IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-760

DIETER RIECHMANN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

Defendant was charged by indictment filed on January 27, 1988, in the Eleventh Judicial Circuit of Florida, case no. 87-42355, with (1) the first-degree premeditated murder of Kersten Kischnick with a firearm, and (2) the use of a firearm in the commission of a felony. (DAR. 3).[1] The crimes were alleged to have been committed on October 25, 1987. (DAR. 3) After he was convicted and sentenced to death, Defendant appealed to this Court, which affirmed, *Riechmann v. State*, 581 So. 2d 133, 141 (Fla. 1991), finding the following facts:

> Riechmann and Kischnick, "life companions" of thirteen years, were German citizens and residents who came to Florida in early October 1987. Kischnick was shot to death in Miami Beach on October 25, while she sat in the passenger seat of an automobile that had been rented and driven by Riechmann. The state's theory at trial was that Kischnick was a prostitute, Riechmann was her pimp supported by her income, and when she decided to quit prostitution, he killed her to recover insurance proceeds. Relying on circumstantial evidence, the state sought to prove that Riechmann stood outside the passenger side of the car and fired a single fatal shot through the partially open passenger-side window, striking Kischnick above the right ear. Riechmann has consistently denied committing the crime, asserting that a stranger shot Kischnick when they stopped the car somewhere in Miami to ask for directions.
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> Testimony at trial established that as early as

[1] The terms "DAR." and "DAT." will be used to refer to the record and transcript prepared on direct appeal in *Riechmann v. State*, Florida Supreme Court case no. SC73,492. The terms "PCR." and "PCT." refer to the record and transcript prepared on appeal from Petitioner's first post conviction motion, *State v. Riechmann*, Florida Supreme Court Case no. SC89,564.

the summer of 1986 Kischnick became too sick to work and wanted to quit prostitution. In the months immediately prior to the murder Kischnick and Riechmann were not getting along, and Riechmann was often verbally abusive toward Kischnick.

After arriving in Miami from Germany, Riechmann rented an automobile with his Diner's Club card, which automatically insured the passengers for double indemnity in the event of accidental death. On the evening of October 25, Riechmann drove around the Miami area with Kischnick in the passenger seat. At some point that evening, Kischnick was shot.

The evidence at trial included a series of statements Riechmann made to police during the hours and days that immediately followed the murder. Riechmann, who spoke broken English, made his first statement during the investigation at the scene on October 25. He told officers that when he stopped to ask directions from a black man, he sensed danger and suddenly heard an explosion. Realizing that the man had shot Kischnick, he accelerated the car and drove around Miami in a panic looking for help. Finally, he spotted Officer Reid and pulled over. Riechmann made subsequent statements to officers at the police station, during "drive-arounds" when attempting to help police find the location of the shooting, and on the telephone. In each pretrial statement Riechmann told virtually the same story, but he was unable to recall details of the shooting or where it took place. Riechmann also told officers that he had not fired a gun on the day of Kischnick's murder.

In his trial testimony, Riechmann gave a more detailed account. Riechmann testified that he and Kischnick had been touring in their car, intending to videotape some of the Miami sights. They got lost and asked a stranger for directions. When Riechmann realized they were close to their destination, he unbuckled his seat belt, reached behind him and grabbed a video camera, apparently getting prepared to use it. He said he put the camera on Kischnick's lap and was in the process of handing her purse to her so she could tip the stranger when he saw the stranger reach behind him. Feeling threatened, Riechmann said he "hit the gas pedal" and stretched out his right arm in a "protective manner," with his palm facing outward in front of him. Instantly he heard an explosion,

accelerated the car, and saw Kischnick slump over. After the shooting he began looking for help, driving as many as ten to fifteen miles before he hailed Officer Reid to get assistance.

While questioning Riechmann at the scene, police "swabbed" his hands for gunpowder residue. An expert for the state, Gopinath Rao, testified that numerous particles typically found in gunpowder residue were discovered in the swab of Riechmann's hand. Based on the number and nature of the particles, Rao concluded that there is a reasonable scientific probability that Riechmann had fired a gun. Rao also said he would not have expected to find the same type and number of particles on Riechmann's hands if Riechmann had merely sat in the driver's seat while somebody else fired a shot from outside the passenger-side window. An expert for the defense, Vincent P. Guinn, testified that the particles of gunpowder residue found on Riechmann's hand proved only that Riechmann was in the vicinity of a gun when it was fired--not that he actually fired a gun--and that Rao's opinion was not scientifically supported.

In Riechmann's motel room police found three handguns and forty Winchester silver-tipped, 110-grain, .38-caliber-special rounds of ammunition in a fifty-shell box. An expert firearms examiner testified that those bullets were the same type that killed Kischnick, although none of the weapons found in the room were used to murder Kischnick. The expert also testified that the bullet that killed Kischnick could have been fired from any of three makes of guns. Riechmann owned two of those three makes of weapons.

The state also presented testimony about the blood found in the car and on Riechmann's clothes. Serologist David Rhodes testified that high-velocity blood splatter found on the driver-side door inside the car could not have gotten there if the driver's seat was occupied in a normal driving position when the shot was fired from outside the passenger-side window. The pattern of blood found on a blanket that had been folded in the driver's seat was consistent with high-velocity blood splatter and aspirated blood, rather than other kinds of blood stains, the serologist said. Blood splatter was found on the steering wheel, but none was found on Riechmann's seat belt or on the back of the driver's seat.

> Additionally, Riechmann had blood stains, rather than blood splatter, on his clothing. Rhodes testified that had Riechmann been sitting in the driver's seat during the shooting, his clothes would have shown evidence of blood splatter rather than just the blood stains that were found.
>
> Evidence seized by German authorities and brought back to the United States included numerous documents. Among them were insurance papers revealing that between approximately 1978 and 1985, Riechmann had become the beneficiary of several German insurance policies on Kischnick, totalling more than $961,000 in the event of her accidental death. Under all the policies murder was considered an accidental death. German documents also showed that on June 9, 1987, Riechmann and Kischnick filed reciprocal wills in a German court designating each other as "sole heir" of their respective estates.
>
> A fellow inmate of Riechmann, Walter Symkowski, testified that while incarcerated pending trial, Riechmann was pleased with the prospect of becoming rich from the proceeds of the insurance policies and Kischnick's will.
>
> The jury found Riechmann guilty of first-degree murder and unlawful possession of a firearm while engaged in a criminal offense. No evidence was presented in the penalty phase, and the jury recommended death by a nine-to-three vote. The court found the murder was committed for pecuniary gain, and was cold, calculated, and premeditated without any pretense of legal or moral justification. Although Riechmann presented no mitigating evidence, the trial court found as a nonstatutory mitigating circumstance that people in Germany who know Riechmann told police they consider him to be a "good person." The trial court imposed the sentence of death, concluding that "[t]he aggravating circumstances far outweigh the nonstatutory mitigating circumstance."

Riechmann v. State, 581 So. 2d at 135-37 (footnotes omitted).

On September 30, 1994, Defendant filed his first motion for post conviction relief. In the motion, Defendant raised claims regarding newly discovered eyewitnesses and alleged *Brady*

violations. (PCR. 148-72, 219-315)

On November 3, 1995, the post-conviction court granted an evidentiary hearing on every claim Defendant requested. (PCR. 2146-51, 2154A) The hearing was conducted on May 13-17, June 11, and July 17-19, 1996. (PCT. 197)

After oral and written argument of counsel, (PCT. 1895-1958, PCR. 5883-5999, 6000-6024), the lower court entered an exhaustive, 56-page order on November 4, 1996, rejecting all of the guilt phase claims. (PCR. 6025-79) The trial court did grant Defendant sentencing relief because the State wrote the sentencing order and counsel was ineffective at sentence. *Id.*

Defendant appealed the denial of his guilt phase claims to this Court, raising 8 issues, including newly discovered evidence and *Brady* claims. *State v. Riechmann*, 777 So. 2d 342, 348 n.6 (Fla. 2000). This Court affirmed the denial of the motion for post conviction relief, including the newly discovered evidence and *Brady* claims. *State v. Riechmann*, 777 So. 2d 342, 358-63 (Fla. 2000).

On June 3, 1997, before the record on appeal from the denial of the first motion for post conviction relief had been prepared, Defendant moved to relinquish jurisdiction. Defendant sought to present a claim that the State had pressured Hillard Veski to give a false statement about the location of the

blanket and flash light in the car when he inventoried the car days after the crime. After the State pointed out that Veski did not testify at trial, that evidence regarding the flashlight was not presented at trial and that the position of the blanket at the time of the crime was confirmed by crime scene photographs, the testimony of the crime scene personnel and Defendant's own testimony, the Court refused to relinquish jurisdiction.

On November 30, 1999, Defendant filed a second motion for post conviction relief, raising 2 claims:

> I.
> NEWLY DISCOVERED EVIDENCE SHOWS THAT [DEFENDANT] IS INNOCENT.
>
> II.
> THE CUMULATIVE EFFECT OF THE NEWLY-DISCOVERED EVIDENCE WARRANTS A NEW TRIAL.

(R. 22-58)[2] The newly discovered evidence referred to in the motion was an alleged confession by Mark Dugan that was allegedly made on August 25, 1998. (R. 50)

Because this matter was pending on appeal from the denial of the first motion for post conviction relief at that time, Defendant moved this Court to relinquish jurisdiction for this motion to be heard. (R. 121) This Court denied the motion to relinquish jurisdiction.

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[2] The symbols "R." and "SR." will refer to the record on appeal and supplemental record on appeal in this proceeding, respectively.

On April 4, 2001, after jurisdiction had returned to the lower court, the lower court held a status conference and agreed to consider the second motion for post conviction relief before proceeding to resentencing. (R. 1234-37) Defendant also indicated that he would like to investigate a letter the State had informed him it had received. (R. 1237-38) The lower court ordered the State to find the letter and disclose it and set a *Huff* hearing date for April 27, 2001. (R. 1238-40)

On April 19, 2001, the State filed a response to the motion. (R. 125-44) The State asserted that Defendant had not sufficiently alleged due diligence and that Defendant had not alleged that he had nonhearsay evidence of the alleged confession to present at an evidentiary hearing. *Id.*

On May 24, 2001, Defendant filed a motion to depose Deborah Schaefer, Catherine Vogel, Charles Rosales and Halina Smykowska regarding a letter Ms. Schaefer had written to Ms. Vogel concerning a reward for which her father Mr. Smykowski had claimed to be eligible because the State lost its copy of he letter after it disclosed its on June 5, 2000 and Defendant wished to verify that the replacement copy the State had disclosed was an actual copy of the original letter and to investigate the content of the letter further. (R. 145-52)

At a status hearing on July 11, 2001, Defendant noted that

he was seeking letters rogatory to depose Ms. Smykowska but that it would take four to six months to do so. (R. 1247-53) At the next status hearing on August 21, 2001, Defendant requested additional time to investigate even though he had the letter, had deposed Ms. Schaefer and had spoken to Ms. Smykowska. (R. 1258-65) The lower court gave Defendant until September 19, 2001, to file any amendments and set a *Huff* hearing for October 19, 2001. *Id.*

On September 14, 2001, Defendant filed an amended second motion for post conviction relief containing five claims:

> I.
> NEWLY DISCOVERED EVIDENCE SHOWS THAT [DEFENDANT] IS INNOCENT.
>
> II.
> THE CUMULATIVE EFFECT OF THE NEWLY DISCOVERED EVIDENCE WARRANTS A NEW TRIAL.
>
> III.
> THE STATE DELIBERATELY WITHHELD MATERIAL EXCULPATORY EVIDENCE AND KNOWINGLY USED FALSE EVIDENCE TO DECEIVE THE COURT AND THE JURY. NEWLY DISCOVERED EVIDENCE SHOWS THAT PROSECUTORIAL MISCONDUCT PREVENTED [DEFENDANT] FROM RECEIVING DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.
>
> IV.
> LAW ENFORCEMENT'S CONDUCT IN THIS CASE WAS SO OUTRAGEOUS THAT IT DEPRIVED [DEFENDANT] OF DUE PROCESS AND SHOULD HAVE BARRED THE GOVERNMENT FROM INVOKING JUDICIAL PROCESS TO OBTAIN A CONVICTION AGAINST HIM. [DEFENDANT] IS ENTITLED TO HAVE HIS CONVICTION AS TO GUILT PHASE VACATED AND HIS CASE DISMISSED.

