IN THE SUPREME COURT OF FLORIDA

DERRICK TYRONE SMITH,

Appellant,

CASE NO. SC03-454

v. Lower Tribunal No. CRC83-265 CFANO

STATE OF FLORIDA,

Appellee.

______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Appellee, State of Florida, will utilize the same abbreviations and record designations as those used by the Appellant/Defendant in his Initial Brief.

STATEMENT OF THE CASE AND FACTS

Following his retrial in 1990,[1] the appellant/defendant, Derrick Tyrone Smith (a/k/a "Rerun"), again was convicted and sentenced to death for shooting a cab driver, Jeffrey Songer, in the back during an attempted robbery planned by Smith and Derrick Johnson (a/k/a "New York"). In Smith v. State, 641 So. 2d 1319, 1320 (Fla. 1994), this Court set forth the following summary of the facts adduced at Smith's retrial:

> At retrial, the evidence showed that Smith and a friend, Derrick Johnson, planned a robbery. To carry out the plan, Smith called a cab from a restaurant's pay telephone at 12:28 a.m. on March 21, 1983. Smith's fingerprint was later matched with a print found on that phone. Songer picked up Smith and Johnson outside the restaurant, then reported to his dispatcher that he was taking the fares to a nearby residential area. A few minutes later, Songer called in "D-16," which was a coded distress call. The dispatcher called the police and sent another cab driver to assist Songer. The driver found Songer lying face down about seventy feet from his cab, dead of a single shot in the back.
>
> An eyewitness testified that he recognized Smith and Johnson. The witness also testified that he saw Smith aim and fire at Songer as the driver tried to run from the cab. Although authorities never found the murder weapon, several witnesses linked Smith to a .38-caliber pistol. Smith's uncle, with whom Smith had once lived, testified that a .38-caliber

[1] In 1986, this Court reversed Smith's original conviction and death sentence at his first trial because (1) the State elicited an improper comment on Smith's exercise of his right to remain silent and (2) the trial court admitted a statement Smith made to a detective after exercising his right to remain silent. Smith v. State, 492 So. 2d 1063, 1065, 1066 (Fla. 1986).

> pistol was missing from his home. A lead fragment found on the victim matched the lead composition of bullets Smith's uncle obtained when he bought the gun. Other witnesses testified that they saw Smith with a gun during the day before the shooting. Johnson's testimony also placed a gun in Smith's possession.
>
> One witness, a Canadian tourist, testified that Smith robbed his wife and him in their motel room about twelve hours after Songer was killed. The robbery victim's description of Smith's gun resembled the description of the gun Smith used in the shooting; however, it was never established that the gun was the same because the weapon was never found. Smith's fingerprints were found on a suitcase in the motel room, and, after Smith's arrest, police recovered a watch that the robbery victim identified as one Smith took.
>
> Smith did not testify at his retrial. Larry Martin, who had been in the Pinellas County Jail with Johnson, testified that Johnson told him Smith did not shoot the cab driver.

Smith, 641 So. 2d at 1319-1320.

In addition, as the trial court's sentencing order noted, not only did Melvin Jones[2] witness the shooting, but "[a] little later that morning, the Defendant [Smith] stated to Priscilla Walker that he "shot a cracker in the back." (R2. V2/ 231).

The trial court found two statutory aggravating circumstances: (1) the murder was committed while Smith was attempting to commit a robbery and (2) Smith had a previous conviction for a violent felony. The trial court found one statutory mitigating circumstance of no significant history of

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[2]During Smith's first trial, eyewitness Melvin Jones explained that his numerous criminal charges were all worthless check

criminal activity because Smith's prior offenses were nonviolent. In addition, the trial court found several nonstatutory mitigating circumstances relating to Smith's background, character, and record. Smith v. State, 641 So. 2d 1319, 1323 (Fla. 1994).

The trial court's sentencing order summarized both the statutory and non-statutory mitigation presented by trial counsel, Richard Sanders:

> The Defendant was twenty years old at the time the homicide occurred. He was a mature individual who had, upon the death of his mother, moved from, in his words "the ghetto", to a family of hard working, God—fearing individuals. Two brothers and one sister currently serve in the armed forces; another sister resides in Lake Worth, Florida. In fact, the Defendant acted, in many respects, as a substitute parent to his siblings. This mitigating factor [age] is found not to exist.
>
> NON-STATUTORY MITIGATING FACTORS
>
> The Court and jury heard testimony from five individuals and from the Defendant. The Defendant's brother, Rodney Brown, testified that DERRICK TYRONE SMITH was seriously affected by the death of their mother, yet he acted as a father figure to the other siblings.
>
> The testimony of Louise Cone indicated that while the Defendant had been in difficulty as a juvenile, he was active in the church and assisted her around the house.
>
> Reverend Walker stated that the Defendant had leadership abilities, but began getting into trouble and dropped out of the church after entering high school. While Reverend Walker tried to counsel DERRICK TYRONE SMITH, it was to no avail, and contact was lost during the high school years. He feels, as did Mrs. Cone, that the Defendant fell in

---

charges or failure to provide services arising from his cabinet making business. (R1. V11/R1687, 1710-1711, 1775).

with the wrong group and that is what caused his problems.

Mr. Walter Golay testified that he has met regularly with the Defendant, DERRICK TYRONE SMITH, whenever he has been housed in the county jail, specifically for the last eight months to a year while awaiting the retrial of this case. He believes the Defendant to be a good Christian. Mr. Golay indicated he has seen change in the Defendant in that he is more calm now and evidences good character.

Defense counsel, Richard Sanders, testified that he has known the Defendant for approximately two and one—half years. Mr. Sanders indicates that, while the Defendant is not an easy person to know, he believes DERRICK TYRONE SMITH built a shell around himself to make himself appear as tough as people thought he was; in fact, Mr. Sanders feels that DERRICK TYRONE SMITH has a strong desire to live and to better himself.

DERRICK TYRONE SMITH testified that he was very close to his mother and was guided by her as a child. When she died, he was angry at the world. He did not know the Cones, yet came to live with them. He believed that more was expected of him, as the eldest, than of the other children. He believes that while Mrs. Cone loved them, the cultural difference was great. He experienced difficulty with the law, and when placed in a group home, ran away. Ultimately, he ended up at Okeechobee School for Boys. He testified he began using cocaine on a fairly regular basis at approximately nineteen years, but did not state this usage contributed to the offense. The Defendant feels he has at last resolved his mother's death in his own mind and has returned to his religious upbringing.

<u>The Court has considered and weighed this testimony as it relates to the family background of the Defendant, DERRICK TYRONE SMITH, his employment background, his potential for rehabilitation, and any drug dependence</u>.

On July 10, 1990, the Court also received testimony from the Defendant's sister, Yolanda Brown, who indicated the other siblings were close to the Defendant. However, because of the eight years difference in their ages, she was not aware of the problems that the Defendant experienced with the law. She believes the Defendant is just a normal

brother. Also testifying was Cynthia Teal. Ms. Teal became acquainted with the Defendant through correspondence while the Defendant was incarcerated in the prison system. When he was returned to Pinellas County, they met. She believes him to be a very caring, warm, sensitive person. Ms. Teal testified that she did not know the Defendant's past, only his present, and she does not see him as a violent person.

> DERRICK TYRONE SMITH also addressed the Court and stated that he regrets what occurred and is sorry for what happened.
>
> (R2. V2/230-233) (e.s.)

Smith's Postconviction Brady/Giglio Claim

Smith's primary issue in this postconviction appeal involves a hybrid Brady/Giglio claim.

On September 15, 1983, Tom Hogan, the original prosecutor in this case, requested an internal CID investigation into whether Melvin Jones "has had any extensive contact with or shared a cell" with Smith's co-defendant, Derrick Johnson. (D. Ex. 8, bsp. 04234). Based on information Hogan received from the SAO's investigator John Osmond, Hogan annotated the "CID" form with a handwritten note which stated:

> *NEVER together - D.J. says 1st time he ever saw Melvin Jones 7-11-83 in holding cell before prelim - Melvin Jones showed D.J. map and said it [he] would help D.J. at trial.*
>
> (PC-R V22/R4091; 4094; D. Ex. 8, bsp. 04234).

During the postconviction hearing, Hogan recalled that Johnson was terrified at being approached by someone who was unfamiliar to him but who knew the details of his case. Hogan also recalled that when approached, Derrick Johnson said nothing to this inmate, Melvin Jones. (PC-R. V27/R4896).

Smith’s co-defendant, Derrick Johnson, also testified at the postconviction hearing below. Johnson confirmed that he had not provided any information about this case when Jones, a stranger, approached Johnson in the holding cell and showed him a hand-drawn map. In fact, Johnson had not known Jones prior to that encounter and was so concerned when Jones approached him about his case that Johnson asked to be moved from the holding cell. (PC-R. V31/R5357-5359). Johnson explained that he was being truthful in his trial testimony, when the defense asked if he had ever discussed the case with Melvin Jones, because he did not consider their brief encounter in the holding cell to be a discussion when Jones did all the talking. (PC-R. V31/R5384). The unsolicited “encounter” lasted an estimated 6 or 7 minutes. (PC-R. V31/5386). Johnson testified that he never told Melvin Jones any facts about this case. (PC-R. V31/R5358).

On January 25, 1988, one of the successor prosecutors in this case, Mary McKeown, submitted the State’s written response to the defendant’s demand for exculpatory material. This response stated, in part:

> 1. In response to Paragraph “1" of Defendant’s Demand for Exculpatory Material, discovery has been provided in this cause. Depositions as well as previous trial testimony of witnesses are available to the defense.
>
> (D.Ex. 1, bsp. 0096).

A third prosecutor, Glenn Martin, ultimately inherited this case for retrial.[3] Although prosecutor Martin did provide supplemental discovery responses, which included several of the polygraph examiner's reports, A.S.A. Martin could not be certain that all of the complete police reports were discovered for Smith's second trial in 1990. (D-Ex. #1, bsp. 25; PC-R. V27/R4820).[4]

SUMMARY OF THE ARGUMENT

ISSUE I: The Brady/Giglio Claim: The Circuit Court properly denied Smith's claim that the State allegedly withheld material evidence from the defense. See, Strickler v. Greene, 527 U.S. 263, 294-96 (1999) (evidence only material if there is a reasonable probability that the result of the proceeding would have been different had information been disclosed). Moreover, Smith failed to demonstrate that any

[3] The prosecutors at Smith's retrial, conducted in May of 1990, were Assistant State Attorneys Glenn Martin and Beverly Andringa.

[4] For ease of reference in addressing Smith's remaining claims, those additional facts (including record citations) pertaining to Smith's specific issues are set forth within the argument section of the instant brief.

false testimony was presented at Smith's retrial or the State knew it.

ISSUE II: Scope of the Evidentiary Hearing: Smith's conclusory complaint refers to some unspecified Brady claims allegedly raised somewhere below. Smith's perfunctory claim does not suffice to preserve any issue for appeal.

ISSUE III: IAC - Guilt Phase: This claim was properly denied by the trial court after an in-depth evidentiary hearing. Smith has failed to show deficient performance and prejudice with regard to any of the alleged claims.

ISSUE IV: Newly Discovered Evidence: Smith's witness was deemed not credible and, even if considered, was not sufficient to "probably produce an acquittal" when evaluated in conjunction with the evidence introduced at Smith's retrial.

ISSUE V: IAC - Penalty Phase: The trial court properly denied Smith's claim of ineffective assistance of counsel during the penalty phase. The trial court's factual findings are supported by competent, substantial evidence. No deficiency and resulting prejudice have been demonstrated in this case.

ARGUMENT

ISSUE I

THE BRADY/GIGLIO CLAIM

In his first issue, Smith asserts a hybrid Brady/Giglio claim, contending that the State violated Brady v. Maryland,

373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). Resolution of Smith's first claim requires an analysis of the following issue which was cogently framed by the trial court:

> **The question is whether def. Ex. 8 — which indicates that Melvin Jones and Derrick Johnson were "never together" in the Pinellas County Jail, but did have an encounter in a holding cell with other inmates on July 11, 1983, at which time Melvin Jones showed Derrick Johnson a map and said it would help him at trial, but where no facts were disclosed about the case —- undermines confidence in the jury's guilty verdict by presenting the case in a whole new light.**

On June 23, 1983, Smith's co-defendant, Derrick Johnson, testified at Smith's adversary preliminary hearing. At that very first hearing, Johnson provided fact-specific details of the events preceding and during the [attempted] robbery and murder of Jeffrey Songer on March 21, 1983. (R1. V1/R70-82; 84-95). On cross-examination, Johnson also verified that he was the one in the front seat of the cab, that the gun used by Smith had a brown handle with a long barrel, and that Johnson initially didn't reveal all of the facts to the police because he didn't want to implicate himself. (R1. V1/R88-89; 93; 95).

The following month, on July 11, 1983, Melvin Jones, a jail inmate whom Johnson did not know, (1) approached Johnson while they were in a temporary holding cell along with several other inmates, (2) displayed a hand-drawn map, and (3) said it

would help him [Johnson] at trial.[5] This holding-cell encounter was very brief; it "couldn't have been" more than "six or seven minutes, if that." (PC-R. V31/R5387). Johnson did not know Jones at all. In response to Jones' unsolicited contact, Johnson called the guard and asked to be moved to another cell. (PC-R. V31/R5358; 5387). Johnson did not provide Jones with any information about the facts of his case. (PC-R. V31/R5358).

Jones subsequently sent copies of his hand-drawn maps to other individuals as well and he also described the events he'd witnessed on March 21, 1983. Jones sent duplicate letters to both the State Attorney's Office and to the Public Defender's Office, enclosing copies of his hand-drawn map of the crime scene.[6] Jones' letter and hand-drawn diagram were

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[5] On August 22, 1983, Johnson entered a guilty plea to second degree murder and he was sentenced to life imprisonment, with eligibility for parole. In October of 1991, Johnson was placed on life parole. Of course, if Johnson had gone to trial instead, then Jones' hand-drawn map and eyewitness identification of Johnson and Smith together certainly could have helped to *convict* Johnson.

[6] According to Johnson, D.Ex. 11 looked like the map Jones had shown Johnson, but the names of the buildings had been added. (PC-R. V31/R5373). The top of Melvin Jones' hand-printed letter referenced "St. Pete's Yellow Cab Homicide." (D-Ex. 11, bsp. 4240). Among other things, Jones described his own location, the shooting, the two passengers and the victim; Jones recognized the shooter [Rerun/Derrick], and wrote that he did not know the other subject, other than the nickname "New York," but Jones was "quite sure I can pick him out, photos or line-up. A face like that you can never forget."

provided to the defense in 1983. (PC-R. V27/R4881). During Jones' initial deposition, taken by the defense on September 26, 1983, Jones discussed both his letter and his hand-drawn map of the crime scene. (R1. V5/T785-786). During Smith's first trial in 1983 (R1. V11/R1711-1712) and during Smith's retrial in 1990 (R2. V6/R992), Jones was again cross-examined about his letter.[7]

Smith asserts that the State committed Brady violations by withholding alleged exculpatory and impeachment evidence that purportedly was material, specifically that:

> (1) On September 15, 1983, Tom Hogan, the original prosecutor in this case, requested an internal CID investigation into whether Melvin Jones "has had any extensive contact with or shared a cell" with Smith's co-defendant, Derrick Johnson. (PCR-4234). In response to this CID inquiry, a brief handwritten notation by Hogan, appearing at the bottom of the typewritten "CID investigation" request, states:
>
> *NEVER together* --

In addition, Jones described the events following the shooting, including the arrival of a second Yellow taxi cab, followed by a police cruiser, and the inquiry by a "lady cop" at his door. In his letter, Jones also admitted that he previously had "altered" the facts and "froze up" because [Detective] San Marco wasn't "going to try to help [Jones] with his charges." (D-Ex. 11, bsp. 4242).

[7] During Smith's retrial, Jones explained that there were rumors circulating around the jail that compelled Jones to write the letter. Everybody around the jail was saying that Smith was saying Johnson was the one that actually shot the cab driver. Jones thought it was totally wrong for two people to "go down" when only one person did it. (D-Ex. 11, bsp. 4242; R2./R1008)

D.J. says 1st time he ever saw Melvin Jones 7-11-83 in holding cell before prelim – Melvin Jones showed D.J. map and said it would help D.J. at trial.

(D.Ex.10, bsp.4234);[8]

(2) On the first day of the investigation, one of the police officers initially posited that Jones might be a possible suspect in this case, based on Jones' outstanding warrants and his nearby residence;

(3) During a door-to-door canvas of the neighborhood on the morning after the shooting, a second officer also received a "negative" result from Mellow Jones;

(4) Prosecutor Tom Hogan's "invest" notes of April, 1984, stated, in part, that [McGruder] could not pick Smith's photo out of a photopak[9] and Hogan also concluded that McGruder's estimates of Smith's weight were "off" by between 35 and 70 pounds;

(5) On August 9, 1989, a successor prosecutor [Mary McKeown] received a telephone call from Melvin Jones. According to McKeown's handwritten notations, Jones' 16-year old daughter, who had a child of her own, accused him of sexual abuse occurring 3 - 6 years earlier. Jones was trying to reconcile with his wife, the daughter didn't like it, and made the allegations. Jones was afraid he'd be arrested, he offered to take a polygraph and wanted her to take a polygraph. (See, D. Ex. 6, bsp. 1565).

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[8] Hogan confirmed that this particular notation was in his handwriting; Hogan thought he got this information from the SAO's investigator, John Osmond. (Supp. PC-R. V30/4861A).

[9] Hogan's synopsis also noted that "It may also be that he [McGruder] is not identifying the defendant out of fear rather than lack of ability to do so." (D-Ex. 10; bsp. 0410).

With regard to his Giglio claim, Smith asserts that the State allegedly presented false evidence concerning:

> (1) Jones' unsolicited approach of Johnson in a holding cell on July 11, 1983; and
>
> (2) Melvin Jones' sentencing dispositions (charges: obtaining property in return for worthless checks) (12/1/83: 3 years suspended, 2 years probation); (8/25/85: 3 years incarceration, 2 years probation).

