reasonable doubt defense was based on a confession that Defendant had made to another inmate, the physical evidence and the corroboration of Ribera's statement by other evidence.[12] Mr. Guralnick made this decision despite having conducted an independent investigation of Ribera and being fully aware that he could impeach Ribera. Given the evidence that was actually presented at the evidentiary hearing, it is clear that Defendant's speculation is contrary to the actual evidence presented. The claim was properly denied.

Moreover, Defendant presented nothing at the evidentiary hearing to show that Defendant would not have testified if Ribera had been impeached. Defendant did not at the hearing that he chose not to attend. Moreover, it should be remembered

[12] This additional evidence distinguishes Defendant's case from that of Garcia.

that Defendant testified against the advice of his counsel. While Defendant did express a desire to testify to refute Ribera's testimony, Defendant makes it clear that Defendant wanted to testify that Ribera was a drug dealer who he used to find drug dealers to kill and that Defendant was not a drug dealer. (R. 3563-3645) Defendant does not explain how impeaching Ribera would have lessened his desire to address this aspect of Ribera's testimony. Since Defendant did not prove that he would not have testified had Ribera been impeached, the claim was properly denied. *Wood*, 516 U.S. at 6-8.

III. THE TRIAL COURT PROPERLY FOUND THAT THE DECISION TO HAVE ALL THE COUNTS TRIED TOGETHER WAS A REASONABLE STRATEGIC DECISION.

Defendant next contends that the trial court erred in denying his claim that counsel was ineffective for withdrawing his motion to sever and having all of the crimes with which Defendant was charged tried at once. However, the trial court properly rejected this claim based on direct testimony that counsel made a strategic decision to proceed as he did.

It is well established that a strategic decision made after a full investigation of the facts and law is virtually unchallengable. They may only be overturned if they were "so patently unreasonable that no competent attorney would have chosen it." *Haliburton v. State*, 691 So. 2d 466, 471 (Fla. 1997)(quoting *Palmes v. Wainwright*, 725 F.2d 1511, 1521 (11th Cir. 1984)(quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983))). Moreover, in reviewing a trial court's decision on a claim of ineffective assistance of counsel, this Court gives deference to the lower court's factual findings while reviewing its conclusion on deficiency and prejudice de novo. *Stephens v. State*, 748 So. 2d 1028, 1032-33 (Fla. 1999).

Here, the trial court rejected this claim because counsel made a strategic decision to proceed with one trial on all the counts. (PCR2. 374) Defendant did not present any evidence

that counsel did not full investigate the facts and the law before making this decision. He does not even contend to this Court that counsel did not investigate the facts or the law. As such, the trial court properly rejected this claim on the grounds that it was a virtually unchallengeable strategic decision. It should be affirmed.

Defendant first appears to attack the trial court's finding that counsel made a strategic decision to have all the cases tried together. However, the question of whether counsel made a strategic decision is a question of fact. *Bolender v. Singletary*, 16 F.3d 1547, 1558 n.12 (11th Cir. 1994). Here, there is competent, substantial evidence to support the trial court's finding that counsel made a strategic decision. Counsel directly testified that he made a strategic decision and the basis for it. As such, it should be affirmed.

Moreover, the record from the time of trial indicated that counsel had made a strategic decision, in consultation with Defendant and without his objection. At the hearing on February 2, 1988, Defendant announced that he was seeking severance both of the counts charged in the indictment in case no. F86-12910A and of the defendants. (R. 1405) At the hearing on March 24, 1988, the trial court originally granted the motion for severance of defendants based on its belief that Defendant's

insanity defense would result in admission from Defendant that Garcia committed the crimes with him. (R. 1476-1517) The trial court refused to hear from Defendant about severance of counts but did hear Garcia's motion and granted him severance only of the Musa/Quintero counts. (R. 1522-37)

The following morning, the State pointed out that Defendant was not implicating Garcia, and the trial court reconsidered its prior ruling on the severance of defendants, which in now denied. (R. 1549-61) Defendant subsequently joined Garcia's motion to sever the Musa/Quintero counts, which was granted. (R. 1577) The trial court then proceeded with the joint trial, which ended in a mistrial during the testimony of Ribera, the first witness. (R. 35-45) After the mistrial, the trial court severed Garcia on Garcia's motion. (R. 45)

Once Defendant was being tried alone, Defendant withdrew his motion to sever any of the counts and moved the trial court to consolidate the two indictments for trial. (R. 1840-42) The trial court allowed all of the counts on both indictments to be tried jointly at Defendant's request. *Id.* During its ruling, the trial court noted:

> But in view of his defense he feels, obviously, and I can see why, it best to try his client on all counts, waiving those motions to sever.