V.

[DEFENDANT] IS ENTITLED TO DNA TESTING OF THE PRESUMPTIVE BLOOD EVIDENCE.

VI.

[DEFENDANT] IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT'S] CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF FLA. R. CRIM. P. 3.852; AND CHAPTER 119, FLA. STAT.

(SR. 2-74) The newly discovered evidence claim was again predicated on predicated on the alleged confession by "Mark Dugan." (SR. 28-36) Claim III was based upon an affidavit from Smykowski and information from Smykowski's wife and daughter that Smykowski had claimed to have been told that he would receive insurance proceeds associated with this case. (SR. 41-57) Claim IV reiterated claims that had been raised and rejected during prior proceeding and the Veski claim. (SR. 58-67)

The State filed a response to this motion, asserting that all of the claims were procedurally barred and legally insufficient. (R. 319-78) The State specifically plead that since this was a successive motion for post conviction relief, Defendant would need to plead and prove that all of the claims had been raised within one year of when the basis for the claim was known or could have become known through an exercise of due diligence. *Id.*

At the Huff hearing, Defendant asserted that he had raised Claims I and III as quickly as possible and that Claim IV was based on information that had been previously available but was being plead so that it could be considered cumulatively. (R. 1279-92) Regarding Off. Veski, Defendant proffered that he would testify that he had been pressured to testify regarding where he found a flashlight. (R. 1289) After a *Huff* hearing, the lower court granted Defendant an evidentiary hearing on two claims: Claim I (regarding the alleged confession of Mark Dugan) and Claim III (regarding the alleged *Brady* violation regarding Walter Smykowski). (R. 1481, 1483)

On November 28, 2001, the State specifically requested leave to depose "Mark Dugan" Smykowski and identifying information regarding Dugan. *Id.* At the hearing on the motion, Defendant indicated that he did not know where Dugan or Smykowski were. (R. 1491) The Court granted the State leave to depose Dugan and Smykowski and ordered Defendant to provide witness addresses as they became available and to provide identifying information regarding Dugan. (R. 1492, 1496) On April 4, 2002, Defendant filed an amended witness list, which did not provide an address or phone number for Smykowski. (R. 485-88)

On January 28, 2002, Defendant filed a motion to perpetuate

the testimony of Smykowski. (R. 463-65) The motion was predicated on Fla. R. Crim. P. 1.330. *Id.* The motion indicated that Defendant was attempting to locate Smykowski so that the State could depose him. *Id.* Defendant asked that the State be available for a three day period, between February 1 and 3, 2002, to take the deposition when Smykowski was found, that the State be required to take the deposition by phone and that deposition be videotaped and admissible as a deposition to perpetuate testimony. *Id.* In response to a request for comments on the motion before it was filed, the State had informed counsel that it had many objections to the motion, which it did not state. (R. 466) However, the State directed Defendant's attention to *Harrell v. State*, 709 So. 2d 1364 (Fla. 1998), and Fla. R. Crim. P. 3.190(j). *Id.* The State also indicated that the logistics of taking a deposition in a foreign country required "greater certainty that a three day window." *Id.*

At the hearing on the motion, Defendant argued that he wanted permission to take a deposition to perpetuate Smykowski's testimony in advance of traveling to the United Arab Emirates and finding Smykowski. (SR. 275-76) [3] Defendant admitted that he did not know an address or phone number for Smykowski but was

[3] The State is simultaneously filing a motion to supplement the record with the transcript of this proceeding. As a result, the page numbers are estimates.

hoping to find Smykowski during a trip to Dubai. (SR. 276) He suggested that the State could either arrange to travel to Dubai itself without governmental clearance or to have the deposition taken telephonically. (SR. 276-78) The State argued that it had yet to be able to even take a discovery deposition of Smykowski because it had not been provided with information about Smykowski's whereabouts, that it wished to take a discovery deposition before a deposition to perpetuate, that any deposition should be taken in a country where the testimony would be under an enforceable oath, that Fla. R. Crim. P. 3.190(j) should govern the procedure for taking a deposition to perpetuate and that expecting the State to wait by a phone for a three days period in case Defendant found Smykowski and could arrange a deposition was unreasonable. (SR. 278-82) The lower court denied the motion because Defendant did not even know where Smykowski was and because the pleading did not comply with the rules. (SR. 284) The lower court specifically denied the motion without prejudice to the issue being readdressed once Defendant found Smykowski. (SR. 284)

After deposing defense witness Peter Mueller, the source of the alleged confession by "Mark Dugan" and the Smykowski affidavit, the State sought to compel the disclosure of a tape recording of "Dugen," two video recordings of Smykowski and a

recording of Hilton Williams. (R. 470-79) At the hearing on the motion, the lower court requested the deposition of Mr. Mueller to determine what he had already revealed. (R. 1531) Defendant also inquired whether the depositions of the journalists had been provided at a later hearing, and the State indicated that the court reporter had sent them. (R. 1555) The lower court indicated at a later hearing that he had reviewed the reporters' depositions. (R. 1566)

In April 2002, Defendant filed a motion to perpetuate the testimony of Hilton Williams and a motion to permit Off. Veski to testify telephonically. (R. 533-35, 582-84) The State filed a response to the motion regarding Williams. (R. 538-56) It indicated that the State had discovered that Defendant had offered an undisclosed reward to Williams for his testimony, as evidence by a letter that Williams had attempted to send Defendant. As such, the State was planning to call Williams at the evidentiary hearing, and there was no reason to perpetuate his testimony.

At a hearing on the Veski motion, the State pointed out that the lower court had summarily denied the claim related to him. (R. 1506-07) Defendant asserted that it did not matter whether the claim was denied because he wanted Veski available to proffer testimony even if he was excluded. (R. 1507) At the

hearing on the other motions, the State requested all identifying information regarding "Mark Dugan," and Defendant claimed that he had provided all the information he had. (R. 1554) The State also indicated that it could not believe that Defendant was unable to find Smykowski, as Mueller had indicated that he had contact information for Smykowski. (R. 1512) Defendant responded that he had not asked Mueller, believing the information might be privileged. (R. 1512-13)

Defendant subsequently filed a motion to compel the State to disclose recordings of telephone conversation between Williams and others, documents concerning a search of Williams' home, the results of the search and documents concerning any other searches the State may have conducted. (R. 612-15)

The State filed a response, explaining that it had already disclosed the recordings of the telephone conversations and statements given to the State by Williams but did so again. (R. 621-46) It asserted that the searches were conducted based on information received from Williams, which disclosed information that Defendant had and had not provided to the State even after being ordered to do so. *Id.* It attached copies of documents related to the searches and invited Defendant to view the items seized during the search. *Id.* Defendant filed a reply, asserting that he had a right to withhold the information that Williams

had provided to him because he had withdrawn Williams from his witness list and he did not consider the information useful. (R. 650-60) He also complained that the State was investigating the information Williams provided because he was not allowed to participate in the State's investigation. *Id.*

The evidentiary hearing was held on May 23, 2002, May 31, 2002, June 4, 2002 and July 11 and 12, 2002. During the course of the hearing, Defendant attempted to call Veski and the State objected because the testimony was beyond the scope of the matters upon which an evidentiary hearing had been granted. (SR. 143-44) Defendant responded that the court needed to hear the testimony to conduct a cumulative analysis and asserted that the importance of Veski's testimony was that the blanket had been in the passenger's seat at some point when it was allegedly bloody. (SR. 144-46) The lower court refused to permit Veski to testify because it had already denied the claim related to him. (SR. 146) Defendant subsequently proffered that his prior counsel had Veski's notes before the last post conviction proceeding. (SR. 157-58)

At the evidentiary hearing, Beth Sreenan testified that she was one of the prosecutors in this matter. (R. 1340) In that capacity, she was aware that the police had been contacted by Robert Stitzer and Walter Smykowski regarding this case. (R.

1340-41, 1369) Ms. Sreenan stated Det. Hanlon had interviewed Smykowski and written a report of that interview on January 12, 1988. (R. 1343-44) In March or April 1988, Ms. Sreenan had traveled to Eglin Air Force Base, where Smykowski was imprisoned, to speak to him. (R. 1351-53, 1370)

Ms. Sreenan recognized a letter dated March 27, 1988, that Smykowski had sent to her regarding the placement of his daughter, as both Smykowski and his wife were incarcerated at the time. (R. 1353-55) Ms. Sreenan did not recall when the letter was received. (R. 1356) Ms. Sreenan took no action based upon this letter. (R. 1355-56) She did not recall if she disclosed the letter to Defendant. (R. 1357) She did recall objecting to questions at depositions, including the deposition of Robert Stitzer, concerning Smykowski's daughter because she did not consider the information relevant. (R. 1358-60) Ms. Sreenan did recall urging Stitzer to disclose any benefit regarding the daughter and disclosing that the State had bought clothes from Smykowski. (R. 1360-62) Ms. Sreenan was never told that Defendant had been taken to see his daughter or that chicken had been purchased. (R. 1365, 1374-75) Had she known, she probably would have disclosed it. (R. 1365, 1375)

Ms. Sreenan stated that the only advice she gave to Smykowski regarding his testimony was to testify truthfully. (R.