Standards of Review

Brady and Giglio claims are often intertwined and both present mixed questions of law and fact. See, Sochor v. State, 883 So. 2d 766, 785 (Fla. 2004), citing Rogers v. State, 782 So. 2d 373, 376-377 (Fla. 2001). Therefore, this Court applies a mixed standard of review, "deferring to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but reviewing *de novo* the application of those facts to the law." Id. at 377, citing Lightbourne v. State, 841 So. 2d 431, 437-38 (Fla. 2003) (citing Stephens v. State, 748 So. 2d 1028, 1031-32 (Fla. 1999).

The Brady and Giglio Standards

To establish a Brady violation, the criminal defendant must show the following: (1) that the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the suppression resulted in prejudice. Sochor v. State, *supra* at

785, citing Rogers v. State, *supra* 378 (citing Strickler v. Greene, 527 U.S. 263 (1999)).

For Brady purposes, in order to constitute prejudice, the non-disclosed information must have been material. Lightbourne v. State, *supra* 437, citing Strickler, 527 U.S. at 282. In addressing the materiality requirement under Brady, this Court repeatedly has emphasized that:

> Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Lightbourne, 841 So. 2d at 437 (Fla. 2003), citing Jones v. State, 709 So. 2d 512, 519 (Fla. 1998) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). As this Court reiterated in Lightbourne:

> a Brady violation is established by "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Jones, 709 So. 2d at 519 (quoting Kyles v. Whitley, 514 U.S. 419, 435, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)). Further, the cumulative effect of the suppressed evidence must be considered when determining materiality. See Way, 760 So. 2d at 913 (citing Kyles, 514 U.S. at 436 & n.10). "It is the net effect of the evidence that must be assessed." Way, 760 at 913 (quoting Jones, 709 So. 2d at 521); see Kyles, 514 U.S. at 436 & n.10.
>
> Lightbourne, 841 So. 2d at 437 (e.s.)

The determination of whether a Brady violation has occurred is subject to independent appellate review. Floyd v.

State, 2005 Fla. LEXIS 545 (Fla. March 24, 2005), citing Cardona v. State, 826 So. 2d 968, 973 (Fla. 2002).

To establish a Giglio violation, the criminal defendant must show that: (1) a witness gave false testimony; (2) the prosecutor knew that the testimony was false; and (3) the statement was material. Sochor at 785, citing Guzman v. State, 868 So. 2d 498, 505 (Fla. 2003) (citing Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001)). Thus, to meet Giglio's initial threshold requirement, the defendant first must show that false testimony was presented. See, Tompkins v. Moore, 193 F.3d 1327, 1340 (11th Cir. 1999) ("Tompkins has failed to meet the threshold requirement that he show false testimony was used."); United States v. Bailey, 123 F.3d 1381, 1395-96 (11th Cir. 1997) (defendant must allege and prove that prosecutor knew testimony was false to show a Giglio violation).

In Mordenti v. State, 894 So. 2d 161 (Fla. 2004) this Court recently addressed the "materiality" prongs of the Brady/Giglio standards and clarified the distinction between the two tests:

> Initially, we note that the "materiality" prongs of the Brady and Giglio tests are often confused as one and the same. They are not. This Court recently clarified the two standards and the important distinction between them. See Guzman, 868 So.2d at 506. The Brady standard of materiality is less defense-friendly:
>
> The Brady standard of materiality applies where the prosecutor fails to disclose favorable evidence to the defense. See Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Under

> Brady, the undisclosed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). A criminal defendant alleging a Brady violation bears the burden to show prejudice, i.e., to show a reasonable probability that the undisclosed evidence would have produced a different verdict. Strickler v. Greene, 527 U.S. 263, 281 n. 20, 289, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).
>
> By contrast to an allegation of suppression of evidence under Brady, a Giglio claim is based on the prosecutor's knowing presentation at trial of false testimony against the defendant. See Giglio, 405 U.S. at 154-55, 92 S.Ct. 763. Under Giglio, where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).... The State, as the beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt. Id. at 680 n. 9, 105 S.Ct. 3375 (stating that "this Court's precedents indicate that the standard of review applicable to the knowing use of perjured testimony is equivalent to the Chapman [v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)] harmless-error standard"). Id. at 506-07 (footnote omitted).

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

Applying the foregoing legal standards to the facts of this case, the defendant's Brady/Giglio claims must fail for the following reasons.

Circuit Court's Rulings:

After conducting a multi-day evidentiary hearing on Smith's hybrid Brady/Giglio and IAC claims, the trial court entered a fact-specific, comprehensive written order denying postconviction relief. (PC-R. V22/R4089-4113). In addressing Smith's intertwined Brady/Giglio claims, the trial court's written order states, in pertinent part:

> ***1.A. 1. - State Failed To Disclose Evidence To Defense Counsel Showing That Melvin Jones' And Derrick Johnson's Testimony Was False***
>
> Claim IA. 1. has several subclaims, the first of which is that the State allegedly possessed evidence showing that Melvin Jones' and Derrick Johnson's testimony was false but failed to disclose this evidence to defense counsel. Melvin Jones is the eyewitness who testified at trial that he saw the shooting occur; he testified that the defendant shot the cab driver. [R2 Pages: 973-991]. Derrick Johnson is the co-defendant who "participated" in the robbery-homicide, and who pleaded guilty in CRC83-O29O4CFANO to second-degree murder, was sentenced to life in prison, and was later paroled in October 1991. The "evidence" in question is defense Ex. 8, the second page of which is a copy of an internal CID Investigation prepared by the State Attorney's Office on September 15, 1983 (bate stamped 004234).[fn1][10] [Def Ex. 8]. The CID Investigation was commissioned by Tom Hogan, the prosecutor, and its purpose was to ascertain whether Derrick Johnson had any contact with Melvin Jones in the Pinellas County Jail. At the bottom of the second page of def. Ex. 8, there appears a handwritten notation that indicates Derrick Johnson and Melvin Jones were "never together," and that Derrick Johnson first saw Melvin Jones on July 11, 1983 in a holding cell before a preliminary hearing. It further indicates that Melvin Jones showed Derrick Johnson the map and said it would "help him

[10] *[fn1 of trial court's order]* CCRC obtained this document pursuant to a public records request.

at trial."[fn2][11] The record reflects that a preliminary hearing was indeed held on July 11, 1983.

On page sixteen of its written closing argument, CCRC asserts that "[t]he record from both trials shows that Mr. Smith's counsel did not know about the meeting between Jones and Johnson." On page twenty, CCRC asserts that the information was crucial and material, and that "[w]ithout this information, counsel's inquiry into the veracity of Jones' and Johnson's stories was "handicapped."

CCRC developed this issue at length during the evidentiary hearing. Tom Donnelly, defense counsel from the 1983 trial, testified that he was unaware of the contact between Melvin Jones and Derrick Johnson in the holding cell. He indicated that this information was not disclosed to him, and that he would have appreciated the impeachment value of this information.[fn3][12] [Pages: 609-612]. Similarly,

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[11]*[fn2 of trial court's order]* The map is Melvin Jones' hand-drawn diagram of the crime scene on Fairfield Avenue.

[12]*[fn3 of trial court's order]* The record from the first trial reflects that Richard Smith, co-counsel with Tom Donnelly at the first trial, asked Derrick Johnson on cross-examination "Have you ever discussed this case at all with a Melvin Jones?" to which Derrick Johnson responded "No." [R1 Page: 1536]. Additionally, Tom Donnelly inquired of Melvin Jones as to whether he was in a holding cell with Derrick Johnson on November 1, 1983 (the first day of trial), and any conversations that may have occurred therein. The following dialogue occurs at pages 1693-1694 of R1:

> Defense counsel: Do you recall being locked up in a holding cell with Mr. Johnson?
>
> Melvin Jones: We was like more or less separate till —
>
> Defense counsel: You were in the same holding cell, weren't you?
>
> Melvin Jones: No.
>
> Defense counsel: Isn't it true you and Mr. Johnson conversed about the testimony

Richard Sanders, defense counsel from the 1990 retrial, testified that he was not provided with this information, that the handwritten notation was indeed important, and that it would have been an aspect of his case during the retrial had he known about it. [Pages: 228-231].

Next, CCRC called David Mack, a parole advocacy paralegal who occasionally works as an investigator for CCRC. He explained that he was twice hired by CCRC to visit Derrick Johnson in Brooklyn, New York, and that during these visits, Derrick Johnson indicated that he had three or four conversations with Melvin Jones in the Pinellas County Jail. David Mack introduced himself to Derrick Johnson as an "investigator working with CCRC on the Derrick Smith case." According to David Mack, Derrick Johnson indicated that he never told Melvin Jones about the facts of the case, and that Melvin Jones was simply "a liar" because he was never at the scene of the crime. Further, according to David Mack, Derrick Johnson explained that if Melvin Jones had been at the scene, he would have known that initially, both the defendant and Derrick Johnson ran in the same direction toward the cab driver. Aside from this detail, David Mack did not ask Derrick Johnson about the substance of the conversations, and no other details were volunteered by Derrick Johnson. The two meetings did not involve any discussion on who shot the cab driver. Finally, David Mack indicated that Derrick Johnson mentioned the map, spoke about informing the State that Melvin Jones was a liar, and that he had been promised leniency by the State. [Pages: 319-345].

As rebuttal witnesses, the State called Derrick Johnson and Tom Hogan. Derrick Johnson testified that he did encounter Melvin Jones while being housed in the Pinellas County Jail, and that this contact occurred in a holding cell occupied by many other inmates who were waiting to go to court. He indicated that he had never seen Melvin Jones prior to this occasion. He explained that Melvin Jones approached him, showed him the hand-drawn map, and began asking him questions as to what position he would be taking in the case. He testified that he

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you're going to give today while you people were in this holding cell?

Melvin Jones: No.

told Melvin Jones that he was unsure what position he would be taking. He testified that he said nothing further, and that he asked to be removed from the holding cell because Melvin Jones was asking too many questions regarding his case. He testified that he never told Melvin Jones any facts about his case. [Pages: 571-578].

As to the meetings with David Mack, Derrick Johnson denied that he ever told David Mack that he informed the State, at both trials, that Melvin Jones was a liar, or that he knew Melvin Jones was not at the scene of the crime because he and the defendant initially ran in the same direction behind the cab driver. [Pages: 578-581]. Derrick Johnson indicated that he was initially considered for parole in 1988, and then every subsequent year until October 11, 1991, when he was eventually paroled. He indicated that the State offered no assistance to him in obtaining his work-release status, or his eventual parole. [Pages: 582-584].

Tom Hogan, the prosecutor during the 1983 trial, testified at the evidentiary hearing on this issue. He recalled that Derrick Johnson was terrified at being approached by someone who was unfamiliar to him but who knew the details of his case. Mr. Hogan recalled that when approached, Derrick Johnson said nothing to Melvin Jones. [Pages: 115-117].

This subclaim is best described as a Brady claim. Brady v. Maryland, 373 U.S. 83 (1963). To establish a violation of Brady: "(1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." Way v. State, 760 So. 2d 903, 910 (Fla. 2000) (quoting Strickler v. Greene, 119 S. Ct. 1936 (1999)).

A defendant is prejudiced by the nondisclosure of exculpatory evidence if "there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." Strickler, 119 S.Ct. at 1952. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

Strickler, 119 S. Ct. at 1952 (quoting Kyles v. Whitley, 115 S. Ct. 1555, 1565-66 (1995)). This inquiry "is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions." Strickler, 119 S. Ct. at 1952. "Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Strickler, 119 S. Ct. at 1952 (quoting Kyles, 115 S. Ct. at 1566 (1995)); Way, 760 So. 2d at 914.

First, the court finds that defense Ex. 8 – which indicates that Derrick Johnson and Melvin Jones encountered one another in a holding cell on July 11, 1983 – does not, in and of itself, possess exculpatory value, for it does not exonerate the defendant from his involvement in the robbery and subsequent homicide. That said, the court recognizes that it may have provided some significance in terms of impeachment. Admittedly, Derrick Johnson and Melvin Jones were crucial witnesses for the State. It may have also aided defense counsel in pursuing a different defense theory.

As indicated in footnote 3 of this order, Melvin Jones, during the initial 1983 trial, denied that he occupied a holding cell with Derrick Johnson on November 1, 1983. Had the State disclosed defense Ex. 8 prior to the retrial, and had Sanders inquired during the cross- examination of Melvin Jones as to whether he ever occupied a holding cell with Derrick Johnson, def. Ex. 8 might have been used for impeachment purposes. In addition, Derrick Johnson, during the initial trial in 1983, answered "No" as to whether he had ever discussed the case with Melvin Jones. This testimony is consistent with his testimony at the evidentiary hearing, at which time he again stated that he never discussed the facts of the case with Melvin Jones in the holding cell. [Pages: 571-578]. Sanders conceded that Derrick Johnson's statement during the first trial was not inconsistent with defense Ex. 8, since the handwritten notation does not indicate that a discussion actually occurred. [Pages: 229-230]. In sum, def. Ex. 8 may have assisted in undermining the

credibility of Melvin Jones and Derrick Johnson. It therefore was favorable to the accused.

Second, the court finds that defense Ex. 8 was not disclosed to the defense. As discussed earlier, Sanders testified that it was not disclosed to him. Glenn Martin, the prosecutor from the retrial in 1990, testified that he had no independent recollection of its disclosure, and that there was nothing in the State's file to indicate that it had been disclosed. [Pages: 57-58]. The court makes no determination as to whether the nondisclosure was inadvertent or willful, other than to note that the nondisclosure in this case is more significant in light of the State's closing argument. That is, at R2: Pages 1302-1303, the State argued:

> Now, was there any testimony from that witness stand that could lead you to believe that Derrick Johnson and Melvin Jones got together and fabricated this testimony in order to pin the blame on Derrick Smith? There is no testimony from that stand that they even [k]new each other on March 23, 1983, other than Melvin Jones saying I knew him on the street as New York.

With that said, after carefully evaluating this issue, the court cannot find that there has been an adequate showing in this case that the undisclosed evidence, the value of which was relatively limited, "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Strickler, 119 5. Ct. at 1952 (quoting Kyles, 115 S. Ct. at 1566 (1995)); Way, 760 So. 2d at 914. The question is whether def. Ex. 8 — which indicates that Melvin Jones and Derrick Johnson were "never together" in the Pinellas County Jail, but did have an encounter in a holding cell with other inmates on July 11, 1983, at which time Melvin Jones showed Derrick Johnson a map and said it would help him at trial, but where no facts were disclosed about the case — undermines confidence in the jury's guilty verdict by presenting the case in a whole new light. As explained below, the court cannot find that it does.

First, both Melvin Jones and Derrick Johnson were cross-examined at the retrial as to whether they had received any leniency or promises from the State in exchange for their testimony. Melvin Jones testified that he was not receiving any leniency

from the State. [R2 Pages: 992-993].[fn4][13] Notably, this is consistent with paragraph eleven in the State's Response to Demand for Exculpatory Material, filed January 26, 1988, which indicates that only Derrick Johnson had received a promise of leniency in exchange for his testimony.

Second, Sanders argued to the jury during closing argument that each individual was a convicted felon, and that each had criminal charges pending at the time of the defendant's retrial. He further argued that neither individual was a credible witness.[fn5][14]

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[13] *[fn4 of trial court's order]* The State Attorney did subsequently testify on his behalf at his own sentencing hearing.

[14] *[fn5 of trial court's order]* During closing argument, Sanders argued to the jury, at R2: Pages 1333-1343:

> The fact is, these two witnesses are not credible witnesses at all. Derrick Johnson, if you believe his testimony is an accomplice here. I suggest to you his primary concern was to escape as much of the blame as possible and pass the blame on somebody else.
>
> Of course, it's really a benefit to poor old Melvin, good citizen Melvin, who's ducking through the alley ways, trying to hide from the police with all his warrants, needing some kind of a break from the State, needing something to get himself out [of] this mess. And isn't it lucky for Melvin that on this particular night this murder goes down right in front of him. He gets a perfect view of it. He gets a little something he can bargain with, a little something he can catch a break with. And Derrick Johnson steers the cabs right over to where he is. Isn't that lucky for Melvin Jones? He's a convicted felon, Derrick Johnson, as is Melvin Jones, with about 24 felony convictions. A one-man crime wave over here.
>
> That brings us to Melvin Jones, I talked a little bit about Melvin Jones already. Melvin Jones has 24 felony convictions. I believe he said he – I don't know how many arrest warrants he had pending at the time this supposedly happened. He eventually ended up pleading to 14 felonies. After he came forward with this testimony, he pleads to 14

Third, Derrick Johnson has consistently maintained under oath, during the first trial and during the evidentiary hearing, that he never discussed the facts of this case with Melvin Jones, and CCRC offered no evidence or testimony to the contrary. Derrick Johnson further testified that Melvin Jones did not ask him any information about the facts of the case, and that he did not keep any police reports or other records with him in the jail. Moreover, as previously discussed, the prosecutor from the first trial, Tom Hogan, testified that Derrick Jones was actually terrified at being approached by someone who was unfamiliar to him but who knew the details of his case.

In conclusion, although this undisclosed evidence would have undoubtedly had some value to the defense, it certainly would not have put the whole case in such a different light as to undermine confidence in the verdict. The fact of the matter is that the jury already heard testimony and argument indicating that Melvin Jones and Derrick Johnson were not credible witnesses, that each had prior felony offenses, and that each had criminal charges pending at the time of the defendant's retrial. That defense counsel could have inquired about a possible meeting in the holding cell where these individuals may have conspired to pin the charges on the defendant is not materially different from that which was argued to the jury. It was already evident to the jury that both Melvin Jones and Derrick Johnson had much to gain in avoiding a first-degree murder charge, and in pinning the homicide on the defendant. Furthermore, Derrick Johnson has at all times stated that he never discussed the facts of the case with Melvin Jones, or that he even had a "discussion." There is no reason to think that he would have testified differently at the retrial.

Accordingly, assessing the cumulative effect of this undisclosed evidence, there is no reasonable probability of a different result, such that this evidence would have undermined confidence in the jury's guilty verdict. Way, 760 So. 2d at 913; cf. Cardona v. State, 826 So. 2d 968, 979-82 (Fla. 2002). To the extent that this claim was couched as

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felonies and he gets three years in the Department of Corrections.

an ineffectiveness claim, the court finds that if fails to meet the Strickland standard for relief. Strickland v. Washington, 466 U.S. 668 (1984).