Defendant did not contest the trial court's observation that he was making a strategic decision. Later during jury selection, the State asked the trial court to confirm that counsel had consulted with Defendant before deciding to consolidate all of the charges and that Defendant had no objection to proceeding in this manner. (R. 1908) The trial court announced that it had seen counsel consult with Defendant, counsel acknowledged that such consultation had occurred and Defendant did not object. (R. 1908) Given the both the testimony from the evidentiary hearing and the record from the trial, the lower court properly found that counsel had made a strategic decision it should be affirmed.

Defendant claims that counsel lied at the evidentiary hearing about why he chose to have the crimes tried together and that the real reason for the consolidation was counsel's financial condition do not change this result. However, Defendant presented nothing to show that counsel was anything but candid with the court regarding this testimony. In fact, while Defendant introduced the drafts of the motion to withdraw, he never even asked counsel if his financial condition influenced his decision to have all the charges tried together. Moreover, determinations of the credibility of the evidence are the job of the trial court. *See Roberts v. State*, 840 So. 2d

962, 973 (Fla. 2002). As such, the allegation that trial counsel lied about his reasons for having all the counts tried together does not show that counsel's decision was unreasonable. The denial of the claim should be affirmed.

Defendant's claim regarding counsel's financial condition also provides no grounds for reversal. Defendant never even asked counsel at the evidentiary hearing if the grounds asserted in the draft of the motion influenced his decision to seek severance. Instead, he merely had counsel identify the handwritten draft of the motion as being in his handwriting and a typed copy of the draft as being typed from the handwritten draft. (PCR2-SR. 188-91) He then asked counsel if anything changed after he drafted the motion that permitted counsel to represent Defendant and counsel indicated that something had. (PCR2-SR. 191-92) Defendant now asks this Court to speculate that, despite counsel's actual testimony, counsel sought to have the crimes all tried together because of his financial condition. However, such speculation does not show that Defendant carried his burden of proof. *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000). This is particularly true here given the unreasonableness of the speculation. The draft of the motion to withdraw, which was never filed, was dated January 1987. Counsel did not seek to have all the counts tried at once

until March 31, 1988, after a mistrial. Until that time, counsel was seeking severance and had actually obtained severance of the Musa/Quintero counts. Additionally, the Millot crimes had been charged in a separate indictment. Defendant does not even attempt to explain, let alone prove, why counsel would have continued to seek severance for more than a year after drafting the motion if the grounds asserted in the motion were the reason for seeking to have all the crime tried together, especially given that whatever prompted counsel to draft the motion did not even compel him to file the motion. Given the speculative nature of Defendant's claim, it does not show that trial court improperly rejected Defendant's assertion over counsel's direct testimony. The denial of the claim should be affirmed.

Finally, Defendant finally attempts to avoid the fact that counsel made a strategic decision by claiming that counsel's strategy was unreasonable because counsel did not directly state that the insanity defense was strengthened by the number of murders and the number of murders would not have strengthen the insanity defense. However, these arguments do not show that counsel's strategic decision was unreasonable.

Counsel did testify that Defendant had little chance of winning all of the cases given the State's evidence. (PCR2-SR.

233) Counsel then added, “So it was my opinion with an insanity defense, if they’re all joined in one case, that if the jury believed he was insane, then he was a total winner.” *Id.* Given this statement, it was not unreasonable for the trial court to infer that counsel believed that the insanity defense was stronger will all of the murders in one case. This is particularly true in the context of a claim of ineffective assistance of counsel claim, where counsel’s actions are presumed to be effective and to have made a strategic decision. *Strickland v. Washington*, 466 U.S. 668, 689 (1984)(“[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’”). The denial of the claim should be affirmed.