1370) She also instructed Smykowski not to mention the racist remarks that Defendant had made, as the trial court had excluded them. *Id.* She did not know that any of Smykowski's testimony was false. (R. 1371-73) Smykowski was promised that he would be prosecuted for perjury if he gave false testimony. (R. 1373-74) Smykowski told Ms. Sreenan that he was aware that the State could not assist him with his federal charges other than to inform the federal officials of his cooperation. (R. 1374) No promises of any monetary reward were made because there was no reward being offered. (R. 1374, 1380)

At the conclusion of Ms. Sreenan's testimony on May 23, 2003, the State inquired if Smykowski had been located and arrangements made regarding his testimony. (R. 1383) Defendant responded that he was attempting to secure Smykowski and his testimony. (R. 1386)

Hilton Williams testified that he had written to the State Attorney Office in April 2, 2002. (R. 1406, SR. 307) He stated that the person presented to Mueller was not Mark Dugan. (R. 1408) Instead, it was a junkie named Shawn, whom Williams had paid to appear. (R. 1408)

Williams stated that his prior testimony and the prior testimony and affidavits from the other alleged eyewitnesses were false. (R. 1409-10, 1412) Williams stated that he

fabricated this testimony in an attempt to earn a $15,000 reward that Defendant's counsel had offered. (R. 1409) Williams stated that James Lohman, Defendant's prior post conviction counsel, was aware that the testimony was false. (R. 1410-11) He stated that Lohman told him what to say. (R. 1411) He stated that he had not witnessed this crime and had not ever seen Defendant before his testimony in 1996. (R. 1422)

Williams stated that he was given $2,000 by Lohman and $1,500 by Mueller. (R. 1412-13) He stated that he was beaten by Germans after the 1996 evidentiary hearing. (R. 1414) Williams stated that Terri Backhus, Defendant's present post conviction counsel, had referred to donations to the "Hilton Williams Be Free Fund" when Williams spoke to her. (R. 1415-16)

Williams stated that he had never been promised any benefit for his testimony or been mistreated by the State. (R. 1417, 1418-19) He testified that he was presently awaiting trial on three charges in Leon County: Robbery, Sexual Battery and Theft.[4] (SR. 295-96) His bond on those charges was $60,000. (SR. 296-97) He stated that he had no agreement with either the State Attorney's Offices in Dade or Leon counties. (SR. 311, 317) The State had not promised him anything. (SR. 311, 317) The State

[4] The State has moved, simultaneously with the filing of this brief, to supplement the record with the transcript of this portion of the evidentiary hearing.

had not even promised not to charge him with perjury regarding his 1996 testimony. (SR. 315-16) However, Williams had previously stated that Backhus had promised to help Williams get a suspended sentence but claimed it was a lie. (R. 1422)

He admitted that he had signed an affidavit in 1994, had testified regarding being an eyewitness in 1996 and had spoken to Mueller in 1997-98. (SR. 290-93) However, he insisted that all of these statements were false. (SR. 309-10) He stated that he had spoke to Meg Laughlin, a reporter from the Miami Herald, after Martin McClain, Defendant's present post conviction counsel, gave him her number. (SR. 303) He stated that he had told Backhus that the State had made promises to him and that guards had beaten him for assisting Mueller. (SR. 293, 301)

He admitted that he had stated that he had buried a gun in Miami that was allegedly used in this crime. (SR. 305-06) However, he stated that the gun had been used in a different robbery that occurred on the same night as this crime. (SR. 312-15)

At the end of Williams's testimony, the lower court set the date for the remainder of the evidentiary hearing. (SR. 318-22) the lower court informed the parties that no further continuances of the remainder of the evidentiary hearing would be permitted. (SR. 321)

James Lohman testified that he did not recall ever seeing the letter from Smykowski to Sreenan. (SR. 152) He claimed that he was not aware of any reward offered to Smykowski. (SR. 151-54) He did not know of any visit to Smykowski's daughter and had no knowledge that Smykowski had been bought chicken. (SR. 151-52)

Lohman stated that he found Williams and Stitt by hiring an investigator to canvas the area from 40th Street to 60th Street on Biscayne Boulevard. (SR. 158-62) He had the investigator, Frank Clay, put up posters offering a $15,000 reward. (SR. 162-64) He stated that Clay found a prostitute who led him to Williams. (SR. 164) Lohman stated that he met with Williams about 5 times. (SR. 165) He claimed that the only thing he told Williams about testifying was to tell the truth and that he had never told Williams what to say. (SR. 166)

He denied giving any money to Williams. (SR. 166) He stated that the only benefit that he had given to Williams was to pay for his lodging for a week. (SR. 168) This was allegedly due to fear that Williams would be shot. (SR. 168) However, Lohman acknowledged that Williams was aware of, and asking for, the $15,000 reward. (SR. 187) He claimed that he had not disclosed the reward offer because Williams was not eligible for the reward. (SR. 187-91)

Lohman stated that Williams told him about Mark Dugan. (SR. 169) Lohman stated that he had been aware of Dugan since 1995. (SR. 194) However, he did not recall making any public records requests regarding Dugan. (SR. 194-95) Instead, Lohman stated that he had Frank Clay attempt to find Dugan. (SR. 194) He stated that he was unaware of an allegation regarding Dugan allegedly selling drugs from a brown Impala and had never heard of the alias Kool. (SR. 169) However, he did recall receiving the "to do" list that included a reference to Kool before the first post conviction proceeding. (SR. 155)

Lohman stated that he had attempted to find Smykowski during the pendency of the first motion for post conviction relief. (SR. 150) He stated that he hired three different investigators. (SR. 150) He stated that he contacted the federal officials. (SR. 151) However, when pressed, Lohman admitted that he had merely contacted INS. (SR. 174) INS had stated that there was a warrant for Smykowski's arrest regarding a parole violation. (SR. 174) He did not recall going to the U.S. Marshall's service. (SR. 174-75) He did not make any public records requests for Smykowski's jail records. (SR. 181-83) He was aware that Smykowksi had expressed concern for his daughter and was aware of the reference to Loretta Stitzer in Smykowski's deposition. (SR. 176-77) However, he did not know if he had ever

spoke to Ms. Stitzer. (SR. 179, 185) He did not remember ever looking for the daughter. (SR. 178) Lohman asserted that he relied upon the fact that INS could not locate Smykowski in assuming that Smykowski could not be located. (SR. 179)

Ed Carhart, Defendant's trial counsel, testified that he had tried 10 to 15 prior capital cases as a defense attorney. (SR. 210) During Smykowski's deposition, Carhart was made aware Smykowski's daughter had stayed with Stitzer's wife. (SR. 213-15, 235) He learned that Stitzer's wife was named Loretta and that Smykowski's daughter was named Deborah Tamara. (SR. 235-36) He also learned that Stitzer had been in contact with Smykowski's daughter. (SR. 214-15) Carhart thought that this was odd but did not know if he pursued the issue of the State's objections to questions concerning the daughter. (SR. 218-19, 237-38)

Carhart stated that he was not aware that Smykowski had been taken to see his daughter. (SR. 215) He had never seen the letter from Smykowski to Sreenan. (SR. 215) He was unaware of any reward being offered to Smykowski. (SR. 216-17)

Carhart admitted that Defendant had provided him with a version of the crime that was similar to what he had told the police. (SR. 241, 244-45) He acknowledged Defendant had told the police that the crime occurred in the area of 163rd Street and

West Dixie Highway. *Id.*

Kevin DiGregory testified that he did not recall having seen the letter from Smykowski to Sreenan or any actions based on that letter. (SR. 250-53) He did not recall any discussions about Smykowski's daughter. *Id.* He did not recall being aware that Hanlon and Matthews had taken Smykowski to see his daughter. (SR. 254) He believed that Hanlon and Matthews would have been involved in transporting Smykowski to the State Attorney's Office for deposition, trial preparation and trial. (SR. 255) He had no recollections of "Kool." (SR. 256-57) He was not aware of any dinner between the German Police and Smykowski. (SR. 259) He did know that Smykowski was never offered any money for his testimony. (SR. 259)

At the end of the second to last day of the hearing, Defendant renewed his request to depose Smykowski because the State had received a call from Smykowski, during which Smykowski had contradicted the affidavit upon which Defendant was relying. (SR. 262) Defendant admitted that his counsel had spoke to Smykowski months before the hearing but claimed still not to have contact information for him. (SR. 263-64, 265) He asserted that Smykowski had verified the information in the affidavit. (SR. 265) The State objected that the request was untimely and that any oath remained unenforceable. (SR. 263) Moreover, the

State pointed out that Smykowski had denied even signing the affidavit and stated that the content of the affidavit was false. (SR. 264) The lower court denied the motion. (SR. 265)

Deborah Schaefer, Smykowski's daughter, testified that she was 8 years old and lived with her grandmother in 1988 because her parents were in prison. (R. 1579-81) She recalled one visit with her father during the time. (R. 1581) She did not believe that her father was in handcuffs during this visit. *Id.* She had been told that her mother called during the visit. (R. 1582) Prior to staying with her grandmother, Schaefer stayed with a lady named Loretta, who was a friend of her parents. (R. 1584)

She made the public records request after she and her mother were contacted by Mueller. (R. 1585, 1587) She wanted to find out about insurance money that her mother said her father had spoken of. (R. 1585-86) She spoke to Ms. Vogel, who stated that the State had no knowledge of any money. (R. 1586-87)

Schaefer stated that her mother's reluctance to cooperate with the defense was because her mother believed that Backhus was attempting to keep Smykowski away from Halina. (R. 1589-90) The prior defense claims about the reasons that Halina would not testify was untrue. (R. 1590-92)

John Skladnick testified that he had met Smykowski in Poland in 1965. (R. 1599) In 1985, he again ran into Smykowski

in Miami at a Polish Club. (R. 1599-1600) He later learned that Smykowski was in jail from Halina. (R. 1600) He assisted Halina in finding an apartment to rent through his friend Sergio. (R. 1601) He once drove Halina and Deborah to see Smykowski in jail. (R. 1601) On or about March 1987, Halina went to jail. (R. 1602) He once saw Smykowski visit his daughter at Sergio's house. (R. 1603) He believed this visit was at the end of 1987 or in 1988. (R. 1618)

Skladnick stated that he heard that Smykowski was deported after his release from prison. (R. 1606) He had recently heard from Smykowski. (R. 1606) During the recent conversation, Smykowski stated that he was becoming a German citizen and that he would be getting money and a house. (R. 1621)

Donald Williams testified that he was unemployed and homeless. (R. 1626) He had lived in the area of 63rd Street and Biscayne Boulevard in 1987. (R. 1627) During that time, he heard of an incident but did not see it. (R. 1627) He stated that he knows a Mark Dugan who he described. (R. 1629-30) He did not know of any alias for Dugan but did know that Dugan has a girlfriend named Doreen. (R. 1630-31) Dugan was never connected to the crime about which Williams had heard. (R. 1631, 1638)

Williams admitted that he had been treated for drug and alcohol abuse over the fifty year period he had been abusing

drugs. (R. 1634) He stated that he drove to Tampa to meet with Backhus and that he spent a night in a hotel during this trip. (R. 1635) He claimed that he had stated that he did not know the year of the incident during deposition because he did not realize the question concerned this incident. (R. 1632-33)

Doreen Bezner testified that she was homeless and lived in the area of 79th Street and Miami Avenue. (R. 1639) In 1987, her boyfriend was Mark Gray. (R. 1640) She claimed that she had seen an incident at 62nd Street and Biscayne during that time period. (R. 1641) She stated that she had seen this incident when she was in the bushes, smoking crack. (R. 1641) She claimed that Gray was supposed to be selling drugs to the people in a car. (R. 1641, 1646, 1654-55) She stated that the drug deal had been set up earlier in the day at a Denny's on Biscayne. (R. 1643, 1654) She identified Defendant and Ms. Kischnick as the people who had the meeting with Gray. (R. 1644-45) She admitted that the identification was based on pictures she had been shown in a magazine. (R. 1656)

She stated that the crime occurred between 6 and 7 p.m. and that it was still light out at the time. (R. 1642, 1653) She stated that the car came down 62nd Street and that Gray stepped in front of the car and put up his hand to stop it. (R. 1641) At that time, two young black men jumped out at the sides of the

car and opened fire. (R. 1641) The car then sped off. (R. 1641-42)

Bezner stated that Gray was never known as Dugan. (R. 1650-51) She stated that she had described the man in the car as having black hair with gray in it. (R. 1653-54) She stated that she was on crack then and now. (R. 1657-58) She stated that she did not have a good memory for dates and times. (R. 1659) She stated that she had a number of prior convictions for prostitution and 11 prior felony convictions. (R. 1658, 1659, 1661-62) She insisted that she was correct about her criminal history even after being shown a printout of it. (R. 1661-62)