Other Exculpatory Evidence That Allegedly Should Have Been Disclosed – Melvin Jones Being A Suspect, The Existence Of Witness Richard Clarence Davis, Melvin Jones Accused Of Sexual Battery, And David McGruder's Identification Of "Shorter Guy" In PhotoPak

Next, CCRC, citing def. Ex. 2, claims that although the State disclosed police reports to defense counsel at or about the time of the first trial, certain of these reports were "Millerized" to delete any mention that the State initially considered Melvin Jones to be a possible suspect in this case (which, according to the State, was based solely on his prior convictions, pending charges, and location of domicile). The court finds that CCRC has failed to adduce any evidence at the evidentiary hearing to support this claim, nor has CCRC proven that the State was legally required to provide this discovery. Spaziano v. State, 570 So. 2d 289, 291 (Fla. 1990) ("The fact that Tate was a suspect early in the investigation, though this theory was later abandoned, is not information that must be disclosed under Brady."). Moreover, CCRC has not proven that the "Millerizing" of these police reports was legally impermissible. Miller v. State, 360 So. 2d 46 (Fla. 2d DCA 1978).

Next, according to CCRC, def. Ex. 3 (police reports) and def. Ex. 10 (Synopsis/Reinvestigation) indicate that Derrick Johnson confessed to Richard Clarence Davis (a/k/a Charles Williams), an inmate in the Pinellas County Jail, that he shot the victim. Def. Ex. 10 contains a document titled Reinvestigation, which was prepared by the State Attorney's Office on April 25, 1983. The last page of this exhibit (bate number 000391) bears a notation which indicates that Richard Clarence Davis stated that Derrick Johnson confessed to killing the cab driver while in the Pinellas County Jail.

This court need not decide if defense counsel was entitled to disclosure of the Synopsis/Reinvestigation because the record reflects that defense counsel, prior to the first trial, knew about Richard Clarence Davis and the statement he

made during the State Attorney's investigation. That is, prior to the 1983 trial, the State inquired as to why Tom Hogan, the prosecutor, was listed as a witness. In response, defense counsel indicated that he was the only individual who could impeach Richard Clarence Davis, should he deny that Derrick Johnson ever confessed to shooting the cab driver. The issue resolved itself when the State indicated that it would not call Richard Clarence Davis as a witness. [R1 Pages: 852-857]. In light of the fact that Sanders, at the evidentiary hearing, testified to reading the entire first trial, he too knew about the existence of Richard Clarence Davis, or at the very least, should have known about his existence. [Page: 139]. Therefore, there can be no Brady violation. Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2002) ("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.").

Next, def. Ex. 6 reflects that Melvin Jones may have been facing a possible charge of sexual battery. Def. Ex. 6 is a handwritten note written by prosecutor Mary McKeown on her own stationary, dated August 9, 1989. The note reflects that Melvin Jones telephoned her, indicated that his daughter, Elizabeth, was accusing him of sexually abusing her some three to six years ago, but that she had fabricated the charges out of anger (since Melvin Jones was trying to reconcile with her mother). The note further indicates that Melvin Jones wanted to take a polygraph exam to clear himself, and that he wanted his daughter to take a polygraph exam as well. CCRC alleges that this information could have been used to impeach Melvin Jones' credibility by showing that he had reason to "curry favor" with the State. This claim must fail, however, because CCRC has not shown that the State was legally obligated to disclose this handwritten note. Carroll v. State, 815 So. 2d 601, 620 (Fla. 2002) ("the prosecution is not required to provide the defendant all information regarding its investigatory work on a particular case regardless of its relevancy or materiality."). Moreover, the record fails to reflect that Melvin Jones was ever charged with this crime. Accordingly, this Brady claim must fail.

Finally, CCRC alleges that def. Ex. 10 — the State Attorney's Synopsis — should have been disclosed. Again, CCRC fails to meet its burden showing that defense counsel was entitled to disclosure of this internal investigatory report. Carroll, 815 So. 2d at 620. Assuming that the State should have disclosed this document, the court finds as follows. Def. Ex. 10 contains a document titled Synopsis, which details the State's internal investigation into the case that was conducted March 31, 1983 to April 4, 1983. The back of the first page (bate number 000409) indicates that although witness David McGruder gave a description of the individuals he saw the night of March 20/21, 1983, he could not pick these individuals out of a photopak. At trial, however, McGruder testified that he picked the "shorter guy" out of the photopak, and that he wrote his name and the date on the back of the photograph he picked out as being the "shorter guy" who exited rear of [the] taxi cab. [R2 Pages: 862-863].

A review of the evidence in this case, specifically the State's Composite Exhibit 24A-G, reflects that McGruder signed his name on the back of photograph A and dated it April 8, 1983. That McGruder could not identify the "shorter guy" from the photopack a week after the murder at the time of the State's investigation, but was able to identify him four days after the State's investigation concluded is significant. It goes without saying that this information would have been favorable to the defense.

That said, the record indicates that the jury heard the inconsistencies in McGruder's testimony. Knowing that the murder occurred on the night of March 20/21, 1983, Sanders cross-examined McGruder as to the date on the back of the photopak. Specifically, he elicited testimony from McGruder which indicated that the "two guys" — the suspects — came into the Hogley-Wogley B.B.Q. establishment on April 7, 1983, the day before he signed the back of photograph A. [R2 Pages: 869-870]. After defense counsel called him as his own witness, the State, on cross-examination, attempted to clarify that McGruder was shown several photopaks on several occasions. In conceding that he was shown several photopaks on several occasions, McGruder then testified that he was not sure that the man in

photograph A was the "shorter guy" who got into the cab that night. [R2 Page: 880, 883].

Given the doubt McGruder expressed, and the inconsistencies in his testimony, which the jury heard, the court cannot find that the undisclosed evidence — def. Ex. 10 — undermined confidence in the guilty verdict. Way, 760 So. 2d at 913. In sum, the court recognizes that it must evaluate the cumulative effect of all of the undisclosed evidence, and it has. Together, def. Ex. 8 and def. Ex. 10, had they been disclosed, would not have 'put the whole case in such a different light as to undermine confidence in the verdict.' Strickler, 119 S. Ct. at 1952 (quoting Kyles, 115 S. Ct. at 1566 (1995)); Way, 760 So. 2d at 914.

1.A. 1. - State Permitted False Testimony At Trial

Next, CCRC asserts that the State permitted Melvin Jones to testify falsely about his contact with co-defendant Derrick Johnson. The court has thoroughly reviewed the transcripts from the evidentiary hearing, as well as the written closing arguments, including the reply. The court is unable to locate any testimony from the retrial which reflects that either Derrick Johnson or Melvin Jones testified falsely about being in a holding cell with each other on July 11, 1983. Therefore, this claim does not relate to def. Ex. 8.

It appears, then, that this claim relates to the allegation that Melvin Jones authored a three-page handwritten letter to both the State Attorney and the Public Defender while housed at the Pinellas County Jail. [Def Ex. 11]. According to CCRC, Melvin Jones, in that letter, changed his version of the events from that originally given by him to Detective SanMarco to be more consistent with the version described by Derrick Johnson. No evidence or testimony probative to this claim, however, was adduced at the evidentiary hearing.

This subclaim is best described as a Giglio claim. Giglio v. United States, 405 U.S. 150 (1972). To establish a Giglio claim, the defendant must show that the State knowingly permitted the presentation of false testimony, which testimony was material to the case. Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001) (citing Robinson v. State, 707 So. 2d 688, 693 (Fla. 1998)). In determining whether

testimony is material to the case, the court must determine "if there is a reasonable probability that the false evidence may have affected the judgment of the jury," thereby undermining the verdict. Ventura, 794 So. 2d at 563 (quoting Routly v. State, 590 So. 2d 397, 400 (Fla. 1991)).

After reviewing this claim in its entirety, the court finds that CCRC has failed to substantiate this claim. CCRC is also unconvincing in its allegation that the State is carrying out a "campaign of obfuscation." This claim lacks merit, and is therefore denied.

I.A.1. - State Failed To Furnish Defense Counsel With Polygraph Results Of Melvin Jones

Next, CCRC alleges that the State doubted the veracity of Melvin Jones' testimony based on his polygraph results, and failed to provide this information to defense counsel. This is yet another claim that was not factually developed at the evidentiary hearing. Nevertheless, the court will look to the record.

Defense Ex. 1 contains Defendant's Motion to Compel Discovery or Exculpatory Material, filed June 14, 1988, which requested to know any information concerning the administration of polygraph tests. In response to this motion, the State Attorney, Glenn Martin, furnished three police reports to defense counsel under an acknowledgement of additional tangible evidence, which reflect that polygraph tests were administered to Derrick Johnson.

As to Melvin Jones, defense Ex. 20 is a supplementary report that indicates the State Attorney's Office administered a polygraph examination to him on November 3, 1983. The report indicates that the results were inconclusive; the writer's opinion reflects that the inconclusive results occurred due to the inclusion of the two "Outside Issue" questions, which did not pertain to the truthfulness of his eyewitness statements concerning the homicide. Sanders testified that he did not recall receiving any information about this polygraph examination. [Page: 676].

To establish a violation of Brady: "(1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is

impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." Way v. State, 760 So. 2d 903, 910 (Fla. 2000) (quoting Strickler v. Greene, 119 5. Ct. 1936 (1999)). A defendant is prejudiced by the suppression of exculpatory evidence if "there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." Strickler v. Greene, 119 S.Ct. 1936 (1999).

CCRC has not met its burden of proving that def. Ex. 20 would have been exculpatory, in that it could have been used for impeachment. CCRC alleges that "[t]he fact that the State conducted the polygraph would have been enough to show the jury that the State had doubts about their own star witness." CCRC has cited no authority, however, to suggest that this singular statement would be admissible at trial. Jones v. State, 709 So. 2d 512, 519 (Fla. 1998) ("If the evidence could not have been properly admitted at trial or would not be admissible on retrial, there is no reasonable probability that the outcome of Jones' trial would have been different if the evidence had been provided to the defense."). In fact, polygraph evidence is generally not admissible at trial. Walsh v. State, 418 So. 2d 1000, 1002 (Fla. 1982) ("Polygraph evidence is inadmissible in an adversary proceeding in this state.").

Finally, CCRC has not sufficiently rebutted the State's assertion, on page 14 of its Response to Order to Show Cause, that Detective Pflieger's police report, which indicates that a polygraph examination was administered to Melvin Jones, was discovered to defense counsel.[fn6][15] In sum, CCRC has failed to satisfy either the materiality or prejudice prongs required for a Brady violation. Vining v. State, 827 So. 2d 201, 208-09 (Fla. 2002). This claim is therefore denied.

PC-R. V22/R4091-4099 (e.s.)

Analysis - Brady Claim

As evidenced by the foregoing meticulous analysis, the Circuit Court painstakingly evaluated the trial and postconviction records and found that Smith failed to establish any materiality[16] under Brady. In Strickler v. Greene, the Court reiterated that while the term Brady violation is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence -

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

See also Wright v. State, 857 So. 2d 861, 870 (Fla. 2003)(noting that prejudice under Strickler is measured by determining whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict and observing that the mere possibility that undisclosed items of information may have been helpful to the defense in its own investigation does not establish constitutional materiality, citing U.S. v.

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[15] *[fn6 of trial court's order]* See Exhibit 17 attached to the State's Response to Order to Show Cause.

[16] Under the prejudice prong, the defendant must show that the suppressed evidence is material. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Reed v. State, 875 So. 2d 415, 430 (Fla. 2004).

Agurs, 427 U.S. 97, 109-110 (1976) and Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988)).

In Vining v. State, 827 So. 2d 201 (Fla. 2002), this Court agreed with the trial court's analysis that the capital defendant had failed, after an evidentiary hearing, to show prejudice because the evidence was not material, as not shown with a reasonable probability to affect the outcome. Materiality of allegedly suppressed evidence is also a requirement to show that the evidence could have been used for impeachment. Butler v. State, 842 So. 2d 817 (Fla. 2003). That the evidence could have been used for impeachment is insufficient showing of materiality unless it is shown that there is a reasonable probability the outcome would have been different. Id. This Court's inquiry focuses on whether the cumulative effect of withheld favorable evidence undermines confidence in the outcome. Strickler v. Greene, 527 U.S. 263, 290 (1999); Occhicone v. State, 768 So. 2d 1037, 1041 (Fla. 2000); Cardona v. State, 826 So 2d 968, 973 (Fla. 2002). In evaluating the Brady elements, the evidence must be considered in the context of the entire record. Carroll, 815 So. 2d at 619; Sireci v. State, 773 So. 2d 34 (Fla. 2000). Most recently, in Floyd v. State, 2005 Fla. LEXIS 545, 16-17 (Fla. 2005), this Court reiterated that "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial

resulting in a verdict worthy of confidence." Id. (quoting Kyles, 514 U.S. at 434).

Jones' unsolicited contact in a holding cell

During the postconviction hearing, former prosecutor Tom Hogan recalled obtaining the information (reflected in his handwritten note) from the State Attorney's investigator. Thus, it was not a verbatim transcript of a conversation that Hogan had with the investigator – or Johnson – or Jones.

Jones' unsolicited contact with Johnson occurred on July 11, 1983, when they were in a temporary holding cell along with several other inmates awaiting court hearings. Johnson testified at the postconviction hearing and verified that he had never seen Melvin Jones prior to this occasion. Johnson never told Melvin Jones any facts about his case;[17] and, in response to this brief encounter, which lasted only 6 or 7 minutes, Johnson asked to be removed from the holding cell. (PC-R. V31/R5353-5360). The original prosecutor, Tom Hogan, recalled that Jones was actually terrified at being approached

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[17] On cross-examination during Smith's first trial, Johnson was asked, "Have you ever discussed this case at all with a Melvin Jones?" And Johnson answered, "No, I never have." (R1 1536). During cross-examination during Smith's first trial, Jones was asked, "Have you ever had a conversation with Mr. Johnson about your testimony here today?" Jones answered, "No, I didn't." (R1 1693). Defense counsel then attempted to impeach Jones with a purported holding-cell contact earlier that week. (R1 1694-1695).

by someone who was unfamiliar to him, but who knew details of his case. At the time of Smith's retrial in 1990, the successor prosecutor, Glenn Martin, admittedly had the State's case file, which included the 1983 "CID" request containing Hogan's handwritten notation at the bottom of the form. (D. Ex. 8).

The Circuit Court found that the defendant met the first two requirements of Brady. Therefore, the dispositive question in this case, as framed by the Circuit Court, is "whether def. Ex. 8 — which indicates that Melvin Jones and Derrick Johnson were never together in the Pinellas County Jail, but did have an encounter in a holding cell with other inmates on July 11, 1983, at which time Melvin Jones showed Derrick Johnson a map and said it would help him at trial, but where no facts were disclosed about the case — undermines confidence in the jury's guilty verdict by presenting the case in a whole new light."

The Circuit Court found that Smith failed to demonstrate materiality under Brady because (1) both Jones and Johnson were cross-examined at the retrial as to whether they had received any leniency or promises in exchange for their testimony; (2) Sanders argued to the jury during closing argument that each individual was a convicted felon, and that each had pending criminal charges and neither individual was a credible witness; (3) Johnson consistently maintained under oath, during the first trial and during the postconviction hearing, that he never discussed the facts of this case with

Melvin Jones; (4) Johnson testified that Jones did not ask him any information about the facts of the case, and that he did not keep any police reports or other records with him in the jail; and (5) the original prosecutor, Tom Hogan, testified that Jones was actually terrified at being approached by someone who was unfamiliar to him but who knew the details of his case. In conclusion, although the Circuit Court found that "this undisclosed evidence would have undoubtedly had some value to the defense, it certainly would not have put the whole case in such a different light as to undermine confidence in the verdict." As the Circuit Court recognized, the "jury already heard testimony and argument indicating that Jones and Johnson were not credible witnesses, that each had prior felony offenses, and that each had criminal charges pending at the time of the defendant's retrial. That defense counsel could have inquired about a possible brief meeting in a holding cell where these individuals allegedly may have conspired to pin the charges on Smith is not materially different from that which was argued to the jury. "It was already evident to the jury that both Jones and Johnson had much to gain in avoiding a first-degree murder charge, and in pinning the homicide on the defendant. Furthermore, Derrick Johnson has at all times stated that he never discussed the facts of the case with Melvin Jones, or that he even had a "discussion." There is no reason to think that he would have testified differently at the retrial." (PC-R. V22/R4094-4095).

Contrary to the defendant's conclusion, the State's case did not depend solely on Melvin Jones. On the morning of the murder, Smith confessed to Priscilla Walker that he'd just shot a "cracker." Smith also admitted to his friend, James Matthews, that he "might" have shot someone, that he was scared, and that he needed a place to stay. Smith's codefendant, Derrick Johnson, first testified at Smith's preliminary hearing in June of 1983, and he was cross-examined extensively by the defense at that hearing and at every subsequent hearing in this case. Johnson's testimony, identifying Smith as the shooter, has never waivered. At Smith's preliminary hearing in 1983, at Johnson's deposition in 1983, at Smith's first trial in 1984, at Smith's second trial in 1990, and at Smith's postconviction hearing in 2002, Johnson consistently testified that the defendant, Derrick Smith [Rerun], was the man who exited from the back seat of the cab and shot the fleeing cab driver. Moreover, during the postconviction hearing, Johnson reiterated that he did not know the inmate [Melvin Jones] who approached him, and that he did not give any information about his case to Jones.

The gun described was consistent with the gun missing from the residence of Smith's uncle (Roy Cone), and the metal composition of the fragment discovered on the victim was consistent with the metal composition of the bullets that Roy Cone purchased for the gun. (R2. V6/R1043-1046). Smith used this gun on the cab driver, and then later when he robbed Marcel DeBulle and his wife at the New Plaza Motel later the

same afternoon. (R2. V6/R1191-1202). According to David McGruder, the cook at the Hogley Wogley B-B-Q, the darker, shorter individual (the same man who had used the telephone) was the man who got into the back seat of the taxicab. (R2. V5/R855-864). Smith's fingerprints were on the telephone used by this man at the Hogley-Wogley.