Moreover, the number of murders did tend to strengthen the insanity defense. Defendant’s insanity defense was premised on the testimony of Dr. Marquit that Defendant was compelled to kill people by unconscious impulses. (R. 3493-94, 3497) Defendant became fixated on drug dealers and concentrated his homicidal compulsion on them. (R. 3499-3500) According to Dr. Marquit, this developed into a delusion that by killing drug

dealers, Defendant was not killing people but exterminating vermin. (R. 3502) Dr. Marquit stated that the source of Defendant's compulsions and fixations was paranoid schizophrenia. (R. 3506) Given the nature of the testimony, the more times that Defendant had been compelled to act on his delusion, the more it seemed that Defendant actually suffered from the delusion and could not control himself. As such, the murder of murders did strengthen the insanity defense. The denial of the claim should be affirmed.

IV. THE PUBLIC RECORDS CLAIM PRESENTS NO REASON TO GRANT DEFENDANT RELIEF.

Defendant next asserts that the trial court abused its discretion[13] in sustaining objections and granting protective orders regarding his requests to numerous state agencies for every record that mentions 103 named individuals. Defendant also appears to complain about other unspecified ruling regarding public records disclosure and the failure to order disclosure of a tape recording made by Ernest Basan. Defendant contends that Fla. R. Crim. P. 3.852 is unconstitutional because it requires that Defendant review records at the repository and that he show the records are relevant. However, the lower court did not abuse its discretion in its rulings on the public records issues. Moreover, Defendant has not sufficiently alleged part of the claim, and the claim regarding the constitutionality of Fla. R. Crim. P. 3.852 is unpreserved and without merit.

With regard to the claim about the sustaining of objections and granting of motions for protective order, pursuant to Fla. R. Crim. P. 3.852(m) (1996), the scope of public records disclosure pursuant to the rule was limited to those records

[13] This Court reviews a trial court's ruling on public records disclosure for an abuse of discretion. *Tompkins v. State*, 872 So. 2d 230, 243 (Fla. 2003).

that are relevant to the subject matter of the post conviction proceedings. This Court has had that this requests a defendant to show that the records requested relate to a colorable claim for post conviction relief. *Tompkins v. State*, 872 So. 2d 230, 244(Fla. 2004); *Glock v. Moore*, 776 So. 2d 243, 254 (Fla. 2001); *Bryan v. State*, 748 So. 2d 1003, 1006 (Fla. 1999). This Court has made it abundantly clear that public records requests are not to be used as fishing expeditions. *Tompkins*, 872 So. 2d at 243-44; *Moore v. State*, 820 So. 2d 199, 204-05 (Fla. 2002); *Mills v. State*, 786 So. 2d 547, 552 (Fla. 2001); *Glock*, 776 So. 2d at 253; *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000); *Bryan*, 748 So. 2d at 1006. Here, the record is abundantly clear that Defendant was on such a fishing expedition. As such, the lower court did not abuse its discretion in sustaining the objections and granting the protective orders.

Defendant filed requests to numerous agencies regarding any record that they might have which mentioned 103 named individuals. When Defendant first filed the requests, Defendant responded to the trial court's question regarding who these individuals were by stating that he was seeking any record that might even be tangentially related to the case. (PCR1. 1480-81) Over the course of numerous hearings during the next nine months, the trial court found that Defendant had to show that

the relevance of his request and gave Defendant time to do so. Yet, nine months later, Defendant could not even identify who these individuals were. (PCR1. 1205-10) Given that Defendant could not even identify these individuals, Defendant did not proffer any reason why any record regarding any of these individuals might be relevant.[14] Under these circumstances, the trial court properly sustained the objections and granted the protective orders. Fla. R. Crim. P. 3.852(m) (1996); *see also Tompkins*; *Mills*; *Moore*; *Glock*; *Bryan*. It should be affirmed.