Joseph Matthews testified that he had previously been a sergeant with the Miami Beach Police. (R. 1665) He first came in contact with Smykowski when he received a call from Lt. Foster at the federal pretrial detention facility. (R. 1666-67) The call occurred on December 7, 1987, and informed Matthews that an inmate had information. *Id.* Matthews first met Smykowski on January 11, 1988. (R. 1667-68) He next met Smykowski at Eglin Airforce Base a couple of months later. (R. 1668) He met Smykowski again at the South Dade Reception Center. (R. 1669) He believed that he had taken Smykowski from the jail once or twice. (R. 1670-71)

On one occasion when Smykowski was with Matthews, he took

Smykowski to his mother-in-law's home to see his daughter. (R. 1672) A bucket of chicken was purchased for them to eat during the visit. (R. 1673-74) He did not recall Smykowski receiving a call during the visit. (R. 1674) During the visit, Smykowski was probably not in handcuffs. (R. 1673) He did not recall if he told the prosecutors about this visit or if a report was written of the visit. (R. 1671, 1676-77) Matthews stated that no alcohol was involved in the visit. (R. 1678)

Matthews stated that he had interviewed Smykowski before Smykowski ever met any of the prosecutors. (R. 1679-80) He stated that Smykowski initiated contact with the State and that the State had no role in the placement of Smykowski in a cell with Defendant. *Id.* Smykowski was not promised any money for his testimony. (R. 1680) He never discussed any insurance money being paid to Smykowski.(R. 1681)

Robert Hanlon testified that he was retired from the Miami Beach Police Department since 1989. (R. 1684) He confirmed that Lt. Foster first called the Miami Beach Police and that Smykowski was first interviewed as a result of this call at MCC on January 11, 1988. (R. 1685) He also confirmed the second visit at Eglin. (R. 1868)

Hanlon stated that he once took Smykowski from the Stockade so that he could visit his daughter. (R. 1686-87) During the

visit, fried chicken was purchased. (R. 1687) He then returned Smykowski to the Stockade. *Id.* He did not handcuff Smykowski during the visit. (R. 1688) He did not recall Smykowski receiving a phone call during the visit. (R. 1689) This visit was made at Smykowski's request. (R. 1691) There was no alcohol use in connection with this visit. (R. 1691)

Hanlon did not notify the prosecutors. (R. 1686) He did not know if he wrote a report of the visit. (R. 1691) He did not see Smykowski at any other time. (R. 1690) He did not discuss any insurance reward with Smykowski and did not offer him any money. (R. 1691, 1692)

Cathy Vogel testified that she represented the State at the first post conviction hearing. (R. 1695-96) After the hearing she wrote Backhus about a letter that she had received from Schaefer. (R. 1696-97) Vogel also recalled receiving a call from Schaefer. (R. 1697-98) She did not recall telling Schaefer to make a public records request. (R. 1698) She had no recollect of any further conversation with Schaefer. (R. 1700) She forwarded Schaefer's public records request to the records department. (R. 1699) Vogel had no knowledge of any insurance reward in this case. (R. 1701)

Terry Backhus testified that she was contacted about representing Defendant in an appeal before the Florida Supreme

Court in 1997. (R. 1702) On December 10, 1998, she received notification of a German radio program that Mueller was airing about Defendant in which someone was allegedly confessing to the crime. (R. 1703) She hired Clay to locate this person in early 1999. (R. 1703-04) In November 1999, she filed the motion to relinquish jurisdiction and the initial version of the second motion for post conviction relief regarding this information. (R. 1704) The Florida Supreme Court denied the motion to relinquish jurisdiction. (R. 1704) In February 2000, this Court issued its opinion about the first motion for post conviction relief. (R. 1704-05)

In June 2000, Backhus received a letter from Vogel, which Backhus claimed was when she first learned of Schaefer. (R. 1705) During Schaefer's deposition, she learned that Smykowski had been allowed to visit her. (R. 1717) In April 2002, the State filed a pleading confirming the visit. (R. 1717-18) At that point she reviewed the materials in her possession and found the letter from Smykowski to Sreenan. (R. 1717)

Backhus later received information from Mueller that Mueller had contacted Smykowski and that Smykowski had executed an affidavit. (R. 1706) Backhus claimed that she had made a public records request for information about Hilton Williams and Smykowski's jail records from the Dade County Jail. (R. 1708)

She never received these records. (R. 1708) She claimed not to have requested the records in compliance with 3.852 because she did not know that the rule applied to cases in which records had been requested before 3.852 was adopted. (R. 1736-37)

Backhus knew that Clay had also worked for Mueller, and Backhus asked Clay to look for Dugan. (R. 1711) According to Backhus, Clay once found Dugan on an expressway exit ramp. (R. 1711) Backhus asserted that Clay said that Dugan did not want to talk to Backhus and sped away. *Id.*

Backhus stated that once Hilton Williams recanted his prior statements, she had Clay find Donald Williams and Doreen Bezner through Donald Williams. (R. 1711-12, 1747) Backhus also claimed to have met Smykowski in Dubai at a hotel in the beginning of March 2002. (R. 1713, 823, 951) Backhus stated that she learned during a conversation with Hilton Williams in April 2002 about "Kool" and a brown Impala. (R. 1717) She then located public records concerning "Kool" and the brown Impala and a to do list mentioning "Kool." (R. 1718)

On cross, Backhus stated that she started with CCR in 1991. (R. 1720) She believed that Smykowski was an important witness. (R. 1722) She also knew that Hilton Williams had told of Mark Dugan in the first post conviction proceedings. (R. 1722, 1726) She claimed that Lohman had tried to find both Smykowski and

Dugan. (R. 1748) Backhus was not looking for any evidence about this at this time because the case was on appeal. (R. 1727)

Backhus acknowledged that the letter from Smykowski to Sreenan and the police report about "Kool" had been disclosed prior to the first post conviction proceeding. (R. 1737, 1754) She stated that the letter was not important at the time even when considered in conjunction with Smykowski's deposition. (R. 1737-38)

Backhus admitted that she had 3 or 4 contacts with Mueller before the December 1998 radio broadcast. (R. 1724-25) However, she did not contact Mueller about his progress in finding witnesses and never learned about the progress of his investigation. (R. 1725-26) She was aware that Mueller contacted Smykowski through contact information from the U.S. Marshall's Office. (R. 1748-50) She never asked Mueller for his raw footage. (R. 1750)

Backhus admitted that she had discussed payments for testimony with Hilton Williams, who was asking both her and Clay for money. (R. 1728-30) Backhus claimed however that she never actually intended to pay Williams. (R. 1729) She claimed that she was only telling Williams to speak to Clay about money and talking about the "Hilton Williams Be Free Fund" to lead Hilton Williams. (R. 1729-30) She stated that she did not visited

Williams in the Leon County Jail until April 2002 but admitted that Clay had. (R. 1727-28) She admitted that she had received other identifying information about Dugan from Williams and did not provide that information to the State despite her representation to this Court that she had provided all identifying information. (R. 1738-40) She claimed not to have provided the information because it was "false leads." (R. 1740-42) Backhus also claimed that the State would never have followed up on such information. (R. 1731-32)

After the evidentiary hearing, Defendant submitted a post hearing memorandum in which he sought to amend his motion for post conviction relief to claim that the State violated *Brady* by failing to disclose Smykowski's visit to his daughter, the State knowingly presented false testimony that Smykowski did not have contact with law enforcement at the time of the visit and there was newly discovered "eyewitness testimony." (R. 664-720) Defendant only claimed to have shown diligence in the presentation of the "eyewitness testimony" and did not address the issue of diligence regarding the other claims. *Id.* The State filed a post hearing memorandum in which it asserted that leave to amend should be denied, that all of the claims were time barred in this successive motion and that Defendant was not entitled to any relief regarding any of the claims even

considering the alleged cumulative effect of the claims. (R. 722-69)

On February 27, 2003, the State sent a letter to the trial court, and faxed a copy to Defendant, in response to a request for the depositions of Doreen Bezner, Donald Williams, Joseph Matthews and Robert Hanlon.[5] (SR. 324) The letter indicated that the request had been made in a conversation between the lower court's judicial assistant and one of the prosecutor's secretary. *Id.* The State refused to comply with the request. *Id.*

On February 28, 2003, the lower court entered its order denying Defendant's amended second motion for post conviction relief. (R. 1120-41) The order noted that Defendant had failed to show that he was diligent in seeking to present his claims because counsel had been aware since before trial of Smykowski's concern for his daughter, counsel should have been aware of the letter from Smykowski before the first post conviction proceedings, counsel conducted an inadequate search for Smykowski in the first post conviction proceeding, counsel failed to request information to locate Smykowski during the second post conviction proceeding and counsel delayed requesting information from Mueller. (R. 1126) As such, it found the claims to be time barred. (R. 1126-27)

[5] The State has filed a motion to supplement to the record to include the letter simultaneously with the filing of this brief.

It also found that even if the claims were not barred, no relief was warranted. (R. 1127-41) It found that the testimony of Donald Williams and Doreen Bezner were incredible, especially when considered cumulatively with the evidence presented at the prior post conviction proceeding and the trial. (R. 1127-32) As such, the lower court found that Defendant was entitled to no relief on his claim concerning them. *Id.* With regard to the claim concerning the alleged confession by "Mark Dugan," the Court found that Defendant had presented no admissible or reliable evidence of the allegedly confession and that considering the claim cumulative with the evidence from the first post conviction proceeding and trial, the claim was particularly without merit as it showed that the confession was created by Hilton Williams in an attempt to collect a reward from Defendant. (R. 1132-35) With regard to the Smykowski claims, the Court found that the police had not told the prosecutors about the visit or the lunch, that knowledge of these things was imputed to the State but that they did not create a reasonable probability of a different result at trial given the amply other impeachment of Smykowski and the other evidence presented at trial. (R. 1135-39) It found that the State had not knowingly presented any false testimony, particular given the language barrier between Smykowski and the

attorneys. (R. 1139-40) It expressly found that even considering this claim cumulatively with the evidence presented at the first post conviction proceeding and at trial did not warrant relief. (R. 1140) It found the other claims to be procedurally barred as they could have and should have been raised earlier. (R. 1140)

In announcing its ruling, the lower court indicated that it had reviewed all the prior transcripts, records and evidence and this Court's prior opinions. (R. 1453) It expressly stated that it had considered the claims cumulatively. *Id.* It expressly found Ms. Benzer and any evidence produced in association with Hilton Williams incredible. (R. 1455) It noted that letter between Defendant and Ms. Sreenan had been introduced with a received stamp on it dated after trial and noted that the letter including the received stamp was in evidence. (R. 1456-57)

On March 10, 2003, Defendant filed a motion to get facts, asserting that an evidentiary hearing was necessary to determine the scope of the contact between the State and Judge Bagley. (SR. 75-82) In the motion, Defendant acknowledged that the letter had been faxed to him on February 27, 2003, but asserted that he had not discovered the letter until March 2, 2003. *Id.*

On March 11, 2003, Defendant filed a motion to disqualify Judge Bagley. (SR. 83-88) The motion sought Judge Bagley's disqualification on the grounds that he was a material witness

and that he had personal knowledge of disputed evidentiary facts and not on the grounds that Judge Bagley had engaged in ex parte communications with the State. (SR. 83-88)

On March 17, 2003, Defendant moved to reopen the evidentiary hearing to present statements made by Smykowski to the German police after he had been arrested in Germany. (SR. 89-118) That same day, Defendant moved for rehearing. (SR. 119-34) On April 15, 2003, the lower court denied all of these motions. (R. 1178-81) This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly summarily denied the claim regarding Off. Veski, as it was not asserted in a timely fashion and was without merit. The lower court also properly refused to permit a deposition of Smykowski, since Defendant did not comply with the rules of criminal procedure in making the request, never knew where Smykowski was and gave inadequate notice of his request. The lower court also properly refused to admit unreliable hearsay.