The night of the murder, Smith admitted to Priscilla Walker that he'd just shot a "cracker" cab driver in the back because he did not want to give up the money. Priscilla Walker saw the gun that Smith brought with him to her residence. (R2. V6/R1016-1022). Another witness, James Matthews also saw the gun, and Smith confessed to him that he might have shot someone, that he was scared, and that he needed a place to stay. (R2. V6/R1027-1030). Finally, Melvin Jones witnessed the shooting and Jones also identified Smith, the shorter, darker man, as the person who exited from the back seat of the taxicab and shot the cab driver. In light of the foregoing, Jones' unsolicited and brief encounter in a holding cell, which prompted Johnson to contact the guard and ask to be moved to another cell, was not material under Brady.

Police Reports

On January 25, 1988, one of the successor prosecutors in this case, Mary McKeown, submitted the State's written response to the defendant's demand for exculpatory material. This response stated, in part:

> 1. In response to Paragraph "1" of Defendant's Demand for Exculpatory Material, discovery has been

> provided in this cause. Depositions as well as previous trial testimony of witnesses are available to the defense.
>
> (D.Ex. 1,, bsp. 0096).

Subsequently, a third prosecutor, Glenn Martin, inherited this case for retrial; and although Martin did provide the defense with additional police reports in supplemental discovery responses, Martin could not be certain that all of the complete police reports were discovered for the second trial in 1990. However, Smith established nothing in the possibly undiscovered reports reflecting anything material under Brady. See Carroll v. State, 815 So. 2d 601, 620 (Fla. 2002) ("The prosecution is not required to provide the defendant all information regarding its investigatory work on a particular case regardless of its relevancy or materiality.") Compare, Rogers v. State, 782 So. 2d 373, 382-84 (Fla. 2001)(finding Brady violation in unprovided reports of co-defendant confessing to commission of different, similar robbery with different accomplice and unprovided tape of phone conversation reflecting prosecutor's coaching changes in co-defendant's testimony). The contents of the possibly undisclosed police reports reflect no similarly relevant exculpatory or impeaching information and do not undermine confidence in the outcome.

The assertion that the State "withheld" portions of police reports that did not constitute "Miller" portions does

not, *ipso facto*, equate with the legal conclusion of Brady violation. The State is not unmindful of this Court's recent decision in Floyd v. State, 2005 Fla. LEXIS 545 (Fla. 2005) addressing "Millerized" police reports. However, in Floyd, this Court found a Brady violation based, in part, on undisclosed police reports which not only identified other suspects, but also failed to include the defendant or anyone meeting his description as being present at the victim's residence at the time of the murder. As this Court explained in Floyd:

> The trial court found that Floyd failed to show that the State was obligated to turn over the Tina Glenn interviews and other information, erroneously relying on case law on the confidentiality of police reports and the general proposition that the State is not obligated to provide all investigatory information possessed by the police to the defense. [n5][18] However, it is apparent that the substantive information contained within the police reports identifying a neighbor of the victim as being an eyewitness to the presence of other suspects at the victim's home at the time of the murder qualified as Brady material. See Rogers. Thus, the trial court erred when it found that the State was not obligated under Brady to turn over the substance of the witness interviews and other information contained within the police reports but not disclosed to Floyd.

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[18] *[fn 5 of Floyd opinion, stating]*, "See Miller v. State, 360 So. 2d 46, 47 (Fla. 2d DCA 1978) (requiring the production of statements made by police officers who witnessed a crime and wrote their observations in police reports despite the holding of a previous case "that police reports are not public documents open to inspection")"

Floyd, 2005 Fla. LEXIS 545.

In this case, Smith's examples of information withheld by the redacted police reports do not reveal impeaching, or in some cases even admissible, evidence. Moreover, the cases relied upon by Smith are readily distinguishable from the circumstances in this case. For example, in Mordenti v. State, 894 So. 2d 161 (Fla. 2004), the defendant was convicted primarily on the testimony of one person, the defendant's ex-wife, Gail Mordenti Milligan. Gail was the only witness who was able to place Mordenti at the scene of the murder. "There was no money trail, no eyewitnesses, no confession, no murder weapon, no blood, no footprints, and no DNA evidence linking Mordenti to the murder." Id. The State's entire case relied solely on Gail's testimony. In Mordenti, a new trial was ordered because the State failed to disclose Gail's date book, which could have been used by the defense for impeachment purposes, and crucial information obtained from the State's interview with a key witness. In Cardona v. State, 826 So. 2d 968, 971 (Fla. 2002), the undisclosed materials warranting new trial were three typed criminal investigation reports and a proffer letter from [the co-defendant]'s attorney to the State outlining the substance of what the [co-defendant] was prepared to testify to at Cardona's trial. In Hoffman v. State, 800 So. 2d 174, 179-81 (Fla. 2001), the nondisclosure

of hair evidence and reports concerning the investigation of other suspects (including a confession) required a new trial.

Other Suspects

The disclosure that Melvin Jones, and others, were initially mentioned as possible suspects on the first day of the police investigation (D. Ex. 2, bsp. 4945) does not constitute information that must be discovered, where, as here, one of the co-defendants confessed at a later time, and the person [Smith] who used the pay phone at the Hogley Wogley and whose fingerprint was on that phone, was identified by Mr. McGruder as the same man who got into the back seat of the taxicab.

In Wright v. State, 857 So. 2d 861, 870 (Fla. 2003), the defendant asserted an alleged Brady violation based on information contained in police files concerning other possible suspects and other criminal activity in the same neighborhood. In denying Wright's postconviction claim, this Court emphasized:

> . . ., the evidence Wright claims as Brady material consists of information contained in police files concerning other possible suspects and other criminal activity in the same neighborhood. This is the same type of evidence that this Court recently addressed in Carroll v. State, 815 So. 2d 601 (Fla. 2002). In Carroll, the defendant argued that the State withheld favorable evidence that consisted of police investigative notes that linked the defendant with another suspect, that another person was believed by the family to be involved, and that other crimes, including another rape, had occurred

> in the neighborhood. In denying relief on this issue, we said, "As noted by the State, the prosecution is not required to provide the defendant all information regarding its investigatory work on a particular case regardless of its relevancy or materiality." Id. at 620. Likewise, investigators in this case were not required to provide all of the notes and information regarding their investigation. Thus, Wright has failed to demonstrate that the evidence should have been disclosed.
>
> However, even if the State should have disclosed the evidence, Wright has not demonstrated prejudice by the failure to do so. In order to be entitled to relief on a Brady claim, the defendant must also show that the evidence "is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988). There has been no such showing in the instant case. The mere possibility that undisclosed items of information may have been helpful to the defense in its own investigation does not establish constitutional materiality. See United States v. Agurs, 427 U.S. 97, 109-10, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976); Gorham v. State, 521 So. 2d 1067, 1069. The fact of other criminal activities and the existence of other criminals in the same neighborhood where this murder occurred does not affect the guilt or punishment of this defendant.
>
> We agree with the trial court's determination that the exculpatory effect of the documents is merely speculative; therefore, we affirm the trial court's denial of relief on this issue.
>
> Wright, 857 So. 2d at 870 (e.s.)

In this case, trial counsel was obviously aware of Jones' past convictions and pending charge, which was the only reason he was mentioned as a possible suspect. (R1. V5/R773). Smith failed to demonstrate that the evidence was favorable to him or admissible as impeachment of Jones. That the police may have investigated other suspects is not automatically

favorable to Smith, and the failure to disclose the preliminary investigation of other possible suspects has been held not to constitute a Brady violation in numerous other cases. See, Swafford v. State, 679 So. 2d 736, 738-739 (Fla. 1996); Medina v. State, 690 So. 2d 1241, 1249 (Fla. 1997); Spaziano v. State, 570 So. 2d 289, 291 (Fla. 1990).

Mellow Jones

The disclosure that Mellow Jones was part of the neighborhood canvas shortly after the 12:30 a.m. shooting and again around 8:30 a.m. does not reflect impeaching information of any substance. Both police reports included her in those households for which the police received "negative" responses. Mellow Jones testified that she had heard nothing; and, on cross-examination, defense counsel Sanders confirmed that Mellow was interviewed by the police *after* she spoke with her husband. Mellow Jones stated that she had not realized the officer was inquiring about the same murder her husband claimed to have witnessed. (R2. V6/R1015-1016). The disclosure that police canvasses of the neighborhood twice received negative results from Mellow Jones would have provided little or no impeachment.

Jones' telephone call to ASA McKeown in 1989

The disclosure that in October of 1989, Jones telephoned prosecutor Mary McKeown and advised that his 16-year-old

daughter, who had a child of her own, recently had made allegations of sexual abuse occurring 3 - 6 years earlier, that her allegations were in retaliation for Jones' attempted reconciliation with his wife, and that Jones wanted to take a polygraph, is not shown to be relevant to or admissible in the second trial. The Circuit Court, citing Carroll, found that the State was not required to disclose this handwritten note reflecting Jones' call. See, Carroll v. State, 815 So. 2d 601, 620 (Fla. 2002) ("the prosecution is not required to provide the defendant all information regarding its investigatory work on a particular case regardless of its relevancy or materiality"); See also, Jennings v. State, 782 So.2d 853, 858 (Fla. 2001) [finding that undisclosed letter does not evidence that witness was seeking (or that the State was offering) an improper benefit that would lead him to fabricate testimony, the letter does not constitute Brady material]. Jones' testimony at each trial consistently identified Smith as the triggerman. Jones had no suspect motivation existing at the time of Smith's trial to arguably alter his prior, consistent testimony or to somehow "skew" that prior consistent testimony. See, State v. Lewis, 838 So. 2d 1102 (Fla. 2002) (even assuming the State failed to disclose potential impeachment evidence, given the limited value of this evidence, and, the fact testifying witness had

already been sentenced, and any motivation for skewing his testimony would have been limited, there was no reasonable probability of a different result).

Additionally, the Circuit Court below noted that Jones was never charged with any offense. "If the evidence could not have been properly admitted at trial or would not be admissible on retrial, there is no reasonable probability that the outcome of [the defendant's] trial would have been different if the evidence had been provided to the defense." Jones v. State, 709 So. 2d 512, 519 (Fla. 1998). Evidence which would not have affected the outcome is not material. White v. State, 664 So. 2d 242, 244 (Fla. 1995).

Prosecutor's Synopsis

In this sub-claim, Smith asserts that the State was required, under Brady, to disclose the prosecutor's investigation synopsis of witness McGruder, the clerk at the Hogley-Wogley. As noted in United States v. Bagley, 473 U.S. 667, 675 (1985) (footnote omitted):

> . . . the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.

At trial, Mr. McGruder testified that the shorter, darker black male got into the rear of the cab, and the other man, a taller, lighter-skinned black male, got into the front of the

Yellow taxi cab when it arrived at the Hogley-Wogley Barbecue. (R2. V5/R859-860). Mr. McGruder identified Smith from a photopak as the one who came inside to telephone for the Yellow cab. (R2. V5/R855-857, 859-860, 862-863). Smith's fingerprint was identified on this telephone receiver. (R2. V5/R838-843; V.7/R1214-1216). Jones' testimony, that "New York" got out of the front of the cab and "Rerun" got out of the back, (R1. V5/R796-808, V11/1674-1678, V11/1692-1693; R2. V6/978-987), was consistent with the testimony of Mr. McGruder, as to which seats the two men had taken on entering the cab. (R2. V5/860). Mr. McGruder did not know either Smith or Johnson, but identified the shorter, darker man [Smith] as the one who got into the back of the cab. (R2. V5/859-863).

In denying postconviction relief on this claim, the Circuit Court found, first of all, that CCRC failed to meet its burden showing that defense counsel was entitled to disclosure of this internal investigatory report. Id. citing, Carroll, 815 So. 2d at 620. The prosecutor's notes, impressions, or inferences from investigations are not Brady material and, therefore, are not subject to disclosure. See, Spaziano v. State, 570 So. 2d 289, 291 (Fla. 1990)(ruling investigative notes detailing inferences from investigation is not admissible evidence and thus not Brady material); Williamson v. Moore, 221 F.3d 1177, 1183 (11th Cir. 2000)(no Brady violation in state's failure to turn over non-verbatim, non-adopted witness statements, not admissible at trial as impeachment evidence; appellate court may not speculate on

what might have been discovered if the documents had been turned over); Hickman v. Taylor, 329 U.S. 495 (1947) (notes of a witness interview contain a real risk of inaccuracy and untrustworthiness); Williamson v. Dugger, 651 So. 2d 84, 88 (Fla. 1994)(Most of the "withheld" evidence consisted of the prosecutor's trial preparation notes; they did not reflect the verbatim statements of any witness interviewed and had not been signed, adopted or approved by the persons to whom they were attributed. The notes also included trial strategy notations by the prosecutor and his personal interpretations of remarks made by the witnesses. Such material is not subject to disclosure); Jennings v. State, 782 So. 2d 853, 856 (Fla. 2001) (prosecutor's investigative notes did not constitute Brady material); See also, Kyles v. Whitley, 514 U.S. 419, 436-438 (1995), noting:

> As Justice Blackmun emphasized in the portion of his opinion written for the Court [in Bagley], the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. 473 U.S. at 675, and n.7. We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in Bagley (and, hence, in Brady) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate. . .

In addition, the Circuit Court alternatively assumed that even if the State should have disclosed the prosecutor's

assessment of witness McGruder, the record confirmed that the jury heard the inconsistencies in McGruder's identification testimony. Ultimately, regardless of McGruder's vacillating ability to identify Smith, which prosecutor Hogan suspected was prompted by reluctance and fear, and the wide range of estimates which McGruder provided of Smith's weight, it was still Smith's fingerprint which was recovered from the telephone used by the shorter, darker man – the same person that McGruder saw enter the back seat of the taxicab.

At trial, defense counsel cross-examined McGruder as to the date on the back of the photopak, and the State attempted to clarify that McGruder was shown several photopaks on several occasions. "In conceding that he was shown several photopaks on several occasions, McGruder then testified that he was <u>not</u> sure that the man in photograph A was the "shorter guy" who got into the cab that night." (PC-R. V/22/R4097, citing R2 Page: 880,883). Consequently, "[g]iven the doubt McGruder expressed, and the inconsistencies in his testimony, which the jury heard, the court cannot find that the undisclosed evidence — def. Ex. 10 — undermined confidence in the guilty verdict. <u>Way</u>, 760 So. 2d at 913. Evaluating the cumulative effect of all the evidence the trial court found, "Together, def. Ex. 8 and def. Ex. 10, had they been disclosed, would not have 'put the whole case in such a

different light as to undermine confidence in the verdict.'" PC-R. V22/R4097., citing Strickler, 119 S. Ct. at 1952 (quoting Kyles, 115 S. Ct. at 1566 (1995)); Way, 760 So. 2d at 914. See also, Mincey v. Head, 206 F.3d 1106 (11th Cir. 2000) (Mincey failed to convince us that "there [was] a reasonable probability that the result of the [penalty phase] would have been different if the [prosecutor's notes] had been disclosed to the defense.")

Jones' Polygraph

The trial court found that Smith was not entitled to relief on this claim because polygraph evidence would not have been admissible and CCRC "has not sufficiently rebutted the State's assertion, . . . that Detective Pflieger's police report, which indicates that a polygraph examination was administered to Melvin Jones, was discovered to defense counsel. [fn6] In sum, CCRC has failed to satisfy either the materiality or prejudice prongs required for a Brady violation. Vining v. State, 827 So. 2d 201, 208-09 (Fla. 2002)." (PC-R. V22/4099). (footnote omitted). Ultimately, the claim that the State may have suppressed information of Jones' polygraph on November 3, 1983, fails to establish a Brady claim as not shown to be material. The report of the polygraph reflects only that Jones' polygraph test was inconclusive on questions pertaining to his bad check charges.

The disclosure that the result of Jones' polygraph was inconclusive, as contrasted with his statements during the polygraph, would have been inadmissible and not available to defense counsel to use for impeachment. See LeCroy v. Dugger, 727 So. 2d 236, 240, n. 10 (Fla. 1998) (inadmissibility of polygraph results among rulings affirmed on summary denial); Walsh v. State, 418 So. 2d 1000, 1002 (Fla. 1982) ("Absent consent by both the state and defendant, polygraph evidence is inadmissible in an adversary proceeding in this state."); Sochor v. State, 883 So. 2d 766, 785 (Fla. 2004) (same). A Brady violation is not established if the evidence would have been inadmissible for impeachment. See Gilliam v. State, 817 So. 2d 768, 775-76 (Fla. 2002); Wood v. Bartholomew, 516 U.S. 1 (1995) (no Brady violation where polygraph results would not have been admissible at trial).

The Giglio Claim

Giglio involves a prosecutor's knowing presentation, *at trial*, of false testimony against the defendant. See Giglio, 405 U.S. at 154-55. In denying Smith's Giglio claim, the Circuit Court first pointed out that the "court has thoroughly reviewed the transcripts from the evidentiary hearing, as well as the written closing arguments, including the reply. The court is unable to locate any testimony from the retrial which reflects that either Derrick Johnson or Melvin Jones testified

falsely about being in a holding cell with each other on July 11, 1983. Therefore, this claim does not relate to def. Ex. 8." Smith does not dispute this dispositive factual finding by the Circuit Court. Consequently, Smith has failed to meet Giglio's initial threshold requirement. See, Tompkins v. Moore, 193 F.3d 1327, 1340 (11th Cir. 1999) ("Tompkins has failed to meet the threshold requirement that he show false testimony was used.").

Smith's reliance on the prosecutor's closing argument likewise fails to establish any valid Giglio claim. In Gorby v. State, 819 So. 2d 664, 678 (Fla. 2002), this Court held that a stacking of inferences alleging that the State struck a deal with a State witness was insufficient to establish a Brady or Gig1io violation for failure to show either that the witness gave any false testimony or that the State knew he had.

During the State's closing argument in the second trial, the prosecutor posed a rhetorical question whether there was any testimony that could lead the jurors to believe that Jones and Johnson got together and fabricated their testimony in order to pin the blame on Smith and argued that there was no evidence presented that *they even knew each other on March 23rd [sic], 1983,* the date of the murder, other than Jones knowing Johnson on the street as "New York." (R2. V8/R1302-1303).