With regard to the claim about unidentified records from unidentified agencies, this claim is insufficient to provide a basis for review. This Court has held that a defendant must specifically identify the records that were allegedly withheld and the agency that allegedly withheld the records. *Cook v. State*, 792 So. 2d 1197, 1204-05 (Fla. 2001); *Thompson v. State*, 759 So. 2d 650, 659 (Fla. 2000). This Court has also required defendants to present arguments explaining why the trial court abused its discretion in denying requests. *Tompkins*, 782 So. 2d

[14] As part of his claim that the rule is unconstitutional, Defendant suggests that requests concerning state witnesses may show that a witness had a history of making false police reports. However, Defendant never even proffered such a reason in support of his requests below. As such, any such issue is unpreserved. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved).

at 244 n.19. As Defendant does not do so, there is no basis for this Court to overturn the trial court's rulings on the public records issues. The denial of the claim should be affirmed.

With regard to the Basan tape, the tape was made by Basan as a private individual and not at the behest of any law enforcement agency. Both the Miramar Police and the Office of the State Attorney certified that after diligent searches for the tape, neither agency had it. Defendant presented no evidence that anyone was lying about not having the tape. Given that the tape was not in the possession of the State or the Miramar Police, the trial court denied a motion to compel its production.[15] The trial court did not abused its discretion in finding that the State and Miramar Police could not be compelled to provide that which they did not have. *Mendyk v. State*, 707 So. 2d 320, 322 (Fla. 1997)(trial court properly denied claim were agency presented affidavit that evidence did not exist and defendant made no showing that it did); *Mills v. State*, 684 So. 2d 801, 806 (Fla. 1996)(where agency denied possession of record and Defendant presented nothing to show it was in agencies

[15] Defendant has not had the transcripts of the public records hearing included on the record on appeal. Since it was Defendant's burden to get these transcripts, he cannot challenge the trial court's finding that the State and Miramar Police did not have the tape. *Hall v. Bass*, 309 So. 2d 250 (Fla. 4th DCA 1975).

possession, denial of public records claim proper). It should be affirmed.

With regard to the claim that Fla. R. Crim. P. 3.852 is unconstitutional, the issue is unpreserved. Defendant never claimed below that the rule was unconstitutional on any basis. In fact, Defendant freely admitted that it was his burden to show that the records he sought were relevant. He never made any arguments about the repository.[16] Since Defendant did not raise this issue below, it is not preserved. *Castor v. State*, 365 So. 2d 701 (Fla. 1978). The denial of the public records claim should be affirmed.

Even if the issue had been preserved, it should still be denied. The version of Fla. R. Crim. P. 3.852 under which the majority of Defendant's requests[17] were made did not require that records be provided through the repository and specifically provided that the "rule does not affect, expand, or limit the production of public records for any purposes other use in a 3.850 or 3.851 proceeding." Fla. R. Crim. P. 3.852(k) (1996).

[16] Given that the majority of the requests were made under the version of Fla. R. Crim. P. 3.852 that was in effective before the establishment of the repository, this is not remarkable.

[17] The only request about which the State is aware that was made after 2000, was a request for documents related to Garcia's plea from the State Attorney's Office. Over the State's objection, the trial court permitted Defendant to inspect the entire State Attorney file again, without involving the repository. The State had no documents regarding Garcia's plea.

Moreover, in adopting the rule, this Court specifically rejected the argument that Defendant is now making. In *In re: Amendments to Fla. R. Crim. P. – Capital Postconviction Public Records Production*, 683 So. 2d 475, 475-76 (Fla. 1996), this Court stated:

> We specifically address the comments of those who are concerned that the rule will unconstitutionally limit a capital postconviction defendant's right to production of public records pursuant to article I, section 24, Florida Constitution, and chapter 119, Florida Statutes (1995). We conclude that the rule does not invade those constitutional and statutory rights.
>
> This rule is a carefully tailored discovery rule for public records production ancillary to rule 3.850 and 3.851 proceedings. The time requirements and waiver provisions of the rule pertain only to documents which are sought for use in these proceedings. The rule does not affect, expand, or limit the production of public records for any purposes other than use in a 3.850 or 3.851 proceeding. This is a rule of procedure which directs the use of the courts' power to require, regulate, or prohibit the production of public records for these postconviction capital proceedings.

As this Court has already rejected Defendant's claim, the claim should remain rejected.

CONCLUSION

For the foregoing reasons, the order denying Defendant's motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to Lucretia Diaz, Assistant CCRC, 101 NE 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this 21st day of February 2005.

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CERTIFICATE OF COMPLIANCE

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

_____
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