The claim regarding the alleged ex parte proceeding was never properly raised below and the motion to disqualify that was filed was untimely and facially insufficient. Moreover, the lower court did not consider matters outside the record.

The lower court properly denied the *Brady* claim and the

newly discovered evidence claim. In doing so, the lower court properly considered cumulative evidence.

ARGUMENT[6]

I. THE LOWER COURT PROPERLY SUMMARILY DENIED THE CLAIM REGARDING OFFICER VESKI.

Defendant first asserts that the lower court erred in refusing to allow Hillard Veski to testify at the evidentiary hearing. Defendant appears to assert that the lower court was required to conduct an evidentiary hearing on this claim because he had asserted other violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). However, the lower court properly summarily denied this claim.

In order to raise a claim in a successive motion for post conviction relief filed outside the time limits set for post

[6] The German Government has filed a brief as amicus curiae in which it asserts that evidence obtained in German should be suppressed because the evidence was gathered under an improper procedure for requesting assistance from the German government and because the searches were allegedly improper under German law. However, Defendant has not raised any issue regarding the propriety of the searches in German on appeal. Amici are not permitted to raise new issues. *Dade County v. Eastern Airlines*, 212 So. 2d 7, 8 (Fla. 1968); *Michels v. Orange County Fire/Rescue*, 819 So. 2d 158, 159 (Fla. 1st DCA 2002); *Keating v. State*, 157 So. 2d 567, 569 (Fla. 1st DCA 1963). As such, this issue is not properly before the Court. Moreover, this Court has already determined, both on direct appeal and in the State habeas proceeding, that Defendant was not entitled suppression of the evidence seized in German and that the continued litigation of this issue is procedurally barred. *Riechmann*, 777 So. 2d at 365-66; *Riechmann*, 581 So. 2d at 138. As such, the issue should be rejected even if it were properly before this Court.

conviction motions, a defendant must show either that the claim is based on a fundamental change of constitutional law that has been held to apply retroactively or that the claim is based on facts that were unknown to the defendant and could not have been discovered earlier. Fla. R. Crim. P. 3.851(d)(2); Fla. R. Crim. P. 3.850(b). Moreover, the claim must be asserted within the applicable time period for raising an initial motion for post conviction after the facts underlying the claim could have been discovered through an exercise of due diligence. *Stewart v. State*, 495 So. 2d 164 (Fla. 1986); *Christopher v. State*, 489 So. 2d 22 (Fla. 1986); *Webber v. State*, 662 So. 2d 1287 (Fla. 5th DCA 1995).

Here, the lower court denied this claim as procedurally barred because it either was or should have been raised on direct appeal or in the prior post conviction proceedings. (R. 1140) The record fully supports the lower court's ruling.

Defendant did not raise this claim in a motion for post conviction relief until he presented it as part of a claim that the State had engaged in outrageous misconduct in his amended second motion filed on September 14, 2001. (SR. 62-64) The claim did not include any assertion regarding when the facts underlying the claim were or could have been discovered or that the claim was based on a fundamental change in constitutional

law. *Id.* Instead, the claim acknowledged that Off. Veski had told Defendant "[a]fter his deposition, but before trial" that he lied at his deposition and had been pressured to testify falsely. (SR. 63)

Moreover, Defendant asserted in the claim that the significance of Off. Veski's testimony was that it showed that the flashlight had gotten bloody when it was in the backseat of the car and not because Defendant had touched it after the murder. (SR. 62-64) He asserted that the State presented false testimony regarding the location of the flashlight to the jury. *Id.* Defendant also mentioned that the blanket had been found on the right front seat and indicated that the location of the blanket was important but made no mention of the seat being wet with blood or blood being transferred to the blanket.[7] *Id.*

Defendant had raised this same claim in the petition for writ of habeas corpus that he filed in this Court on June 11, 1998. Petition, FSC Case No. 89,564, at 86-87. Moreover, at the evidentiary hearing regarding the first motion for post conviction relief, trial counsel testified that he was aware that Off. Veski had been pressured to testify falsely before trial and was shown a copy of the notes of the inventory Off.

[7] In fact, in the next claim in the motion, Defendant sought DNA testing, claiming the presumptive blood on the blanket was not Ms. Kischnick's. (SR. 68-70)

Veski conducted. (PCT. 1665-69)

As seen above, the record conclusively shows that Defendant was aware of the alleged pressure and alleged false testimony before trial. It also shows that he had Off. Veski's inventory notes at the time of the first post conviction proceeding. Under these circumstances, the lower court properly denied this claim as procedurally barred. *See Swafford v. State*, 828 So. 2d 966 (Fla. 2002); *Buenoano v. State*, 708 So. 2d 941, 948 (Fla. 1998);*Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997); *Mills v. State*, 684 So. 2d 801, 804-06 (Fla. 1996). It should be affirmed.

To the extent that Defendant is attempting to assert that the claim was properly filed because *Banks v. Dretke*, 540 U.S. 668 (2004), represents a fundamental change in law that had been held to be retroactive, he is entitled to no relief.[8] *Banks* did not purport to recognize a new fundamental constitutional right. Instead, the Court claimed it was merely applying preexisting precedent regarding *Brady* claims and the determination under federal law of the existence of cause to excuse a procedural default in a federal habeas proceeding, an issue that the United States Supreme Court has characterized as an issue of federal

[8] This is particularly true since the claim was not raised below and is not properly before this Court. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003).

law that does not have to depend on a constitutional claim. *Murray v. Carrier*, 477 U.S. 478, 489 (1986). Moreover, Defendant has not shown that *Banks* has been held to be retroactive. As such, *Banks* does not meet the requirements of the second condition for filing an untimely, successive motion. The lower court properly rejected this claim as procedurally barred.

To the extent that Defendant is attempting to assert that *Banks* held that *Brady* claims cannot be procedurally barred, this is again not true. *Banks* did not hold that all *Brady* claims could not be procedurally barred. In *Banks*, the Court based its finding that the defendant had shown cause to overcome a procedural bar on three factors:

> "(a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the [State] confirmed petitioner's reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received everything known to the government."

Banks, 540 U.S. at 692-93 (quoting *Strickler v. Greene*, 527 U.S. 263, 289 (1999)). The Court then stated that it had not decided "whether any one or two of these factors would to sufficient to constitute cause" and was not doing so in *Banks*. *Id.* at 693 n.13 (quoting *Strickler*, 527 U.S. at 289). The language that Defendant relies upon is contained in a discussion of Texas' argument regarding cause after the Court had already found cause

as discussed above. *Banks*, 540 U.S. at 696. Given that Defendant's argument is basically that he only needs to satisfy part (a) of showing of cause and the Court directly stated that it was not deciding that question, Defendant's reliance on *Banks* is misplaced. This is particularly true here, since Defendant had the allegedly withheld information at trial and during the first motion for post conviction relief.

To the extent that Defendant is attempting to claim, a *Brady* claim cannot be barred because a cumulative analysis must be conduct, again Defendant is not entitled to any relief. This Court has held that *Brady* and *Giglio* claims can be procedurally barred even while requiring a cumulative analysis. *Buenoano*, 708 So. 2d at 948; *Mills*, 684 So. 2d at 804-06. This is consistent with this Court's repeated holding that a cumulative error fails when the individual claims are procedurally barred or without merit. *Roberts v. State*, 840 So. 2d 962, 972 (Fla. 2002). Moreover, *Mordenti v. State*, 894 So. 2d 161 (2004), does not compel a different result, as this Court did not find that any of the claims considered cumulatively were procedurally barred. The lower court properly denied this claim as procedurally barred and should be affirmed.

Even if the claim had not been procedurally barred, the lower court would still have properly summarily denied this

claim. While Defendant continually asserts that this Court is required to accept his factual allegations as true, the law only requires this Court to accept factual allegations as true "to the extent they are not conclusively rebutted by the record." *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999); *see also Arbelaez v. State*, 775 So. 2d 909, 914 (Fla. 2000). Here, Defendant's allegations are refuted by the record.

While Defendant asserted that Off. Veski testified falsely, Off. Veski never testified at trial. Moreover, no testimony was presented at trial regarding the flashlight.[9] The State elected not to introduce it at trial because it could not prove where it was found. (PCT. 1546-48) In *Buenoano v. State*, 708 So. 2d 941, 948 (Fla. 1998), this Court described a claim regarding the knowing presentation of false testimony from a witness who never testified at trial as baseless. Similarly here, the issue is baseless and was properly summarily denied.

To the extent that Defendant is attempting to claim that the State withheld the fact that Veski had allegedly been pressured, both the record and Defendant's own motion show that

[9] The portions of the record to which Defendant cited in his motion consist of suppression hearing testimony of Trujillo and Lonergan and a statement by the prosecutor delay during a pretrial hearing concerning the reason why drawing Defendant's blood had been. (DAR. 1278, 1304, 1351-54, 1664) Moreover, showing that Veski's testimony was inconsistent with other officers would not demonstrate perjury. *Maharaj v. State*, 778 So. 2d 944, 956 (Fla. 2000).

he is entitled to no relief. Both show that Defendant knew of the alleged pressure before trial. As such, this claim was without merit and properly denied. *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000)(no *Brady* violation, where defendant knew of evidence before trial).

With regard to the location of the blanket at the time of the crime, Veski did not see the blanket until two days after the crime. Photographs taken at the scene, sometime between 11:45 pm on October 25, 1987 and 1:00 a.m. on October 26, 1987, show the blanket in the driver's seat and the victim in the passenger's seat. (DAR. 274-77, 400-01, 2563-64, 2566) Detective Richard Ecott, the crime scene technician who took the photographs, testified that the blanket was in the driver's seat. (DAR. 2569, 2605) Moreover, Defendant personally, testified on direct examination that the blanket was in the driver's seat. (DAR. 4547) At the post-conviction hearing, defense counsel Edward Carhart testified that Defendant told him that he was sitting on the blanket (in the driver's seat) at the time the victim was shot. (PCT. 1628) Thus, the record conclusively refutes this claim.

To the extent that Defendant is claiming that the fact that the blanket was moved was important because the blood was transferred, Defendant did not raise this claim in his motion

for post conviction relief. As such, it is not properly before this Court. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003); *Vining v. State*, 827 So. 2d 201, 211-13 (Fla. 2002). Moreover, the record reflects that counsel knew that the blanket was recovered from the passenger seat and presented this at the time of trial. (DAR. 3278-79) As such, it would not show a *Brady* violation. *Maharaj*, 778 So. 2d at 954. The claim was properly denied and should be affirmed.