The prosecutor's rebuttal closing argument in the second trial, (R2. V8/R1349-1350) was in direct reply to defense counsel's argument that Johnson and Jones acted in collusion and plotted and planned their testimony together. The prosecutor repeated that they [Jones and Johnson] hardly knew each other and added that they had no motive for plotting, although adding that Jones had, since the first trial, received the three-year sentence on his bad check charges and that Jones did not consider it much of a break.[19]

Jones admitted to giving an altered version[20] of the facts to Detective SanMarco at their first meeting and this was thoroughly addressed by defense counsel on cross-examination at both the first and second trials as part of their efforts to show that Jones' testimony was intended by him to obtain benefits from the State in his own sentencing. (R1. V11/R1694-1695; R2. V6/R991-993, 997-1005, 1008-1009). At the first trial, Jones testified the State had promised him

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[19] Sanders recalled that, at the time of Smith's retrial, he'd reviewed Jones' court file. (PC-R. V27/R4942). Therefore, Jones' judgments and sentencing dispositions were known to him. Obviously, there can be no Brady/Giglio violations where the defense had the exhibits or information ostensibly demonstrating the violation. See Routly v. Singletary, 33 F.3d 1279, 1286 (11th Cir. 1994).

[20] Initially, Jones said the cab was turned a different way. (R2. V6/R1002) Jones answered a few of the officer's questions and then "just stopped" answering. (R2. V6/R1005).

nothing, but that he expected that the sentences would be imposed concurrently as a five-year sentence. Jones explained that his charges were all worthless check charges or failure to provide services arising from his cabinet making business. (R1. V11/R1687, 1710-1711, 1775). At the second trial, Jones testified that the prosecutor had spoken in his behalf at Jones' sentencing after Smith's first trial and that he had received a three-year sentence, which Jones did not consider to be any break.[21] (R2. V6/R998, 1000).

During the evidentiary hearing, Derrick Johnson testified that he provided no information to Jones when Jones showed him a hand-drawn map in the holding cell. Johnson had not known Jones prior to that encounter and was so concerned by Jones approaching him about his case that he asked to be moved from the holding cell. (PC-R. V31/R5357-5359). Johnson described the "very brief conversation" he had with Jones and said that

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

he “became very uncomfortable, [and] asked to be moved." (PC-R. V31/R5359).

Unlike Alcorta v. Texas, 355 U.S. 28 (1957), the instant case does not involve a situation where a witness knowingly gave false testimony known by the prosecutor to be false which was material. Johnson did not describe the crime to Jones in any way. (PC-R. V31/R5379). Johnson had already experienced that inmates would ask him questions in an effort to learn about his case to help themselves and had learned not to talk to anybody. (PC-R. V31/R5379). Johnson testified that he had no police reports with him in jail or any other records than the original charge sheet. (PC-R. V31/R5359). Johnson explained that he was being truthful in his trial testimony, when the defense asked if he had ever discussed the case with Melvin Jones, because he did not consider their encounter in the holding cell to be any discussion when Jones did all the talking. (PC-R. V31/R5383). Johnson gave Jones no information about the case and Jones asked for none, except what Johnson was going to do, was he going to testify or not. (PC-R. V31/R5385). Jones did not describe what he had observed but, via the hand-drawn map, showed Johnson what he had observed. The map showed where all the parties were, including Jones. The only information Johnson provided during the 6 or 7 minute

encounter was that he did not know what he was going to do. (PC-R. V31/R5385-5386).

The postconviction hearing did not establish that the State presented any false testimony which was material to the outcome of Smith's conviction and sentence. Testimony of defense counsel Thomas Donnelly confirmed the record showing that the defense was aware of some contact in the holding cell in November, just prior to trial. (PC-R. V31/R5391; R1. V11/R1693-1695). Sanders testified he read the transcript of the first proceeding. Moreover, Johnson consistently has denied providing any information to Jones. (PC-R. V31/R5357-5359; 5379).

The postconviction hearing did not establish that Jones or Johnson testified falsely at trial about their not having collaborated on their testimony. None of the criteria for demonstrating a Giglio violation are present - there was no false testimony, known to be false by the prosecutor, or which is material. Ventura, *supra*. None of the witnesses testified about Johnson providing any information to Jones, or that they worked together to place responsibility on Smith, and Johnson denied it. (PC-R. V31/R5356-5359). The State Attorney's Investigative Memo, (D. Ex. 8) does not show that Jones received any information from Johnson about the facts of this case.

Here, Jones' denial that he resided with Johnson in a cell at the jail is not materially false because there is no showing that the brief encounter in a holding cell at the courthouse changed the trial testimony of either Jones or Johnson. The State's Closing Argument – that no evidence showed Johnson and Jones collaborated or worked together to place responsibility for the shooting on Smith – has not been shown to be false. Johnson has never waivered in identifying Smith as the shooter and insisting that he provided no information to Jones. False evidence is material if it undermines confidence in the outcome. Rose v. State, 774 So. 2d 629, 634 (Fla. 2000). In the instant case, nothing presented at the postconviction hearing undermines confidence in the outcome of Smith's retrial. See, Wood v. Bartholomew, 516 U.S. 1, 8 (1995). ("[i]t should take more than supposition on the weak premises offered by [defendant] to undermine a court's confidence in the outcome").

ISSUE II

THE SCOPE OF THE EVIDENTIARY HEARING CLAIM

In his second issue, Smith alleges that the trial court erroneously limited the scope of the multi-day evidentiary hearings concerning alleged Brady/Giglio violations. However, other than obliquely complaining that the trial court purportedly refused "to permit Mr. Smith to present all of the

evidence of Brady/Giglio violations...," Smith fails to particularly identify any specific ground which was improperly summarily denied. (See, Initial Brief of Appellant at 77-80).

Smith's allegation that "some evidence" drew an objection that it was beyond the scope of the hearing and conclusory complaint that "all of the allegedly undisclosed favorable [unidentified] evidence must be presented," is woefully inadequate to fairly preserve and present this issue for appeal. (See, Initial Brief at 78-79). As this Court has previously stated, "the purpose of an appellate brief is to present arguments in support of the points on appeal." Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990). The State submits that merely making reference to arguments which were raised somewhere below does not suffice to preserve issues and, therefore, this claim is waived. See, Cooper v. State, 856 So. 2d 969, 977, n. 7 (Fla. 2003); Sweet v. State, 810 So. 2d 854 (Fla. 2002); Dufour v. State, 2005 Fla. LEXIS 691, 84-85 (Fla. 2005).

Moreover, the trial court thoroughly addressed each of the defendant's identified claims, reconsidered its original order which summarily denied, in part, the defendant's amended motion to vacate, and ultimately expanded the scope of the evidentiary hearing in response to Smith's request. On January 7, 2002, the trial court entered a 62-page written order which summarily denied, in part, some of the defendant's postconviction claims. Smith sought rehearing/reconsideration of seven rulings in the order of January 7, 2002. On February

11, 2002, the trial court granted rehearing, in part, and directed Smith to "properly supplement his postconviction motion." On March 13, 2002, Smith filed a supplemental amended motion to vacate. On May 10, 2002, the trial court granted, in part, the defendant's supplements and, therefore, expanded the scope of the evidentiary hearing. After the multi-day evidentiary hearing, the trial court entered a comprehensive final written order denying postconviction relief. The trial court's final written order sets forth an extensive analysis of Smith's postconviction claims, both individually and cumulatively. (PC-R. V22/R4089-4113). Thus, even if this perfunctory issue is now considered, no relief is due because Smith has not identified any specific error in the treatment of any identified claims below.

ISSUE III

THE "IAC - GUILT PHASE" CLAIM

In this claim, Smith asserts that trial counsel was ineffective during the guilt phase in allegedly failing to (1) contact an impeachment witness, Ventura Gibson, (2) thoroughly challenge the conclusions of the FBI chemist, Donald Havekost, (3) assert a cause challenge against some unnamed jurors, and (4) adequately investigate purported "alibi" witnesses, Khan Campbell and James Hawkins.

To establish a claim that trial counsel was ineffective, a defendant must establish both deficient performance and prejudice, as set forth in Strickland. See, Rutherford v. State, 727 So. 2d 216, 218 (Fla. 1998). To meet the first

prong, deficient performance, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards. See, Gore v. State, 846 So. 2d 461, 467 (Fla. 2003), citing Strickland, 466 U.S. at 688. Second, as to the prejudice prong, the deficient performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. See Strickland at 694; Rutherford, 727 So. 2d at 220. "When a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003); Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001).

Standards of Review

After an evidentiary hearing on a claim of ineffective assistance of trial counsel, this Court reviews the dual Strickland deficiency and prejudice prongs as "mixed questions of law and fact subject to a *de novo* review standard but . . . the trial court's factual findings are to be given deference. So long as the [trial court's] decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence." Sochor v. State, 883 So. 2d 766, 781 (Fla. 2004) (quoting Porter v. State, 788 So. 2d 917, 923 (Fla. 2001)).

Impeachment witness Ventura Gibson

The Circuit Court found that trial counsel was deficient in failing to locate Ventura [Vince] Gibson, however, the Court found no resulting prejudice. As the Circuit Court explained:

> . . . the court cannot find that the deficiency so affected the fairness and reliability of the proceeding such that confidence in the outcome is undermined. Maxwell, 490 So. 2d at 932 (citing Strickland v. Washington, 466 U.S. 668 (1984)). The fact of the matter is that any impeachment of Melvin Jones as to how he arrived in the alleyway near his residence is collateral to his being there. He explained in detail that he saw the crime occur, and no impeachment evidence as to how he arrived there would have altered his eyewitness testimony describing the robbery and homicide.
>
> Additionally, as noted by the State in its written closing argument, and as noted by Justice Shaw in his dissent from the opinion reversing the case for a new trial, there exists a plethora of evidence implicating the defendant in this homicide, which is separate and distinct from Melvin Jones' testimony. Smith v. State, 492 So. 2d 1063, 1069-70 (Fla. 1986).
>
> Derrick Johnson consistently testified at his preliminary hearing, at his deposition, in both trials, and at the evidentiary hearing that the defendant shot the cab driver. The gun described was consistent with the gun missing from Roy Cone's residence (Roy Cone is the defendant's uncle), and the metal composition of the fragment discovered on the victim was consistent with the metal composition of the bullets that Roy Cone purchased for the gun. [R2 Pages: 1043-1046]. The defendant used this gun on the cab driver, and then later when he robbed Marcel DeBulle and his wife at the New Plaza Motel later the same day. [R2 Pages: 1191-1202]. Mr. David McGruder, the cook at the Hogley Wogley B-B-Q, identified Derrick Johnson and Melvin Jones as exiting the cab that night. He also indicated that the darker, shorter individual exited the back seat of the cab. [R2 Pages: 855-864]. The night of the

> murder, the defendant told Priscilla Walker, a disinterested witness, that he just shot a "cracker cab driver in the back" because he did not want to give up the money. Additionally, Priscilla Walker saw the gun that the defendant brought with him to her residence. [R2 Pages: 1016-1022]. Finally, another witness, James Matthews also saw the gun, and the defendant confessed to him that he might have shot someone, that he was scared, and that he needed a place to stay. [R2 Pages: 1027-10301.
>
> All of this evidence must be considered in determining if the single act of failing to locate and investigate Vince Gibson undermined the reliability of the verdict. Based on a review of the entire record, and in light of the Strickland standard, the court finds that it did not.
>
> (PC-R. V22/R4100-4101) (e.s.)

The State asserts that Smith's claim of ineffective assistance for failure to discover Ventura Gibson as an impeaching witness meets neither prong of Strickland. Trial counsel's performance was not deficient because Gibson's testimony would have been mere collateral impeachment on the irrelevant, immaterial matter of how Jones arrived at the scene. Furthermore, there is no reasonable probability that the outcome would have been different even had Mr. Gibson's collateral impeachment been admitted at trial because the State's proof of the case did not depend on the testimony of Melvin Jones.

Johnson consistently testified -- at Smith's preliminary hearing (on 6/23/83, which obviously preceded the holding cell contact on 7/11/83), at deposition, at two trials and at the postconviction hearing, that Smith shot the cab driver.

Smith, not Johnson, was the one seen with a handgun on the day of -- the day before -- and the day after the murder. The gun described was consistent with the gun missing from Smith's uncle's residence, and the metal composition of the fragment discovered on victim Songer was consistent with the metal composition of the bullets Smith's uncle had purchased for the gun ten years before.

Smith's unsuccessful efforts to sell the gun for money resulted in Smith using the gun, first on the cab driver, Jeffrey Songer, and then on the Canadian couple at the motel later the same day, in his efforts to obtain money. Mr. McGruder, the cook at the Hogley-Wogley Barbecue placed the shorter, darker man, [Smith] as the one entering the back seat of the cab and the taller, lighter-skinned man [Johnson] in the front passenger seat. On the night of the murder, Smith admitted to Priscilla Walker that he had just shot a "cracker" cab driver in the back because he had acted like he did not want to give up his money, and Smith also confessed to James Matthews he might have shot someone. Trial counsel's failure to locate Ventura Gibson does not reflect "a reasonable probability that, but for the deficiency, the result of the proceeding would have been different." <u>Spencer v. State</u>, 842 So. 2d 52 (Fla. 2003), citing <u>Strickland</u>, at 695.

There is no basis to the allegation that the State made a "decision not to verify essential elements of Jones' story." (Initial Brief at 87). How Jones arrived at his eyewitness position that night was not an "essential element" of Jones' observations on the night of the shooting.[22] Extrinsic evidence to impeach a witness on a collateral matter is inadmissible. Keen v. State, 775 So. 2d 263, 278 (Fla. 2000); Caruso v. State, 645 So. 2d 389, 394-395 (Fla. 1994). Such collateral impeachment is not shown to be admissible evidence in this case. The State submits that how or who dropped off Jones near his home earlier that night would not have shown that Jones lied about being at the scene or what he saw, and trial counsel was not ineffective for failing to investigate a matter of inadmissible evidence.

Contrary to Smith's argument, Gibson's postconviction testimony -- that he did not give Jones a ride -- would not have supported any defense claim that Jones "had colluded with Johnson." (Initial Brief at 87). Smith's postconviction attorneys, below and on appeal, are Smith's third and fourth team of defense attorneys who have failed to establish that

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[22] On cross-examination during Smith's first trial, Jones explained that regardless of who was dropping him off, Jones never got dropped off in front of his house because he first wanted to check the alley for police cars because of his outstanding warrants. (R1. V11/R1713- 1724).

Jones learned *anything* from Johnson. Trial counsel ethically could not have argued that Jones must have received his facts from Johnson, for lack of any evidence thereof. Likewise, trial counsel could not ethically have argued that Johnson, and not Smith, was the triggerman and that it was Jones, not Smith, who was Johnson's "real" codefendant. See, Cohen v. State, 581 So. 2d 926, 927 (Fla. 3d DCA 1991)(third party's possible culpability in the murder was properly excluded because there is insufficient evidence on the record to support its relevancy). Appellant has failed to demonstrate any deficiency of counsel and resulting prejudice under Strickland.

Bullet Lead Analysis

On Smith's direct appeal following his retrial, Smith's initial brief noted that "FBI Agents Roger Asbery and Donald Havekost analyzed the lead fragment from the autopsy and lead from the bullets obtained from Roy Cone. Both agents determined that the composition of the lead in the fragment was the same as the lead in the bullets. (R1033-1050, 1062-1086)." (Smith v. State, Case No. 76,491, Initial Brief of Appellant, at page 13.)

In denying relief on Smith's claim of ineffective assistance of counsel in allegedly failing to adequately challenge the F.B.I. expert regarding the bullet lead

composition analysis, the Circuit Court found no deficiency of counsel. In fact, defense counsel, Sanders, consulted an expert of his own and he conducted his own research on neutron activation analysis. In denying this postconviction sub-claim, the Circuit Court stated:

> <u>I. B. 6. - Defense Counsel Failed To challenge The State's F.B.I. Expert Who Testified Regarding The Lead Composition Evidence; Further, Defense Counsel Failed To Seek A Chemical Residue Expert To Aid Him In Conducting The Cross-Examination Of The State's Expert Witness</u>.
>
> CCRC Claims That The Testimony Of Dr. Erik Randich Would Have Refuted The State's Expert Testimony In This Regard (CLAIM XIV).
>
> Next, CCRC asserts that Sanders failed to challenge the State's F.B.I. expert who testified regarding the lead composition evidence. In its written closing argument, CCRC refers to this as "Unchallenged Junk Science." This is an ineffectiveness claim, and as such, the <u>Strickland</u> standard, discussed above, applies to this claim. Special Agent Robert Sibert, Special Agent Roger Asbury, and Special Agent Donald Havekost testified at trial as to this issue. Dr. Erik Randich and Charles Peters testified at the evidentiary hearing as to this issue.
>
> Special Agent Robert Sibert, an expert in firearms identification, testified at trial. He indicated that his specialty was to compare the microscopic marks on fired bullets and cartridge cases to a particular firearm. He testified that he discovered lead residue on both of the garments submitted for testing.
>
> Special Agent Roger Asbery initially performed the testing in 1983. Utilizing neutron activation analyses, which tests antimony, copper, and arsenic, Agent Asbery tested the metal composition of the bullet fragment extracted from the victim's body and compared it to the metal composition of the two unfired .38 special plus p caliber cartridges manufactured by Winchester-Western from the box owned by Roy Cone, the defendant's uncle. Agent Asbery found the elemental composition to be the

same. [R2 Pages: 1035-1045]. The State's theory of the case, as argued at trial, was that the defendant used his uncle's gun and bullets during the murder of Jeffrey Songer and the subsequent robbery of the DeBulles.

Next, Donald Havekost, a Special Agent for the F.B.I. assigned to the elemental composition unit in Washington, D.C., testified as an expert witness in neutron activation analysis and inductively coupled plasma atomic emissions spectrometry (ICP). He testified that in 1988, Agent Asbery came to him with the evidence in hand, and explained that this case, which originated in 1983, was going back to trial. Agent Asbery inquired as to whether any new technologies had developed, such that additional testing should be completed. Agent Havekost explained that ICP was a newer analysis that permitted testing of two additional elements – bismuth and silver. Subsequently, Agent Havekost retrieved the samples and conducted his own neutron activation analysis as well as the newer ICP analysis. His ultimate conclusion was that the neutron activation and ICP analyses he conducted, which chemically compared the elements of antimony, copper, arsenic, bismuth, and silver, revealed no difference in the samples, such that the samples originated from a common source. [R2 Pages: 1066-1071].