II. THE LOWER COURT ACTED PROPERLY REGARDING THE DEPOSITION AND USE OF HEARSAY STATEMENTS BY SMYKOWSKI.

Defendant next asserts that the lower court erred in denying his motion to take a deposition to perpetuate the testimony of Walter Smykowski. Defendant asserts that the granting of a deposition to perpetuate was mandatory under Fla. R. Crim. P. 3.190(j), pursuant to which Defendant allegedly sought to depose Smykowski. Defendant further contends that the denial of the deposition or of admission of an alleged affidavit from Smykowski or Defendant's counsel's hearsay account of Smykowski's alleged statements to her violated due process. However, these claims present no basis for reversal.

While Defendant asserts that he sought to depose Smykowski under Fla. R. Crim. P. 3.190(j), this is not true. Defendant's motion was predicated on Fla. R. Civ. P. 1.330(a)(3)(C), and not Fla. R. Crim. P. 3.190(j). (R. 463-65) It was the State that

argued that compliance with the criminal rule was required. (R. 466, SR. 279) Since Defendant never sought to take a deposition under Fla. R. Crim. P. 3.190(j), he belated reliance on the rule should not now be countenanced.

Moreover, Defendant did not comply with the requirements of Fla. R. Crim. P. 3.190(j). That rule requires that a motion pursuant "shall be verified or supported by the affidavits of credible persons that a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing, that the witness's testimony is material, and that it is necessary to take the deposition to prevent a failure of justice." Here, Defendant's motion was not under oath or accompanied any affidavits. (R. 463-65) Moreover, Defendant did not actually allege where Smykowski was living. *Id.* At the hearing on the motion, Defendant admitted that he did not have even an address or phone number for Smykowski and did not even know if he would be found. (SR. 275-76) Thus, Defendant did not comply with the requirements of Fla. R. Crim. P. 3.190(j). As such, the lower court did not abuse its discretion[10] in finding that Defendant's motion was insufficient. *See Cherry v. State*, 781 So. 2d 1040,

[10] The standard of review for denials of motions to take depositions to perpetuate testimony is abuse of discretion. *Cherry v. State*, 781 So. 2d 1040, 1054 (Fla. 2000).

1054-55 (Fla. 2000). The denial of the motion should be affirmed.

Additionally, the lower court did not completely refuse to allow Defendant to take a deposition to perpetuate testimony. Instead, at the time it ruled on Defendant's motion originally, it denied the motion without prejudice to Defendant renewing the motion "if for some reason or somehow an investigator is able to discover the witness." (SR. 284) Even though Backhus testified that she met with Smykowski in March 2002 (R. 1713, 823, 951), Defendant did not come back to the court and renew his request to take a deposition to perpetuate Smykowski's testimony at that point. Instead, Defendant waited until the end of the day on the day before the hearing was schedule to conclude, asserting that the motion had not been made earlier because he still did not have an address or phone number for Smykowski. (SR. 262-65) However, Fla. R. Crim. P. 3.190(j)(1) specifically provides that requests to perpetuate testimony made within 10 days of the proceeding can be denied. Here, the motion was not made until the proceedings were drawing to a close. Under these circumstances, the lower court did not abuse its discretion in denying the motion to take a deposition to perpetuate Smykowski's testimony. It should be affirmed.

Moreover, none of Defendant's requests gave the State

adequate notice. Here, Defendant filed his motion to take the deposition to perpetuate Smykowski on January 28, 2002. (R. 463-65) Defendant acknowledged that the State had yet to receive permission to travel to take any deposition. *Id.* Defendant also acknowledged that he did not even know where Smykowski was. (SR 276) Yet, Defendant proposed that the deposition would be taken sometime between February 1, 2003 and February 3, 2002. Such a brief period was clearly inadequate to allow the State to attend any such deposition. Moreover, despite being given leave to renew the request when he had located Smykowski, Defendant made no attempt to do so until the evidentiary hearing was about to conclude. (SR. 263-65) As such, the lower court properly refused to allow the deposition. Fla. R. Crim. P. 3.190(j)(5)(stating that procedure for depositions to perpetuate covered by civil rules); Fla. R. Civ. P. 1.310(b)(1)(requiring reasonable notice); Fla. R. Civ. P. 1.330(a)(requiring presence at deposition as condition of its use); *see also* Fla. R. Crim. P. 3.220(h)(requiring reasonable notice).

In fact, Defendant's motion did not seek to allow the State to attend any deposition. Instead, Defendant suggested that after he found Smykowski, he would simply call the State and allow the State to question Smykowski over the phone. However, any oath administered during such a phone conversation would not

have subjected Smykowski to penalty of perjury. *See Harrell v. State*, 709 So. 2d 1364, 1371 (Fla. 1998)(requiring proof that a witness could be extradited for perjury to show oath effective); *see also United States v. Parafin Wax*, 23 F.R.D. 289 (Fla. 1959)(noting that ability to take a foreign deposition is governed by law of country in which deposition is taken).[11] Under these circumstances, the lower court did not abuse its discretion in refusing to allow the deposition.

While Defendant asserts that refusal to allow the deposition to perpetuate denied him due process, this is not true. Due process is not violated simply because a witness who could not be produced did not testify. *See United States v. Sensi*, 879 F.2d 888, 898-99 (D.C. Cir. 1989); *United States v. Layton*, 855 F.2d 1388, 1408 (9th Cir. 1988); *United States v. Zabaneh*, 837 F.2d 1249, 1259-60 (5th Cir. 1988); *see also Mancusi v. Stubbs*, 408 U.S. 204, 209-13 (1972). Here, Defendant continually claimed not to know where Smykowski was. (SR. 263-65, 276) As such, he never showed that a proper deposition to perpetuate could have been taken.

The cases relied upon by Defendant do not compel a different result. In *Provenzano v. State*, 750 So. 2d 597 (Fla.

[11] Here, Defendant made no showing that either a commission or letters rogatory issued by the trial court could have been domesticated in Dubai, particularly in the time given.

1999), *Roberts v. State*, 840 So. 2d 962, 970-72 (Fla. 2002), and *Jones v. Butterworth*, 695 So. 2d 679 (Fla. 1997), the defendants had witnesses they could allegedly locate and produce given time and legal process. Here, Defendant admitted that he did not know where Smykowski could be located and never claimed to be able to produce Smykowski given time.

In *Johnson v. Singletary*, 647 So. 2d 106 (Fla. 1994), the lower court had refused to allow the defendant to present witnesses but allowed the State to present evidence to rebut the witnesses' proposed testimony. Similarly, in *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995), the lower court permitted the State to present evidence at a *Frye* hearing but refused to hear from a defense witness. Here, the lower court specifically granted an evidentiary hearing to hear from Smykowski. Defendant simply stated that he did not know Smykowski's whereabouts.

To the extent that what Defendant is actually seeking is the reversal of the lower court's refusal to admit Smykowski's affidavit or his counsel's testimony that the affidavit was true, the lower court properly excluded the affidavit and testimony concerning it. Such evidence was hearsay. This Court has held hearsay is not admissible in post conviction proceedings. *Randolph v. State*, 853 So. 2d 1051, 1062 (Fla. 2003); *Routly v. State*, 590 So. 2d 397, 401 n.5 (Fla. 1991). As

such, the lower court did not abuse its discretion in refusing to admit the affidavit or counsel's testimony. The denial of the claim should be affirmed.

To the extent that Defendant is attempting to assert that the hearsay had to be admitted under *Chambers v. Mississippi*, 410 U.S. 284 (1973), the lower court still properly refused to admit the affidavit. In *Chambers*, the Court held that a state may not mechanically apply its rules of evidence to preclude evidence that bore substantial indicia of trustworthiness. Here, no evidence of trustworthiness of Smykowski's affidavit were presented.

Smykowski's affidavit sought to recant his trial testimony. This Court has generally considered such evidence unreliable. *Sochor v. State*, 883 So. 2d 766, 786 (Fla. 2004). Moreover, the oath under which the affidavit was signed was unenforceable, particularly given that Defendant was unable to even produce contact information for Smykowski. *See Harrell v. State*, 709 So. 2d 1364, 1371 (Fla. 1998)(requiring proof that a witness could be extradited for perjury to show oath effective). The only evidence regarding how the affidavit was procured was Backhus's testimony that Mueller had secured the affidavit. (R. 1706) However, Hilton Williams, the other "witness" to provide information to Mueller, testified Mueller paid him when he

provided false informant. (R. 1412-13) In addition, Backhus, who sought to testify that Smykowski had affirmed the truth of the affidavit to her, was caught making offers of "charitable contributions" to Hilton Williams. (R. 1415-16, 1728-30) Skladnick also testified that Smykowski was expecting to become a German citizen and receive money and a house. (R. 1621) Finally, the State proffered that it had received a call from someone purporting to be Smykowski, who stated that the affidavit was false. (SR. 264) Given the lack of indicia of trustworthiness and the presence of information indicating the affidavit was untrustworthy, the lower court did not abuse its discretion in refusing to admit the affidavit. *See Grim v.* State, 841 So. 2d 455, 464 (Fla. 2003); *Sliney v. State*, 699 So. 2d 662, 670 (Fla. 1997); *Lightbourne v. State*, 644 So. 2d 54, 57 (Fla. 1994). It should be affirmed.

The same analysis applies to the refusal to reopen the evidentiary hearing. Defendant again sought to present hearsay, interviews with Smykowski by the German police. (SR. 89-118) Again, such hearsay is inadmissible. *Randolph v. State*, 853 So. 2d 1051, 1062 (Fla. 2003); *Routly v. State*, 590 So. 2d 397, 401 n.5 (Fla. 1991). The only indicia of reliability claimed for these statements were that they were taken by the German police. However, the fact that a statement was given while in police

custody, as were the statements here, is general considered a circumstance that makes the statement less reliable. *Lilly v. Virginia*, 527 U.S. 116, 137-38 (1999); *Lee v. Illinois*, 476 U.S. 530, 544 (1986). Moreover, the statements themselves detail payment from Mueller to Smykowski. Under these circumstances, the lower court did not abuse its discretion in excluding these statements. *See Grim v.* State, 841 So. 2d 455, 464 (Fla. 2003); *Sliney v. State*, 699 So. 2d 662, 670 (Fla. 1997); *Lightbourne v. State*, 644 So. 2d 54, 57 (Fla. 1994). It should be affirmed.

III. THE CLAIMS REGARDING THE JUDGE'S CONDUCT PRESENT NO BASIS FOR REVERSAL.

Defendant next asserts that the lower court erred in denying his motion to recuse it because the lower court had engaged in ex parte communication with the State. He also contends that the lower court allegedly engaged in an improper independent investigation. He also appears to allege that the lower court erred in denying his motion to get facts. Defendant finally avers that the lower court relied upon facts that were not in evidence in denying his motion. However, the lower court should be affirmed because the issues are unpreserved and without merit.

Defendant first contends that the lower court should have recused itself because it engaged in improper ex parte communications with the State. However, Defendant never asked

the lower court to recuse itself because it had engaged in ex parte communication with the State. Instead, Defendant's motion for disqualification, which was filed 12 days after the State faxed its letter to Defendant, requested that the lower court recuse itself because the lower court was allegedly a material witness and allegedly had personal knowledge of the disputed evidentiary facts. (SR. 83-88) Since Defendant did not seek Judge Bagley's recusual on the basis that he had allegedly engaged in ex parte communications in the lower court, this claim is not properly before this Court. *See City of Coral Gables v. Brasher*, 132 So. 2d 442, 445-46 (Fla. 3d DCA 1961)(disqualification only cognizable if raised in lower court); *see also Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved).