Essentially, CCRC maintains that Agent Havekost's testimony went unchallenged, particularly the aspect of his testimony dealing with the chance that another box of bullets would have the same, materially indistinguishable levels of the five chemical elements. CCRC also takes issue with Agent Havekost's testimony of R2, page 1083. CCRC asserts that defense counsel should have, at the very least, hired a metallurgist to advise him regarding the significance of another match. In support of this argument, CCRC, at the evidentiary hearing, presented the testimony of Dr. Erik Randich, a metallurgist employed at Livermore National Laboratories. He testified, in pertinent part, that Agent Havehost's opinion – the samples originated from a common source – is erroneous unless that source is unique. In short, Dr. Randich would correct the statement to indicate that they could have come from the same source. [Pages: 439-443].

The record reflects that Agent Havekost addressed this issue on direct-examination. According to Roy Cone's trial testimony, the unfired cartridges that comprised one of the two samples, the other being the bullet fragment extracted from the victim, were at least eleven years old. [R2 Pages: 890-892]. Agent Havekost explained that the chances of finding a box that was purchased or manufactured say, a year ago, with the same compositional make-up would be, in his opinion, "very unlikely." He opined that as time progresses, the chances of finding another box with the same compositional make-up becomes less and less remote, and that the chance of finding such "would be an insurmountable job." [R2 Pages: 710-711].

Moreover, Agent Charles Peters, the 27-year veteran F.B.I. laboratory technician, testified at the evidentiary hearing. As a rebuttal witness to Dr. Randich, he explained that Agent Havekost, in 1974, took samples from the melting pot at Winchester-Western and from three different billets, compared them, and found them to be homogenous as to their contents. Agent Peters indicated that he reviewed the trial testimony of Agent Asbery and Agent Havekost, and that based on his expertise, neither of those Agents misled or exaggerated the relevance of the lead comparison analysis. [R2 Pages: 522-523].

Sanders testified that he did, in fact, consult an expert in the area to assist him with the lead comparison testimony. State's Ex. 24, which is a Motion for Costs of Expert, confirms that he sought costs for "experts on ballistics and fingerprinting to aid in trial preparation," and State's Ex. 23 confirms that he hired a firearms expert. In particular, Sanders indicated that he called an expert clearinghouse, and was referred to a qualified expert in the area. He recalled "I just wanted to see if there was any way — if he [his expert] saw any way I could challenge what they did or the conclusions they reached, at the very least, with respect to that lead analysis testimony they gave." He further testified "I sent that [F.B.I. reports on lead comparison tests as furnished in discovery] to him [his expert] and asked him — explained to him what the case was about and asked him whether he saw any problems with what the F.B.I. expert had done and what he had concluded. And he

called me back sometime later, as best I recall, and said something to the effect that he didn't see any problem with it." Finally, Sanders indicated that he conducted research at Stetson College of Law to familiarize himself with neutron activation analysis. [Pages: 672-676; 678-681].

In light of the foregoing, the court is not convinced that Sanders was deficient in failing to more thoroughly challenge the State's expert witnesses on the bullet lead comparison testing. Maxwell, 490 So. 2d at 932 (citing Strickland v. Washington, 466 U.S. 668 (1984)). As discussed above, the record reflects that he was not inattentive to the issue. That is, he consulted an expert of his own, and he conducted his own research on neutron activation analysis. As previously explained, "courts are required to make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time and indulge a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." White, 729 So.2d at 912 (citing Wainwright, 507 So.2d at 1381. "That current counsel, through hindsight, would now do things differently than original counsel did is not the test for ineffectiveness." Stano, 520 So.2d at 281 n.5; Cherry, 659 So.2d at 1073 ("The standard is not how present counsel would have proceeded, in hindsight....").

The court was unable to find any testimony or evidence offered at the evidentiary hearing concerning Sanders' failure to hire a chemical residue expert. At the evidentiary hearing, Dr. Randich discussed, in detail, the bullet lead comparison testing and how Agent Havekost's opinion at trial was "flawed." He did not, however, offer testimony on the testing that determined lead to be present on the victim's sweater and t-shirt, and on the defendant's jeans. Therefore, to the extent it is distinct, the chemical residue expert claim shall be deemed abandoned. Anderson, 822 So. 2d at 1266-67.

(PC-R. V22/R4103-4104)

Smith now describes FBI expert Havekost's bullet lead analysis as "Junk Science." (Initial Brief of Appellant at 88). However, Smith's disparaging characterization does not factually alter that three FBI agents with expertise in metal element analysis have all testified concerning identification of the metal composition of the metal fragment on the body of the murdered cab driver and its comparison with the metal composition of the bullets in the box owned by Smith's uncle, Roy Cone. Of course, the State's theory at trial was that this gun was the one used by Smith to shoot the cab driver. Trial counsel Sanders hired a ballistics expert for the retrial to review the FBI's raw data and testing, but developed nothing for impeachment. (PC-R. V32/R5460-5463; St. Ex. 23 & 24). Even now, the defense metallurgist expert, Dr. Randich, accepted the results of the neutron activation analysis and ICP analyses as done by the FBI. (PC-R. V30/R5209).

Because of new technology, Agent Havekost, in 1988, retested the exhibits which were previously tested by Agent Asbury in 1983. Havekost repeated the neutron activation analysis that Asbury previously had performed for amounts of copper, arsenic and antimony, and added the new instrumental technique ICP for detection of the amounts of antimony and the additional chemical elements of bismuth and silver. (R2.

V6/R1043-1044, 1066-1069). Three elements were compared by neutron activation and one of those three and an additional two by ICP. (R2. V6/R1069-1070). He had been doing neutron activation analysis with the FBI since 1973 and the ICP instrumental technique since 1985. (R2. V6/R1062-1063). He gave the history of the development of the ICP instrument and its use in universities and industry since the 1960's, and its subsequent forensic use at Scotland yard in the 1970's before the FBI began its daily use in 1985. He testified to its acceptance in the scientific community as a reliable instrument and to the proper use of the machine for his testing. (R2. V6/R1070-1071). Agent Havekost concluded that the fragment bullet samples he analyzed for comparison were indistinguishable chemically for the five elements, from which he formed his opinion that they had a common source. (R2. V6/R1071). He described his particular expertise in Winchester cartridges from seventeen years of working with the product which resulted from the manufacturing process at Winchester-Western Corporation, the cartridge plant to which he was personally assigned and had visited to observe the process. (R2. V6/R1074-1075). Typically, several metal compositions of bullets were represented within a typical box of fifty bullets. (R2. V6/R1081).

Dr. Randich's conclusion, that the fragment may also have been consistent with bullets sold in other boxes was not omitted by the FBI testimony. Dr. Randich, Agent Havekost, and Agent Peters all addressed the fact that bullets from different melt pours often ended up in the same box of 50 bullets, because bullet casings were not assembled with date-sensitive explosive components until needed. Conversely, bullets from the same melt pour could end up in different boxes as well as the same box. Agent Havekost explained that the odds of finding unshot boxes of bullets chemically matching bullets from other boxes diminished rapidly as the years go by and unlikely after ten years. (R2. V6/R1081-1083). Cone's box of bullets, that were compositionally indistinguishable for five elements of the metal fragment found on the victim, had been purchased over ten years earlier. (R2. V6/R891-894, 1231).

Finally, Dr. Randich admitted that his own information was not available for use by defense counsel in 1990, having only been developed by studies he began in 1998, and that he knew of no other source of such information in 1990. (PC-R. V30/R5237-5238). Although he would have started such a study in 1990, if he'd been asked, he had yet to publish an article for peer review, other than having had one on the Internet for two months, four years after commencing his study. (PC-R.

V30/R5238-5239). Accordingly, Smith did not establish the availability of a metallurgist in 1989-1990 to have contradicted the FBI chemical composition analysts.[23] The Circuit Court's findings are supported by competent, substantial evidence and Smith has failed to demonstrate any deficiency of counsel and resulting prejudice under Strickland.

Failure to Investigate Alleged Alibi Witnesses and Strike Jurors for Cause

Smith also asserts that trial counsel was ineffective in failing to adequately investigate Smith's "potential alibi witnesses, Khan Campbell and James Hawkins." (Brief of Appellant at 92). Prior to Smith's retrial, attorney Sanders moved to withdraw, asserting an alleged conflict in that "the client wants counsel to represent testimony that counsel believes to be perjurious." (R2. V1/R86). After a pretrial hearing on the motion (R2. V2/R351-364), the trial court

[23] The State recognizes that Dr. Randich pointed out, however, that the data he used from the lead suppliers (i.e., SPARK data) was available in the 1980's, and that the 1987-1989 data had been included in his Internet paper. (PC-R. V30/R5230). However, the lack of precision of the SPARK data would have so minimized the weight of such evidence, as compared to the precision of the ICP procedure for confirming the neutron activation testing, as to not show with any reasonable probability that it would have affected the outcome, nor constituted ineffective assistance of counsel for failure to present it.

denied the motion, as not presenting a legally sufficient reason to withdraw. (R2. V2/R358). The "potential" defense witnesses were identified during trial as Campbell and Hawkins. (R2. V7/R1238). The State took the depositions of both Campbell and Hawkins on November 8, 1989. In their depositions, both Hawkins and Campbell admitted to having an extensive history of felony convictions for which they were currently incarcerated at Florida State Prison; both were transferred there from Union Correctional Institution for fighting with other inmates and other disciplinary reports. Campbell had known Smith since 1979 when they had met in a program for juvenile delinquents, and Hawkins had known Smith since 1980, after meeting him on the street as "Rerun." Campbell met Smith at the clinic at Florida State Prison in May of 1989, and Smith asked Campbell if he recalled seeing Smith at Norm's Bar on March 20, 1983, the same date as the murder, and if Campbell recalled the time he had seen Smith.

At the time of Smith's retrial, the State had obtained record evidence to impeach the deposition statements of Smith's alleged alibi witnesses, Campbell and Hawkins, of seeing Smith at Norm's Bar and outside there after 12:30 closing time on the day of the cab driver's murder. Both Campbell and Hawkins had testified on deposition that they could recall the date as the same day they had both taken

Campbell's pregnant girlfriend to Bayfront Hospital with labor pains, but that she had not had the baby until another later time. The State obtained the hospital records for Campbell's pregnant girlfriend, Dylan Misha Walters, and established that the date of her admission to Bayfront for false labor pains was March 28, 1983, a week *after* the cab driver's murder on March 21, 1983. (State's three-page proffer of testimony filed May 25, 1990, PC-R. V13/R2249-2251).

At the time of trial, the trial court resolved the matter by having defense counsel Sanders[24] and Smith seal their versions of confidential, privileged discussions they had about Campbell and Hawkins testifying as alibi witnesses and by allowing the State to file its proffer of the impeachment

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[24] Trial counsel's files, discovered to the State during the postconviction proceedings by Court order, reveal that Smith's additional claimed alibi witnesses, Shy Fat, Denise Young, Norm and Casper, did not support Smith's claimed alibi of their having seen Smith after midnight, but only earlier that night. Casper told the investigator he had spoken to Smith between 11:00 and 11:15 P.M., while playing the next-to-last set of music as the disc jockey. Denise Young said she was with Smith for about two to three hours at Norm's, after Smith arrived between 6:00 and 7:00 P.M. Norm thought he might have seen Smith the evening of the shooting, but was not sure. Shorty Fat, whom the investigator thought was possibly Shy Fat, denied seeing Smith that night, but said Smith had asked him, while the two were in jail together, to help him with his alibi. (PC-R. V13/R2239-2246). As reiterated in DeHaven v. State, 618 So. 2d 337, 339 (Fla. 2d DCA 1993), "a defendant's Constitutional right to the effective assistance of counsel does not include the right to require his lawyer to perpetrate a fraud on the court."

evidence. (R2. V7/R1237-1253; PC-R. V13/R2255). The statement by trial counsel Sanders, filed May 25, 1990, unsealed on postconviction, reveals that Smith told Sanders that the two witnesses, Khan Campbell and James Hawkins, were lying, but that Smith recalled only that he told Sanders they *might* be lying. (PC-R. V13/R2255). Smith filed no separate sealed statement, but Smith wrote a letter to the Court, referred to in his initial brief. (PC-R. V13/R2284-2285). Trial counsel's strategic decision, ethically declining to present false testimony, does not constitute any deficiency of counsel under Strickland.

Smith also claims that trial counsel was ineffective in failing to challenge for cause some unnamed jurors who allegedly expressed bias in favor of imposing a sentence of death. (Brief of Appellant at 91-92). Smith's argument on this point consists of two sentences. Smith does not identify, by name, any particular juror; instead, he simply lists a series of page numbers from the direct appeal record. (Id. at 92).

Smith's conclusory, two-sentence assertion is woefully inadequate to fairly preserve this issue for appellate review. See, e.g., Cooper v. State, 856 So. 2d 969, 977, n. 7 (Fla. 2003); Sweet v. State, 810 So. 2d 854 (Fla. 2002) ("because on appeal Sweet simply recites these claims from his

postconviction motion in a sentence or two, without elaboration or explanation, we conclude that these instances of alleged ineffectiveness are not preserved for appellate review"); Dufour v. State, 2005 Fla. LEXIS 691 (Fla. 2005), citing Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990). Assuming, *arguendo*, that Smith's two-sentence claim is fairly preserved and presented on appeal, which the State specifically disputes, Smith has not demonstrated any deficiency and resulting prejudice under Strickland and its' progeny. In summarily denying postconviction relief on Smith's allegation that trial counsel was ineffective in failing to strike various jurors for cause, the trial court's written order of January, 2002, specifically addresses particular, identified jurors, and sets forth a thorough analysis of this claim. The Circuit Court evaluated each allegation in conjunction with the trial record and the applicable legal standards and found that Smith failed to establish any entitlement to relief, individually and cumulatively. Thus, even if this claim is considered, no relief is due because Smith has not identified any error in the treatment of these postconviction claims. See, Dufour v. State, 2005 Fla. LEXIS 691 (Fla. 2005) (Defendant "is not entitled to relief on his cumulative error claim because the alleged individual claims of error are all without merit, and,

therefore, the contention of cumulative error is similarly without merit.”) Griffin v. State, 866 So. 2d 1, 22 (Fla. 2003) (“Where individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail.”)

ISSUE IV

THE “NEWLY-DISCOVERED” EVIDENCE CLAIM

In his fourth issue, Smith alleges that he is entitled to a new trial on the basis of “newly discovered” evidence of a purported confession by Derrick Johnson to another inmate, Charles Hill, in 1985. According to Hill, Derrick Johnson, while still in prison, allegedly confessed to Hill that Johnson was the one who shot the cab driver, Jeffrey Songer. Johnson’s alleged confession purportedly took place in 1985; however, Hill did not reveal Johnson’s alleged confession until fifteen years later, when contacted by CCRC in 2000. Johnson testified at the postconviction hearing that he never came into contact with Charles Hill at the Belle Glade Correctional Institution in 1985. Johnson also testified that he never told anyone that he shot the cab driver.

This Court has emphasized the following two requirements that must be satisfied in order to set aside a conviction or sentence on the basis of newly discovered evidence:

> First, in order to be considered newly discovered, the evidence "must have been unknown by

> the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known [of it] by the use of diligence."
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.

Lightbourne v. State, 841 So. 2d 431, 440 (Fla. 2003); see also, Jones v. State, 591 So. 2d 911, 915 (Fla. 1991) ("Newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. The same standard would be applicable if the issue were whether a life or a death sentence should have been imposed.").

In determining whether the second prong of the Jones standard has been met, the trial court is required to first "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial." Specifically,

> In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. Once this is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether the evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence. Where, as in this case, some of the newly discovered evidence includes the testimony of individuals who claim to be witnesses to events that occurred at the time of the crime, the trial court may consider both the length of the delay and the reason the witness failed to come forward sooner.

Lightbourne v. State, 841 So. 2d at 440-441 (citations omitted).

In denying postconviction relief after conducting an evidentiary hearing on Smith's claim of newly discovered evidence, the trial court denied relief on five separate and independent grounds. First, the trial court found "there has been no showing that the existence of Charles Hill and his testimony could not have been discovered through the exercise of due diligence prior to March 2000." Second, the "testimony of Charles Hill is unworthy of belief." Third, "Charles Hill never offered an explanation for why he waited approximately 15 years to report this alleged confession." Fourth, Derrick Johnson testified at the evidentiary hearing that he never came into contact with Charles Hill at the Belle Glade Correctional Institution in 1985. He further testified that he never told anyone that he was the individual who shot the cab driver. Fifth, even if Hill's testimony was considered, the trial court found that it was not sufficient to "probably produce an acquittal," when evaluated in conjunction with the evidence introduced at Smith's retrial. As the trial court's sound written order explains:

> III. - Newly Discovered Evidence In That Derrick Johnson Confessed To Inmate Charles Hill That He Shot Cab Driver
>
> Next, CCRC alleges that co-defendant Derrick Johnson, while in prison, confessed to Inmate Charles Hill that he shot the cab driver. This is being raised as a newly discovered evidence claim. CCRC alleges that the existence of Charles Hill was discovered in March of 2000, and that he was

actually located in August of 2000. The affidavit of Charles Hill is State's Exhibit 13.

The State argues that this claim is not newly discovered evidence because the defendant's conviction was final on February 21, 1995, when the U.S. Supreme Court denied certiorari. The State asserts that the existence of Charles Hill and his testimony could have been, and should have been discovered sooner. Smith v. Florida, 115 S. Ct. 1129 (U.S. 1995). This court recognized, in its order dated May 10, 2002, that this claim may not constitute evidence of a newly discovered nature, but found that in an abundance of caution, the claim would be considered at the evidentiary hearing.

At the evidentiary hearing, Charles Hill testified that while at the Bell Glades Correctional Institution in 1985, he had two occasions to visit with co-defendant Derrick Johnson, both of which occurred in the recreational yard. Charles Hill indicated that Derrick Johnson informed him that he shot the cab driver, and that he "pinned" it on the defendant because he "had to do what he had to do [to get out of prison]." [Pages: 284-285]. Charles Hill initially reported this information to a CCRC investigator named Rosa Greenbaum on or about September 6, 2000. [Pages: 293-295; 730].