Even if the claim was properly before the Court, the denial of the motion to disqualify should still be affirmed. Motions to disqualify must be filed within 10 days of when the grounds for the recusal are disclosed. Fla. R. Jud. Admin. 2.160(e); *Rodriguez v. State*, 30 Fla. L. Weekly S385, S391 (Fla. May 26, 2005); *Willacy v. State*, 696 So. 2d 693 (Fla. 1997); *Steinhorst v. State*, 636 So. 2d 498, 500 (Fla. 1994). Here, the State faxed its response to the call from the Judicial Assistant to the

prosecutor's secretary on February 27, 2003. Defendant did not file his motion to recuse the judge until March 11, 2003, twelve days later. Since Defendant did not file his motion to recuse within 10 days of when the alleged ex parte communication was disclosed, the motion would have been untimely had it been based on the alleged ex parte communication. As such, it would have been properly denied and provides no basis for reversal.

Even if the claim was properly before this Court and the motion had been timely filed, Defendant would still be entitled to no relief. This Court has made it clear that ex parte communications do not require disqualification of the trial judge if they concern purely administrative matters. *Rodriguez*, 30 Fla. L. Weekly at S391; *Arbelaez v. State*, 775 So. 2d 909, 916 (Fla. 2000); *Rose v. State*, 601 So. 2d 1181, 1183 (Fla. 1992). Here, the communication between the Judicial Assistant and the secretary was merely a request that certain documents be provided to the trial court.[12] The State's written refusal to provide those documents was provided to Defendant and was not ex parte. *See Shuler v. Green Mountain Ventures*, 791 So. 2d 1213

[12] In an attempt to bolster his belated allegations of an improper ex parte communication, Defendant speculates that the State and lower court may have engaged in other ex parte communications and points to order authorizing travel expenses for a prosecutor to attend a deposition. (R. 162) However, such allegations are insufficient to form a basis for disqualification. *Roberts v. State*, 840 So. 2d 962, 969-70 (Fla. 2002); *Barwick v. State*, 660 So. 2d 685, 693 (Fla. 1995).

(Fla. 5th DCA 2001). Given that the alleged ex parte communication consisted of nothing more than a request for documents, it was administrative in nature. Thus, even if Defendant had requested that the trial court recuse itself based on the alleged ex parte contact and had done so on a timely basis, there is no basis for recusal. The denial of the request should be affirmed.

Moreover, the lower court properly denied the motion for disqualification on the grounds that were alleged. For a judge to be a material witness, a defendant must show (1) that the judge possessed relevant information affecting the merits of the cause, and (2) that no other witness might similarly testify. *Rodriguez*, 30 Fla. L. Weekly at S392; *Van Fripp v. State*, 412 So. 2d 915 (Fla. 4th DCA 1982). Thus, to meet this standard, a defendant must show that the trial judge's testimony is "absolutely necessary to establish factual circumstances not in the record." *State v. Lewis*, 656 So. 2d 1248, 1250 (Fla. 1994). Here, Judge Bagley was not the only witness who could have testified regarding the nature of the communication between the Judicial Assistant and the secretary. Both the Judicial Assistant and the secretary could have testified. Moreover, the facts do not appear to be outside the record as the State informed Defendant of the nature of the contact in its letter.

(SR. 324) Thus, Defendant did not show that Judge Bagley was a material witness whose testimony was absolutely necessary to establish factual circumstances outside the record. The motion to disqualify was properly denied and should be affirmed.

Defendant's reliance on *Smith v. State*, 708 So. 2d 253 (Fla. 1998), is misplaced. In *Smith*, the lower court had called the State Attorney personally and asked that an order be prepared. He later called the State Attorney again to request a change in the order, which the State Attorney convinced him not to make. He later called the State Attorney again to discuss a pending motion for disqualification. Here, there was one call from the Judicial Assistant to one of the prosecutor's secretary in which depositions were requested. Nothing was discussed regarding the substance of the post conviction proceedings. The State's negative, written reply to the request was provided to Defendant. Under these circumstances, this matter bears no resemblance to *Smith*. There is no basis for reversal.

Defendant next contends that he is entitled to have the denial of his successive motion for post conviction relief reversed because Judge Bagley allegedly engaged in an independent investigation concerning this matter and would not permit Defendant to have an evidentiary hearing regarding the alleged independent investigation. However, there is no reason

to reverse the denial of the successive motion for post conviction relief.

In support of this claim, Defendant relies upon *Vining v. State*, 827 So. 2d 201 (Fla. 2002). However, *Vining* did not grant relief based on an improper independent investigation. Instead, the issue in *Vining* was whether the trial court had violated *Gardner v. Florida*, 430 U.S. 349 (1977), by considering evidence that the defendant allegedly did not have the opportunity to explain or deny. *Id.* at 209-10. Even in that context, this Court denied relief. *Id.*

Here, Defendant's allegation is based on the Judicial Assistant's request for depositions from a prosecutor's secretary in connection with a successive motion for post conviction relief. This Court has noted that issues concerning the preparation of order denying post conviction relief are not the same as issues concerning the preparation of orders sentencing a defendant to death. *Patton v. State*, 784 So. 2d 380, 388-89 (Fla. 2000). This is particularly true, given that the version of the post conviction rule governing this motion required the lower court to consider the "motion, files and records" in ruling on a motion for post conviction relief. Fla. R. Crim. P. 3.851 (2000); Fla. R. Crim. P. 3.850(d). Moreover,

the request for the depositions was rebuffed by the State.[13] Despite having the lower court's order denying the successive motion for post conviction relief, Defendant has been unable to identify any information that resulted from the alleged independent investigation other than to complain about an inference the lower court drew from a letter Defendant had admitted at the hearing.[14] Under these circumstances, the lower court properly determined that Defendant was entitled to no relief. It should be affirmed.

In an attempt to bolster his claim that there was an independent investigation and that an evidentiary hearing should be held to determine the scope of the independent investigation, Defendant asserts that there is a "suspicious anomaly" in the record regarding the depositions of journalists Jacqueline Williams and Peter Mueller. Initial Brief at 59 n.53. Defendant avers that the placement of the depositions in the record "suggests" that Judge Bagley ordered the depositions to use in writing his order and then relied upon them without citing to them. However, the record fully reflects when and why the depositions were given to Judge Bagley. In considering the

[13] Defendant's objection to this request is puzzling given that Defendant attempted to admit the pretrial deposition of Det. Matthews and the prehearing deposition of Donald Williams. (R. 1349, 1638)

[14] This issue is discussed more fully *infra*.

State's motion to compel disclosure of materials from the journalists, Judge Bagley requests the depositions of the journalists to evaluate whether they had waived any privilege by disclosing information during deposition. (R. 1531) Defendant was subsequently informed that the depositions had been provided and that the lower court had reviewed the depositions. (R. 1555, 1566) Since the record demonstrates that the depositions were given to Judge Bagley as part of his consideration of a prehearing motion with Defendant's full knowledge and without Defendant's objection, his supposition does not support his claim that Judge Bagley received these depositions as part of any independent investigation.

Even if Defendant could show that Judge Bagley had engaged in an independent investigation, Defendant would still be entitled to no relief. It is well settled in Florida law that when a judge sits as a trier of fact, he is presumed to have ignored any inadmissible evidence to which he might have been exposed unless he expressly relies on that evidence. *See Guzman v. State*, 868 So. 2d 498, 510-11 (Fla. 2003); *State v. Arroyo*, 422 So. 2d 50, 51 (Fla. 3d DCA 1982). In fact, this Court found the alleged error in *Vining*, the case upon which Defendant relies, to be harmless because the facts found by the lower court were supported by the evidence admitted at the sentencing

proceedings. *Vining*, 827 So. 2d at 209-10; *see also Consalvo v. State*, 697 So. 2d 805, 817-18 (Fla. 1996); *Lockhart v. State*, 655 So. 2d 69, (Fla. 1995).

Here, Defendant does not point to any finding in the lower court's order that relied upon the depositions that the Judicial Assistant requested but the State never provided. While Defendant has previously complained about the trial court's reliance on the inconsistencies in the description of Bezner, Bezner testified at the evidentiary hearing that she had described Defendant as having black hair with gray in it. (R. 1653-54) Defendant admits that the lower court's order makes no reference to the journalists' depositions. Initial Brief at 59 n.53. Under these circumstances, Defendant has not shown that the presumption that the lower court did not consider any impermissible evidence is rebutted. Thus, Defendant would be entitled to no relief even if the lower court had conducted an independent investigation.

In an attempt to make it seem as if the lower court had conducted an independent investigation and did rely on the results of that investigation, Defendant asserts that the lower court relied on nonrecord evidence when he considered the received stamp on the letter from Smykowski to Sreenan. However, the letter and envelope, with the received stamp on it, were

admitted at Defendant's request at the evidentiary hearing.[15] (R. 1356-57) Since Defendant presented the letter with the received stamp on it, the lower court's consideration of the admitted exhibit does not show that it considered nonrecord evidence. The real gravamen of Defendant's complain is that the lower court reached the logical conclusion based on the evidence that was admitted that the received stamp indicated the date upon which the letter was received. However, the lower court, as the finder of fact, was permitted to draw a logical inference from the admitted evidence. *See Franqui v. State*, 804 So. 2d 1185, 1195 (Fla. 2001); *Mann v. State*, 603 So. 2d 1141, 1143 (Fla. 1992). Thus, this issue is without merit.

Moreover, there was no reason to hold an evidentiary hearing to "get the facts" regarding what occurred. The State disclosed what occurred in its letter: the Judicial Assistant requested depositions of the prosecutor's secretary and the State refused to supply them. Defendant does not explain what other facts need to be disclosed, except to speculate that there may have been other attempts to obtain information and other ex parte communications. However, this Court has stated that post conviction relief and motions to disqualify are not to be based

[15] While Defendant asserts that Ms. Sreenan testified that she received the letter before trial, this is not true. Ms. Sreenan testified that she had seen the letter prior to the hearing but did not recall when the letter was received. (R. 1353, 1356)

on speculation. *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000); *Barwick v. State*, 660 So. 2d 685, 693 (Fla. 1995). Allowing a defendant to obtain an evidentiary hearing at which the judge would be required to testify would permit a defendant to obtain delay and disqualification based on such speculation. Further, the lower court's order is based on the evidence presented. As previously argued, any exposure to other information would not provide grounds for relief. *See also Rivera v. State*, 717 So. 2d 477, 482 (Fla. 1998)(motion for disqualification based on alleged reliance on unspecified nonrecord evidence legally insufficient). Thus, the request was properly denied.

Moreover, Defendant freely admits that what he truly wants to know is why Judge Bagley sought the depositions. However, this Court has held that a judge's thought process is privileged. *Rivera v. State*, 717 So. 2d 477, 481-82 (Fla. 1998); *State v. Lewis*, 656 So. 2d 1248, 1250 (Fla. 1994); *United States v. Morgan*, 313 U.S. 409, 422 (1941). Why Judge Bagley wanted the depositions would be part of his thought process in preparing the order. As such, it would not be an appropriate subject of inquiry. The lower court properly refused to allow Defendant to inquiry into it.