To argue a successful newly discovered evidence claim, the asserted facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." Jones v. State, 591 So. 2d 911, 916 (Fla. 1991) (quoting Hallman v. State, 371 So.2d 482, 485 (Fla. 1979)). In order to provide relief, the newly discovered evidence must be admissible at trial, and it "must be of such nature that it would *probably* produce an acquittal on retrial." Jones, 591 So. 2d at 915 (emphasis in original).

The court finds that this claim must fail for several reasons. First, there has been no showing that the existence of Charles Hill and his testimony could not have been discovered through the exercise of due diligence prior to March 2000. Jones, 591 So. 2d at 916 (Fla. 1991) ("Referring to the proffered evidence, it appears that much of the evidence referring to events which occurred near the time of the murder may not qualify as newly discovered because if not already known it could

have been obtained with the exercise of reasonable diligence.”). CCRC alleges that the defendant has been diligent in raising this claim, in that Rosa Greenbaum, in March 2000, had compiled a long list of individuals to interview concerning the defendant’s alleged drug use. She then discovered Charles Hill and his testimony when she began interviewing persons concerning the defendant’s alleged drug use. But this explanation does not account for why an investigation took five years to commence, irrespective of its initial purpose.

Second, for the reasons stated above, the testimony of Charles Hill is unworthy of belief. It is incumbent upon this court to consider the credibility of witnesses in a claim alleging newly discovered evidence. For the following reasons, the court rejects the testimony of Charles Hill, finding it to be unreliable:

Charles Hill testified that he was at the Bell Glades Correctional Institution on two occasions “for a week at a time.” However, the State introduced evidence that Charles Hill was only at the facility for less than 24 hours on the first occasion and only 5 1/2 hours on the second occasion. [St.’s Ex’s. 21 & 22; Pages: 307-308; 732-734].

Charles Hill, a felon with prior convictions for grand theft and forgery, both of which are crimes involving dishonesty, has admittedly maintained a longtime friendship with the defendant. Specifically, he testified that he was a member of the A-Team, an association of individuals who “got together to do drugs” during the 1980’s. He described the A-Team as “one big family,” and that “each time I came out [of prison], it was just right back together.” [Page: 291]. The defendant was a member of the A-Team, and Sheila Jenkins, the mother of the defendant’s young daughter, Shakeyla, was also a member. [Pages: 312-315]. In addition, he indicated that he has repeatedly visited the defendant in the Pinellas County Jail over the last couple years, and acted as an intermediary between the defendant and his child’s mother. [Pages: 312-315].

Charles Hill never offered an explanation for why he waited approximately 15 years to report this alleged confession. No testimony was offered to rebut this fact. Lightbourne v. State, 2003 WL 124529, 28 Fla. L. Weekly S65 (Fla. Jan. 16, 2003)

> ("the trial court may consider both the length of the delay and the reason the witness failed to come forward sooner."). And when Charles Hill did disclose the alleged confession, it was only after CCRC initiated the contact.
>
> Fourth, and finally, Derrick Johnson testified at the evidentiary hearing that he never came into contact with Charles Hill at the Belle Glade Correctional Institution in 1985. He further testified that he never told anyone that he was the individual who shot the cab driver. [Pages: 572-574].
>
> Even if he were a credible witness, and even if this claim were timely, Charles Hill's testimony is not, in and of itself, sufficient to probably produce an acquittal on retrial. Jones, 591 So. 2d at 915-16; Robinson v. State, 770 So. 2d 1167 (Fla. 2000). The court makes this finding after reviewing the evidence offered at the retrial, with particular emphasis on the testimony of the following witnesses: Melvin Jones, David McGruder, Priscilla Walker, James Matthews, Roy Cone, Derrick Johnson, and the F.B.I. experts. Jones, 591 So. 2d at 916 (the trial court "will necessarily have to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial.").
>
> (PC-R. V22/R4111-4113).

This Court has held that it will not substitute its judgment for that of the trial court on questions of fact, and likewise on the credibility of witnesses and the weight given to the evidence so long as the trial court's findings are supported by competent, substantial evidence. Windom v. State, 886 So. 2d 915, 927 (Fla. 2004). Likewise, this Court has repeatedly acknowledged the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact. Brown v. State, 894 So. 2d 137 (Fla. 2004).

In the instant case, the Circuit Court's factual findings with regard to this issue are supported by substantial, competent evidence, and Smith's subjective disagreement with

the ultimate conclusion reached does not provide a basis to reject these findings. Moreover, the Circuit Court also found that even if Charles Hill's testimony is considered, it "is not sufficient to probably produce an acquittal on retrial," particularly in light of the substantial evidence which was presented at Smith's retrial, specifically, the testimony of Melvin Jones, David McGruder, Priscilla Walker, James Matthews, Roy Cone, Derrick Johnson, and the F.B.I. experts. Absent any demonstration of legal or factual error, this Court must affirm the ruling below and deny relief on this issue.

ISSUE V

THE "IAC - PENALTY PHASE" CLAIM

As previously noted, both the performance and prejudice prongs of Strickland[25] are mixed questions of law and fact, and

[25] In Wiggins v. Smith, 539 U.S. 510, 533 (2003), the Court reaffirmed its reliance on Strickland and emphasized:

> In finding that [defense counsel's] investigation did not meet Strickland's performance standards, we emphasize that *Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing*. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of Strickland. 466 U.S., at 689, 80 L Ed 2d 674, 104 S Ct 2052. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the

this Court will give deference to the trial court's findings of fact that are supported by competent, substantial evidence. Peterka v. State, 890 So. 2d 219, 228-229 (Fla. 2004), citing Stephens v. State, 748 So. 2d 1028, 1033-34 (Fla. 1999).

The final 4½ pages of Smith's initial brief are devoted to Smith's claim of ineffective assistance of counsel during the penalty phase. Trial counsel, Richard Sanders, testified that his approach during the penalty phase was to paint the best possible picture of Smith for the jury. (PC-R. V28/R4982; 4998-4999). Accordingly, trial counsel Sanders presented several witnesses during the penalty phase, including the defendant, members of Smith's family, clergy, as well as Sanders himself. During the penalty phase, Smith personally described the hardships and troubling aspects of his life, and his additional witnesses highlighted Smith's positive characteristics. According to Smith, Sanders also should have introduced evidence that Smith allegedly was on a "drug binge" during the weekend of the murder, that Smith was unemployed, that Smith was distraught over his girlfriend's claim that he was not his daughter's biological father, and that Smith had experienced a dysfunctional childhood in New Jersey.

Following several days of evidentiary hearings, the Circuit Court entered a fact-specific, comprehensive written

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limitations on investigation." Id., at 690-691, 80 L Ed 2d 674, 104 S Ct 2052. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." Id., at 691, 80 L Ed 2d 674, 104 S Ct 2052. (e.s.).

order denying postconviction relief, finding no deficiency of counsel under Strickland. The Circuit Court attentively addressed each of the defendant's "IAC-penalty phase" claims and entered the following findings of fact and conclusions of law:

> XIV. - Defense Counsel Failed to Discover and Present Additional Evidence in Mitigation, Including Background Information, Evidence That The Defendant Was On A "Drug Binge" During The Weekend Of The Homicide, And That He Suffered Mental Health Problems; Further, Defense Counsel Failed To Use Such Evidence To Rebut The Specific Intent Elements Of The Two Aggravators - Prior Violent Felony, And That The Defendant Committed The Murder During The Course Of A Felony (CLAIM XV.)
>
> Next, CCRC maintains that Sanders failed to discover and present mitigating evidence, including background information on the defendant's childhood in Jersey City, New Jersey, evidence that the defendant was on a "drug binge" during the weekend of the homicide, and that he suffered mental problems, all of which, according to CCRC, could have been used to negate or rebut the two aggravators found in this case. In support of the background information aspect of this claim, CCRC offered the testimony of Ruby McClary, Sharonda Shackelford, Sonja Scott, Sylvia Ball, and Ronnie Allen. In support of the "drug binge" aspect of this claim, CCRC offered the testimony of Charles Hill, Diane Jenkins, Jeffrey Whittier, Rodney Jones, and Rodney Davis. Finally, in support of the mental health aspect, and how this mitigation could have negated or diminished the weight of the aggravating factors, CCRC offered the testimony of Dr. Jethro Toomer, Ph.D.
>
> Background Information
>
> At the evidentiary hearing, Ruby McClary, from Jersey City, New Jersey, testified that the defendant's mother, Beatrice Brown, shortly after relocating the defendant and his siblings to Jersey City, which was in the early 70's, "got on public assistance," "met some friends, the wrong kind," "started using drugs," and "didn't provide for her kids." [Pages 682-690]. Sharonda Shackelford, the

defendant's sister who, at the age of twelve, was sent by her adoptive parents back to Jersey City to live with her biological mother and siblings, testified that family life in Jersey City was "rough," that her mother was never at home, and that she had to steal food to eat. She testified that she eventually hitchhiked back to Florida after living in Jersey City for approximately eighteen months. [Pages: 692-701]. Sonja Scott, who lived in Jersey City and knew the defendant and his family, testified that the defendant's mother was a heroin addict, that she shoplifted food, that the defendant became the de facto parent in the household, that the household duties were sorely neglected, that Yolanda, the defendant's sister, drank from the toilet, and that that the defendant was in the apartment when his mother died from a drug overdose. [Pages 703-713]. Sylvia Ball, the defendant's cousin, testified that the defendant's mother was a drug addict, that her house was constantly dirty, and that she witnessed the defendant's mother die from a drug overdose. [Pages 713-717]. Finally, Ronnie Allen, the defendant's cousin, testified that the defendant and his siblings came to live with him in Florida following their mother's death, but that the defendant never wanted to leave Jersey City. Ronnie Allen indicated that the defendant eventually returned to Jersey City on his own. [Pages 720-724].

<u>Drug Binge</u>

At the evidentiary hearing, Charles Hill, Diane Jenkins, Jeffrey Whitter, Rodney Jones, and Rodney Davis all testified that the defendant had a history of taking drugs. Most of the aforementioned individuals testified that they were members of the "A-Team," an association of individuals who gathered together to take drugs. Specifically, Diane Jenkins testified that the defendant, between the years of 1980-1983, took cocaine, acid, and marijuana She herself did acid for four years. [Pages 617-6221. Charles Hill testified that he and the defendant would do cocaine and "mushrooms," and that the defendant "got worn down by it." [Pages: 295-29 7]. He further testified that the defendant was doing cocaine on the weekend of the homicide. [Pages: 276-277]. Upon inquiry, however, Charles Hill could not be specific as to the dates or times, and indicated only that the defendant, while high on

cocaine, would just "sit around" and not want to be involved in anything. [Page: 297].

To rebut this claim, the State introduced the defendant's own testimony during the first penalty phase. [Pages: 198-199]. Conspicuously absent from this testimony is any mention that the defendant was intoxicated or high on drugs the weekend of the murder. [St. Ex. 7]. Further, Sanders testified that he knew the defendant frequently smoked marijuana, and that the defendant's mother died from a heroin overdose, but that neither the defendant nor any of the other penalty phase witnesses – Rodney Brown (the defendant's brother), Louis Cone, Reverend Walker, Walter Goley, Sanders – indicated to him that the defendant was intoxicated at the time of the homicide. [Pages: 164, 197, 200]. Reviewing the Pre-Sentence Investigation dated November 29, 1983, which only indicated that the defendant tried cocaine, Sanders conceded that there was no information at the time of the second penalty phase that the defendant was on a drug binge during the homicide. [Pages: 214-215].

Mental Health

At the evidentiary hearing, the State introduced Ex. 12, an Order for Payment of Fees, which indicates that Dr. Vincent E. Slomin, Ph.D. was appointed by the court, in 1987, to reevaluate the defendant's mental condition. Dr. Slomin had previously been appointed to evaluate the defendant prior to the 1983 trial. The court did not permit Sanders to hire a different expert prior to the retrial. [Page 241-242].

In terms of explaining why he did not call a mental health expert during the penalty phase, Sanders testified that Dr. Slomin's report and diagnosis would not have been "particularly helpful." He indicated that, in his opinion, Dr. Slomin's diagnosis – antisocial personality disorder – was nondescript and unhelpful. He explained that presenting Dr. Slomin's opinions to the jury would have been inconsistent with the evidence he chose to present in mitigation. [Pages 243-246].

At the evidentiary hearing, CCRC called Dr. Toomer as a mental health expert specializing in clinical and forensic psychology. Dr. Toomer explained that he evaluated the defendant in connection with offering a formal diagnosis and overall impression of the defendant's mental health. He opined that the defendant's development was

stunted by a number of predispositional variables that adversely affected upon his functioning, such as nurturance deprivation, profound poverty during the "meager years," and his forced role in becoming a caretaker. Dr. Toomer explained that the defendant's symptomology most closely approximates borderline personality disorder. [Pages 365-375; 386-388].

To Negate or Rebut Aggravators

During the penalty phase, the State successfully argued for the prior violent felony aggravator, which was based on the armed robbery of the DeBulles hours after the murder of Jeffrey Songer, as well as the aggravator that the murder was committed during the course of a robbery. CCRC alleges that Sanders should have introduced additional evidence in the penalty phase to neutralize these aggravators. According to CCRC, Sanders should have introduced evidence that the defendant was high on drugs that weekend, that he had recently been terminated from his employment, that he was distraught over his girlfriend informing him that he was not his daughter's biological father, and that he suffered through "dysfunctional years" in New Jersey. CCRC concludes that these factors "significantly impaired Mr. Smith's higher- order thought processes." The court has thoroughly reviewed the transcripts from the evidentiary hearing. Aside from Sanders' testimony on page 167, it appears that CCRC failed to elicit testimony on this precise issue at the hearing. Nevertheless, this issue is intertwined with the mitigation claim, and is therefore considered below.

The Evidence That Was Presented In Mitigation

On May 16, 1990, the penalty phase proceedings began with the parties reviewing the first penalty phase, from 1983. Sanders then successfully argued to exclude any mention of the defendant's pending criminal charges. That is, the State had listed correctional officers as rebuttal witnesses to testify that the defendant had committed an assault and a battery on a law enforcement officer while housed in the correctional institution. [R2 Pages: 1389-1398]. The parties, and the defendant himself, agreed that the defendant's juvenile record would be disclosed, since it was part of the deposition testimony of Louise Cone. [R2 Pages: 1402-1404].

As the first penalty phase witness during the 1990 proceedings, Sanders presented the testimony of

Rodney Brown, the defendant's younger brother who was then stationed in the 108th Military Police Company at Fort Bragg, North Carolina. Rodney Brown explained that their mother died in '74, and that the family then came to St. Petersburg to live with their great aunt and uncle, Roy and Louise Cone, who was willing to care for all five children. [R2 Pages: 1413-1416].

He explained that the defendant was a father-figure to the children, and that he gave them advice and support. He explained that the death of the defendant's mother affected the defendant more than any other child. He explained his aunt and uncle were strict disciplinarians, and that he and the defendant attended church on a weekly basis where the defendant sang in the choir and worked as an usher. He further explained that the defendant had a healthy and productive relationship with his aunt and uncle. [R2 Pages: 1416-1419; 1422]. He then indicated that his other brother and one of his sisters were also in the U.S. Army. [R2 Page:1419].

Louise Cone then testified by way of deposition. She indicated that the defendant, who lived with her for seven years, was a "big help" to her in raising the children, and that he attended church with her where he actively participated in church-sponsored activities. [R2 Pages: 1426-1428]. She indicated that he was never disrespectful to her or her husband. [R2 Page: 1434]. Sanders then presented the videotaped deposition of Reverend B.O. Walker, who was the pastor of the church that the defendant attended when he was a teenager, and Walter Goley/Gaulette, a Jehovah Witness' Minister from the Pinellas County Jail. Presumably, their testimony highlighted the positive aspects of the defendant's life while a teenager and while in custody. [R2 Page: 1436].

The defendant then took the stand. His testimony was decidedly more somber. He told the jury that his father died when he was three or four years of age, and that he never knew him. He explained that his mother died while he was eleven years of age, and that her death had a profound impact on him. He remarked that he felt abandoned and alone, and that he blamed God for her death. [R2 Pages: 1439; 1448-1449]. He told the jury that his family was extremely poor, and that his mother did not work. He explained that he had to adjust when he came to live in St. Petersburg with his aunt and

uncle. That is, his mother was "more or less [like] a sister," whereas his aunt and uncle were strict disciplinarians. He told the jury that he liked attending church. [R2 Pages: 1438-1441]. He then spoke about the details of his prior juvenile offenses in an attempt to mitigate the significance of those crimes. [R2 Pages: 1441-1443, 1445-1447]. He spoke about attending the Job Corps in Kentucky, and then coming back to St. Petersburg to live in a "rooming house." [R2 Pages: 1443-1444].

The defendant continued to testify about the hardships and difficulties he faced. He spoke about his drug use. In particular, he told the jury that he started smoking marijuana at age thirteen, and that he started doing cocaine at age nineteen. [R2 Page: 1445]. He then told the jury about his seven-year old daughter, and that he was actively involved in her life. [R2 Page: 1448; 1450]. He concluded his direct testimony by explaining that if he were to receive a life sentence, he would attempt to better himself. He explained that his brothers and sisters still looked to him for advice. [R2 Pages: 1 449-1450].

Next, Sanders himself testified. At the inception of his testimony, he explained the reasons he was testifying. At R2 Page: 1454:

> Let me just explain briefly why I am testifying. Derrick has been incarcerated for the last seven years, since 1983, and there's not many people that know him very well in the last seven years. As you can see, most of the people that know him know him from many years ago. I'm one of the few people, in fact, probably just about the only person that's really gotten to know him very well. I was appointed to represent him two and a half years ago — approximately two and a half years ago, and I've been representing him ever since.

Throughout his testimony, Sanders told the jury that the defendant had already received a life sentence on the armed robbery charge (the DeBulles), and that he was not eligible for parole on that case. [R2 Pages: 1454-1455]. He indicated to the jurors that they should not be alarmed by the intimidating appearance of the defendant, and that the defendant received a limited education and did not express himself well but that he was overall an intelligent person. [R2 Pages: 1456-1457]. Sanders then informed the jury that the defendant wanted to

live, had a strong desire to better himself, that he had a good sense of humor, and that he was a good judge of character. [R2 Pages: 145 7-1 459].

At the Spencer hearing, Sanders presented the testimony of Yolanda Brown, the defendant's sister. She informed the judge about the defendant's family history, and indicated that he was a "good brother." She also indicated that he was not a violent man. [R2 Pages: 1500-1503]. In addition, Sanders presented the testimony of Cynthia Teal, a woman who had been corresponding with the defendant as a pen-pal for approximately two years. She indicated that the defendant was a "giving, sweet and understanding, compassionate person, very compassionate." [R2 Pages: 1503-1505].

Analysis:

As recently noted in Gudinas v. State, 816 So. 2d 1095, 1104 (Fla. 2002) (quoting Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988)), the analysis for determining whether counsel's failure to investigate and present mitigating evidence was deficient is as follows:

> First, it must be determined whether a reasonable investigation should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. If, however, the failure to present the mitigating evidence was an oversight and not a tactical decision, then a harmlessness review must be made to determine if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Thus, it must be determined that the defendant suffered actual prejudice due to the ineffectiveness of his trial counsel before relief will be granted.

In short, to prevail on this claim, the defendant must demonstrate that "but for counsels errors, he probably would have received a life sentence." Gaskin v. State, 822 So. 2d 1243, 2147 (Fla. 2000) (citing Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995)).

At the evidentiary hearing, Sanders testified that he relied on the mitigating evidence that was presented during the first penalty phase, in 1983. He explained that he inherited the case

"prepackaged," and that he basically utilized the same evidence and witnesses that were involved in the first trial. [Pages. 165-166]. In addition, he also "sent somebody up there [New Jersey] to see if we could locate witnesses or anything like that." [Page: 163].

He explained that his strategy during the penalty phase was to "paint the very best picture of Derrick Tyrone Smith" that he could, as if to suggest to the jury that this is a life worth saving. Through the witnesses listed above, Sanders presented testimony that the defendant attended Bible class since 1983, was a church-going Christian, acted as a de facto parent to his siblings, that his adoptive family never really had reason to discipline him, that he is the father of a seven year-old daughter, and that he is an intelligent young man with a sense of humor. Through his own testimony, Sanders was able to assuage any apprehension that the jurors may have had about the defendant's appearance and demeanor by explaining that he had known the defendant for two years and that he had a sincere desire to better himself. [Pages: 206-207].

Sanders explained that he actively chose what information to present to the jury, and that he did not present every piece of evidence simply because it was "out there." He explained that he chose not to present the testimony of Dr. Slomin because it was negative and inconsistent with his strategy. [Pages 247-249]. He recalled that he had successfully argued to prevent the jury from viewing the cross-examination of Walter Goley/Gaulette, which would have introduced evidence of the defendant's then-pending battery on law enforcement officer charges. [Pages 210-212]; [R2 Pages: 1390-1393].

Although his strategy was to present the positive aspects of the defendant's life in an effort to win a life recommendation, Sanders was not inattentive to letting the jury know about the difficulties and hardships that the defendant encountered. The defendant himself testified that both his mother and father died while he was young, that his mother's death significantly affected him, that he never knew his father, that he had a history of drug use, that his family was impoverished, and that he was forced to move to Florida to live with his great aunt and uncle.

Clearly, after thoroughly reviewing the penalty phase proceedings, including the Spencer hearing, one can glean that Sanders was attempting to "paint the very best picture of Derrick Tyrone Smith" while not ignoring the more troublesome aspects of the defendant's life. As the Florida Supreme Court has held, "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000).

In terms of the background information, the witnesses presented by CCRC at the evidentiary hearing were cumulative to one another. The record reflects that Sanders was not oblivious to the defendant's life in New Jersey. He testified "I knew a little bit about Mr. Smith's background in New Jersey, but I really can't remember [if] I got that from him or from his family." [Page: 163]. He then explained that he was aware that the defendant's mother died in New Jersey." [Page 164]. The details these witnesses offered that the jury never heard (e.g., the defendant witnessed his mother die from drug overdose) would, at best, have together constituted a nonstatutory mitigator, which would have carried little weight, if any.

In terms of the alleged "drug binge," the court listened very carefully to the testimony that was offered by Charles Hill, Diane Jenkins, Jeffrey Whitter, Rodney Jones, and Rodney Davis. Aside from the fact that most of these witnesses were longtime drug users themselves, with multiple felony convictions, none of the witnesses, other than Charles Hill, offered testimony that the defendant was on drugs the night of the murder. Charles Hill testified that the defendant was high the weekend of the murder, but as the court explains in the next claim, he was not a credible witness. Furthermore, when pressed for details, he could not be specific as to the times or dates, and indicated only that the defendant, while high on cocaine, would just "sit around" and not want to be involved in anything. [Pages: 296-298].

Moreover, as previously explained, the defendant told the jury about his drug problem when he testified, but failed to mention that he was high on drugs the night of the homicide. And Sanders conceded that there was no information at the time

of the second penalty phase that indicated the defendant was on a drug binge during the homicide. [Pages: 214-215]. In conclusion, the court finds that Sanders was not deficient during the penalty phase for failing to present this evidence. First, it was contrary to his tactical approach, and second, the evidence was specious. Damren v. State, -- So. 2d --, 2003 WL 151756 (Fla. Jan. 23, 2003) (defense counsel did not render ineffective assistance by failing to present evidence of addiction to cocaine, where no testimony was offered to show the defendant was intoxicated at the time of the offense).

In terms of the mental health testimony that went unpresented, the court finds that such testimony was inconsistent with Sanders' approach during the penalty phase. As previously discussed, Sanders explained that he chose not to present the testimony of Dr. Slomin because it was negative and inconsistent with his strategy. [Pages 247-249]. Occhicone, 768 So. 2d at 1048. As for Dr. Toomer's more severe diagnosis of borderline personality disorder, coupled with his finding that the defendant's development was stunted by a number of predispositional variables that adversely affected upon his functioning, the court observes that Sanders investigation into the defendant's mental health, as conducted by Dr. Slomin, and his decision not to present such testimony, was not deficient "merely because the defendant has now secured the testimony of a more favorable mental health expert." Gaskin, 822 So. 2d at 1250 (quoting Asay v. State, 769 So. 2d 974, 986 (Fla. 2000)).

The court has carefully weighed the proffered mitigation against that which was presented during the penalty phase. The court is not convinced that any of the mitigation previously discussed herein (i.e., additional background information, drug binge, mental health), or any of the additional mitigation alleged to date (i.e., the defendant discovered that he was not his child's biological father, had a fight with his girlfriend, and/or had lost his job) undermines confidence in the outcome, such that the defendant may have received a life sentence. The fact of the matter is that either: (a) much of this proffered mitigation is cumulative to that which was already presented to the jury; (b) if not cumulative, it would have amounted to nonstatutory mitigation carrying little, if any,

> weight, and falling far short of outweighing the two statutory aggravators; and finally (c) if not presented, it was not for oversight or inadvertence; rather, it was a tactical decision made by informed counsel. Gudinas, 816 So. 2d at 1104; Gorby v. State, 819 So. 2d 664, 674 (Fla. 2002). Accordingly, this claim fails under Strickland. It is therefore denied.
>
> (PC-R. V22/R4104-4111) (e.s.).

Smith alleges that trial counsel was deficient in the penalty phase because attorney Sanders agreed that he "should have looked harder," although Sanders also added that he did not know of anything that he did not find. (PC-R. V28/R56-13-5614). Sanders' concession that he could have done it differently is not dispositive of the legal question of whether his representation was within the realm of reasonably effective assistance and, if not, there was a reasonable probability of a different result. See, Mills v. State, 603 So. 2d 482, 485 (Fla. 1992); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995).

To merit relief on a claim of ineffective assistance of counsel, Smith must show not only deficient performance, but also that the deficient performance so prejudiced his defense that, without the alleged errors, there is a "reasonable probability that the balance of aggravating and mitigating circumstances would have been different."[26] Bolender v.

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[26] When considering a claim of ineffective assistance of penalty phase counsel, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would

Singletary, 16 F.3d 1547, 1556-57 (11th Cir. 1994). This Court has denied relief in a number of similar cases where collateral counsel asserts that additional information should have been discovered. Sweet v. State, 810 So. 2d 854 (Fla. 2002); Bruno v. State, 807 So. 2d 55 (Fla. 2001); Robinson v. State, 707 So. 2d 688, 695-697 (Fla. 1998); Breedlove v. State, 692 So. 2d 874 (Fla. 1997).

Smith's reliance on Williams v Taylor, 529 U.S. 362 (2000) to support his claim is misplaced. In Williams, counsel had failed to investigate and discover evidence that "Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody." Id. at 395. Additionally, there was evidence that Williams was borderline mentally retarded and had a fifth grade education. Id. at 396. Smith has failed to present any credible evidence that was not known to trial counsel, that would have been truly mitigating or undermined the aggravating

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have concluded that the balance of aggravating and mitigating circumstances did not warrant death." See, Sochor v. State, 883 So. 2d 766 (Fla. 2004).

circumstances. Moreover, it is not sufficient to establish that counsel could have done more. Rather, to carry his burden to prove deficient performance, Smith must establish that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. See, Monlyn v. State, 894 So. 2d 832 (Fla. 2004); Windom v. State, 886 So. 2d 915 (Fla. 2004) (quoting Strickland).

Smith has failed to demonstrate any deficiency of counsel and resulting prejudice under Strickland. Balanced against the evidence of mitigation now being urged, Smith has failed to establish prejudice. There is no reasonable probability that, absent the alleged errors, the sentencer would have concluded that the mitigating circumstances now offered outweighed the aggravating circumstances found by the trial court.

Ineffective assistance is not demonstrated for failure to present cumulative evidence nor "merely because the Defendant has now secured the testimony of a more favorable mental health expert.'" Gaskin v. State, 822 So. 2d 1243, 1250 (Fla. 2000), quoting Asay v. State, 769 So. 2d 974, 986 (Fla. 2000). The fact that postconviction counsel "is subsequently able to locate experts who are willing to say that the statutory mitigators do exist," or that the aggravators do not, is insufficient to say that trial counsel was ineffective. Jones

v. State, 732 So. 2d 313, 318 (Fla. 1999). Where, as here, the new mental health expert's testimony painted "a much more negative and prejudicial picture" of the Defendant, than trial counsel intended to present to the jury, this Court has agreed with the trial court's finding that the new mental health testimony did not undermine confidence in the outcome. See, Gaskin, 822 So. 2d at 1250 (new information painted a much more negative and prejudicial picture of defendant); Windom, 886 So. 2d at 928 (record supports the postconviction court's conclusion that counsel's strategy to prevent the jury from hearing damaging evidence was reasonable).

In this case, Sanders was aware of Smith's family history in New Jersey, of Smith's mother's drug habits, and how she died and Sanders sent someone to New Jersey to locate witnesses or information. Sanders had read the 1983 transcript of the penalty phase and other proceedings. Sanders had materials from former trial counsel, including some of Smith's school records, and although he did not have the New Jersey school records, Smith has not shown they were available. See D. Ex. 18. Sanders located and presented additional witnesses to those who had testified in the 1983 proceedings. (PC-R. V27/R4944-4946; V28/R4978-4982). Sanders presented the witnesses from the first penalty phase, including the Defendant, his brother Rodney Brown, and added witnesses of Jehovah's witness minister, Walter Gauletta, and

Sanders himself. Sanders presented Smith's deprived background of the death of both his parents, the four children going to live with their great aunt and uncle, Mr. and Mrs. Cone, and Smith's assisting them and with his younger siblings as the oldest. He presented evidence of Smith having attended church while living with the Cones and participating in Bible classes since 1983. He successfully avoided the jury's learning of Smith's battery on a law enforcement officer in the jail by prohibiting the State's cross of Mr. Gauletta about that. (PC-R. V28/R4984; 4992-4998; 5030). His theme was to present Smith as having characteristics of a soul worth saving. (PC-R. V28/R4985-4986; 4989). His own testimony in the penalty phase was to explain to the jury that Defendant was not a mean person, should not be judged by his appearance, and had already received a life sentence, would be in jail anyway, and that there was, therefore, no need for them to impose a death sentence. (PC-R. V28/R4987-4989).

Sanders also presented additional witnesses in the Spencer sentencing hearing -- Smith's brother and sister, Rodney and Yolonda Brown, both of whom testified in their military uniforms as to their family life and of Derrick Smith as having been a good brother to them. (PC-R. V28/R4996-4998). He also presented the testimony of Smith's pen pal Cynthia Teal as to her opinion of Defendant as being a "very caring, warm, sensitive person .. . ." (PC-R. V28/R4998-4999). His

intended approach for both the penalty and sentencing phases was to present Defendant in the best light possible. (PC-R. V28/R4982; 4998-4999). The failure to present cumulative evidence does not establish ineffective assistance. Gorby v. State, 819 So. 2d 664, 674 (Fla. 2002).

As in Valle v. State, 778 So. 2d 960, 966 (Fla. 2001), the record clearly demonstrates that Sanders knew he did not have to put on the same evidence at the resentencing hearing. The fact that postconviction counsel suggests a different strategic approach does not establish that Sanders was ineffective. Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000); Carroll v. State, 815 So. 2d 601 (Fla. 2002); Brown v. State, 755 So. 2d 616, 635 (Fla. 2000); Glock v. State, 776 So. 2d 243, 250-252 (Fla. 2001).

Defense counsel could not be faulted for not discovering evidence of Smith being on any alleged “drug binge” at the time of the murder. Sanders testified that he had not been informed by Smith or his family of any such binge, (PC-R. V28/R4979-4981), he was not aware of anything suggesting the existence of such information, (PC-R. V28/R4995-4996), and the witnesses at the evidentiary hearing did not credibly support any “binge.” Smith’s own testimony in the penalty phase included that he had begun "smoking dope" at 13 or 14 years of age and had done cocaine on a "fairly regular basis" after starting at age 19. (R2. V9/R1444-1445). Smith said nothing

about any binge. Additionally, record evidence of Smith's actions and appearance immediately before, during and after the murder negated the allegation, which was not even supported by the testimony of his friends at the postconviction hearing, that Smith's appearance or actions were any different than normal or were indicative of any drug binge. None of the witnesses described any "binge," but only that Smith was known to use cocaine on a regular basis and looked as he always did.

Sanders testified that Smith had been examined by Dr. Slomin, but Sanders made the decision not to use him because his testimony would have been inconsistent with the picture of Smith which he was painting to the judge and jury. (PC-R. V28/R5024-5026). Although Sanders testified that he had not presented information to Dr. Slomin for his report, he added that the reason was the report had been done for the first trial and he did not know what information Dr. Slomin had. Dr. Slomin's appointment had been requested specifically for consideration of proving three statutory mitigators. (R2. V1/R33-34). Smith did not establish that Dr. Slomin did not have Smith's complete background.[27]

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[27]Smith did not allege nor establish even that he cooperated with the court-appointed mental health-expert for re-evaluation. Sanders had been granted a re-evaluation, but only by the same psychologist. (R2. V1/R33-35, 365-374. Smith did not raise in the evidentiary hearing anything about this

Clinical and forensic psychologist Dr. Toomer interviewed, tested and evaluated Smith in April 2000 after reviewing background materials (D. Ex. 17) and found no "supported" nor tested mental illness. (PC-R. V30/R5141-5145). Although Diagnostically, Smith's "symptomatology" most closely approximated "borderline personality disorder." (PC-R. V30/R5167-5168). Dr. Toomer defined the borderline personality disorder as "a manifested, ongoing maladjustment in terms of overall behavior and functioning that starts early and exists for a long period of time ... [I]t's a maladaptive pattern of behavior that . .. affects their overall functioning." (PC-R. V30/R5174-5175). The primary characteristic is instability across all aspects of functioning. (PC-R. V30/R5175). Dr. Toomer disagreed that Smith could be diagnosed as having antisocial personality disorder as not meeting the criteria of being devoid of

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right to reevaluation nor ask Sanders whether Smith had refused to cooperate for a re-evaluation. Defendant apparently chose not to divulge confidentiality of this mental health expert by revealing information either from Smith himself or Dr. Slomin and, instead, relied on the recollection of Sanders who had not seen the report since the time of resentencing. Smith is not without obligation to cooperate with the mental health expert and to inform him about factors affecting his mental health that he wants considered. See, Shere v. State, 742 So. 2d 215, 223-24 (Fla. 1999).

conscience and acting for self-gain and power, without concern for others.[28]

Dr. Toomer's conclusion – that Smith's borderline personality, which was exacerbated by his abuse of drugs, caused him to act impulsively -- fails to undermine confidence in the outcome. That Smith may have acted impulsively, ostensibly resulting from his early nurturance deprivation, drug habits, and his girlfriend's claim that her daughter was not Smith's child is insufficient to show mitigation for Smith's decisions to arm himself with a loaded gun, in order to rob both the cab driver and the DeBulle's on March 21, 1983, and to shoot the fleeing cab driver for not giving up his money. Smith's decisions to rob unarmed victims with a loaded firearm does not show impulsivity. Moreover, the violence of taking aim and shooting the cab driver directly in the back, threatening Mrs. DeBulle with the gun, and slugging Mr. DeBulle in the face with the gun does not show "impulsivity," but a deliberate, predatory man who brazenly targeted innocent strangers and used brutal violence to seize their property. Smith has failed to establish both a

[28] Dr. Toomer did not explain how Smith's attempt to rob the cab driver and robbery of the DeBulle's the same day was not goal oriented for self-gain. Dr. Toomer did not address Smith's criminal history by the time of the second trial, which included the violent crimes of three batteries on corrections officers. R2 1404-1405.

deficiency of trial counsel during the penalty phase and resulting prejudice under Strickland. Accordingly, the trial court's well-reasoned order denying postconviction relief should be affirmed.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. regular mail to Martin J. McClain, Esq., McClain & McDermott, P.A., 141 N.E. 30th Street; to C. Marie King, Assistant State Attorney, P. O. Box 5028, Clearwater, Florida 33758-5028; and to the Honorable Mark I. Shames, Circuit Judge, Room 200, 545 First Avenue North, St. Petersburg, Florida 33701, this 25th day of April, 2005.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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