While Defendant asserts that this restriction should not

apply because he is seeking facts outside the record to establish that Judge Bagley acted inappropriately, this does not distinguish *Rivera* or *Lewis*. In each of these cases, the defendants had alleged that the judge had acted inappropriately. Yet, in each of these cases, this Court emphasized that the judge's thought process was privileged. Thus, these cases apply regardless of Defendant's claim. The lower court properly refused to conduct a hearing so that Defendant could attempt to obtain privileged information.

Defendant's reliance on *Smith v. State*, 708 So. 2d 253 (Fla. 1998), is misplaced. The opinion does not reflect that the judge was asked why he engaged in ex parte communications; instead, it merely reflects that the judge responded that during an ex parte communication, the prosecutor changed his mind. Moreover, the fact that a holder of a privilege elected to waive that privilege does not indicate that a different individual had to waive his privilege in a different proceeding. Moreover, in *Smith*, the need for evidentiary development was based on a dispute concerning whether there had been an agreement made off the record for the lower court to contact the prevailing party to have an order drafted.[16] Here, there is no dispute regarding

[16] The same is true of the relinquishment in *Roberts v. State*, 840 So. 2d 962 (Fla. 2002). It was occasioned by a dispute arising regarding whether an ex parte communication had occurred

what occurred; only speculation that something additional may have occurred. As such, *Smith* does not support Defendant's request, which was properly denied. The lower court should be affirmed.

IV. THE LOWER COURT PROPERLY DENIED THE *BRADY* AND *GIGLIO* CLAIMS.

Defendant next asserts that the lower court erred in denying his motion for post conviction relief regarding his alleged violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Specifically, Defendant asserts that Smykowski lied regarding the number of times that he spoke to the State and being given benefits by the State and that the State failed to disclose a letter from Smykowski requesting assistance in finding a placement for his daughter, Smykowski's statements to his family that he was eligible for a reward, the fact that the State allowed Smykowski to visit his daughter and bought lunch for the visit and a police report that someone named Kool had bragged about killing someone during a drug rip-off. Defendant asserts that the lower court erred in finding that the claims were time barred. He also appears to assert that the lower court improperly refused to consider the cumulative effect of his alleged *Brady* violations.

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because the State was aware of the entry of an order after it was signed but before it was filed.

However, the lower court properly denied these claims, individually and cumulatively.

As argued in Issue I, Defendant needed to show that the claims were based on evidence that was unknown until a year prior to the filing of the claim and could not have been discovered earlier through an exercise of due diligence because this was a successive, untimely motion. Fla. R. Crim. P. 3.851(d)(2); Fla. R. Crim. P. 3.850(b); *Stewart v. State*, 495 So. 2d 164 (Fla. 1986); *Christopher v. State*, 489 So. 2d 22 (Fla. 1986); *Webber v. State*, 662 So. 2d 1287 (Fla. 5th DCA 1995). This Court reviews the lower court's finding regarding whether the claim was asserted in period to determine whether it is supported by competent, substantial evidence. *Swafford v. State*, 828 So. 2d 966, 977 (Fla. 2002).[17]

Moreover, in order to prove a Brady claim, a defendant must show:

> [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*, 527 U.S. 263, 281-82 (1999)). To show prejudice, the

[17] To the extent that Defendant is attempting to claim that *Brady* claims cannot be barred or that *Banks v. Dretke*, 540 U.S. 668 (2004), represents a fundamental change of constitutional law, these claims are without merit for the reasons asserted in Issue I.

defendant must show that but for the State's failure to disclose this evidence, there is a reasonable probability that the results of the proceeding would have been different. *Guzman v. State*, 868 So. 2d 498, 506 (Fla. 2003). The question of whether the evidence is exculpatory or impeaching is a question of fact, as is the question of whether the State suppressed the evidence. *Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003). Questions of fact are reviewed to determine if they are supported by competent, substantial evidence. *Way*, 760 So. 2d at 911. The question of whether the undisclosed information is material is a mixed question of fact and law, reviewed de novo, after giving deference to the lower court's factual findings. *Rogers v. State*, 782 So. 2d 373, 377 (Fla. 2000); *Stephens v. State*, 748 So. 2d 1028, 1032-33 (Fla. 1999).

To assert a *Giglio* claim properly, a defendant must assert that: A(1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the statement was material.@ *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991). To demonstrate perjury, a defendant must show more than mere inconsistencies. *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989); *see also United States v. Bailey*, 123 F.3d 1381, 1395-96 (11th Cir. 1997)(proof of perjury requires more than showing of mere memory lapse, unintentional error or

oversight); *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994)(conflicts in testimony are insufficient to show perjury). False testimony is material if there is a reasonable likelihood that it contributed to the verdict. *Guzman*, 868 So. 2d at 506. *Giglio* violations are mixed questions of fact and law and reviewed de novo after giving deference to the lower court's factual findings. *Sochor v. State*, 883 So. 2d 766, 785 (Fla. 2004).

Here, the lower court denied these claims:

> 11. The Court concludes that the defendant has not shown that he exercised due diligence in pursuing his successive motion and amended claims. See Swafford v. State, 828 So.2d 966 (Fla. 2002). Specifically, a lack of due diligence is evident from the following: (1) trial counsel's testimony at the 1996 and 2003 post conviction evidentiary hearings and trial counsel's pre-trial deposition of Smykowski revealed trial counsel (Edward Carhart) and first post conviction counsel (James Lohman) were aware of Smykowski's concern and security of his daughter; (2) the existence of the March 27, 1988 letter from Smykowski to Sreenan which could and should have been discovered before defendant's first rule 3 motion filed by post conviction counsel James Lohman in 1994; (3) first post conviction counsel's inadequate search from Smykowski; (4) second post conviction counsel's (Backhus) failure to request information from journalist Peter Mueller concerning the whereabouts of Smykowski; and (5) second post conviction counsel's delay in requesting a copy of Mueller's investigative report or tape concerning confession by Mark Dugen, as well as her failure to request from Mr. Mueller copy of raw footage of Mark Dugen's taped interview.
>
> Under these circumstances, the Court find the defendant did not exercise due diligence in presenting his claims for consideration on the merits. Therefore, the Court concludes that defendant's successive motion

is time barred.

Even assuming his motion is not time barred, the Court concludes the defendant's claims are without merit and he is not entitled to relief. The Court now addresses the merits of defendant's claims, including the amended claims raised in his closing argument memorandum.

After having reviewed: (1) the testimony of the thirteen witnesses who testified at the nine day evidentiary hearing; (2) all matters and exhibits introduced at that hearing; (3) other matters presented to the Court through the file, record and transcript; (4) the Florida Supreme Court's opinions in Riechmann v. State, supra 581 So.2d 133; and State v. Riechmann, supra 777 So.2d 342; and (5) written argument of counsel, together with the Court's opportunity to consider the credibility of the witnesses who testified during the post conviction proceedings, the Court hereby finds:

* * * *

As to Ms. Backhus's testimony concerning Smykowski's affidavit which asserts he provided untruthful testimony at trial and received several benefits from the State, the Court finds this evidence unreliable and inadmissible for consideration by the Court.

* * * *

2. NEWLY DISCOVERED IMPEACHMENT EVIDENCE
(Smykowski's State Arranged Visit With His Daughter)
And
3. THE STATE KNOWINGLY ALLOWED MISLEADING OR FALSE TESTIMONY

20. In his initial motion to vacate, the defendant claimed newly discovered evidence alleging that Mr. Smykowski's testimony was false regarding his claim that he was getting no benefit from the State for testifying because the prosecutors had no authority over his federal sentence. In citing Judge Gold's Order at page 42, the Supreme Court held that the following findings were supported by the evidence presented at the hearing and trial:

> Regarding the Smykowski matter, there is express testimony at trial regarding the possibility of the prosecutor writing a letter to the federal parole authorities on his behalf, as well as defense counsel's

> argument to the jury about it. At the post conviction hearing, both prosecutors testified that there was no deal with Mr. Smykowski. Given that the newly discovered evidence with respect to Mr. Smykowski is only of an impeaching nature, and not evidence of any false statement, it presents no basis for relief.
>
> State v. Riechmann, id. at 361.

In his amended motion to vacate, the defendant asserts that the State failed to disclose, at trial and in the first post conviction hearing, evidence that Mr. Smykowski received a State arranged visit with his daughter that provided impeachment of his trial testimony that he received no benefit from the State for testifying. Furthermore, the defendant asserted that the State knowingly allowed misleading or false testimony to be presented without correction when Smykowski testified that he had no contact with law enforcement between March 1988, and July 1988, two days before he testified in front of defendant's jury and that he received no benefit for his testimony other than possibly a letter. In support of these two claims, which the Court consolidates for its finding and conclusion, the defendant presented a March 27, 1988 letter from Walter Smykowski addressed to former trial prosecutor Beth Sreenan, which states:

> Dear Ms. Beth Sreenan,
>
> I am writing to you with a request for a favour. As you know my ex-wife is in jail, and my daughter is staying with friends.
> However, it appears that this arrangement may not be acceptable for much longer, as this particular friend is experiencing difficulties in coping with her job, and looking after children.
> Can I be so bold, as to ask you if you can suggest anyone who could take care of my daughter in instead.
> I do not wish to send her to any institution or boarding school.
> I will of course pay well for this facility and will value your suggestion greatly.
> Also, if it is possible, can you give me an indication when approximately do you (word

not legible) me being sent to Miami.

Yours Sincerely,
Walter Smykowski

See Defendant's Exhibit C, Letter from Smykowski addressed to Ms. Beth Sreenan, dated 3-27-88, with an Eglin Air Base Stamp of March 28, 2988, and stamped RECEIVED, Oct. 4, 1988, Sexual Battery Unit, State Attorney, 11th Circuit.

The defendant also presented the testimony of Beth Sreenan who testified that she participated in an interview of Mr. Smykowski in March 1988. Ms. Sreenan further explained that "we did nothing for Walter Smykowski," and Smykowski's request in his letter was not the type of thing "we got involved in." She stated that she would remember if she did.

As to Smykowski's trip to visit his daughter with detectives Joseph Matthews and Robert Hanlon, Ms. Sreenan testified that she had no knowledge from detective Matthews, detective Hanlon or Smykowski of this arranged visit, and that she did not know the detectives also purchased chicken for them to eat during the visit with Smykowski's daughter. Ms. Sreenan further testified that had she known about this information, she would have disclosed it to trial counsel. Moreover, Ms. Sreenan emphatically maintained that the State nor the police promised or offered Smykowski anything for his testimony because he was a federal prisoner whom they had no control regarding his sentence, notwithstanding Smykowski's hope for a letter from the prosecutor to the Judge presiding over his case.

The Court concludes that the evidence is indisputable that detective Hanlon and Matthews failed to reveal to the State an arranged visit by Mr. Smykowski with his daughter and the purchase of chicken for that visit. Although this information was not disclosed to the prosecutors, "the State Attorney is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers." Gorham v. State, 597 So.2d 782, 784 (Fla. 1992). The Court, however, find that this withheld evidence is not material.

As noted in United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985), 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."

The Court concludes that the defendant did not lack an ability to impeach Mr. Smykowski with ample evidence as demonstrated by trial counsel's exhaustive cross examination. As noted in the State's Post Hearing Memorandum, at 29:

> At trial, the jury knew that Smykowski had once plead guilty to two bad check charge where Smykowski's wife had actually written the check because he wanted his wife to be able to be with his daughter. (D.A.R. 4113-14) The jury knew that Smykowski was concerned about his daughter's welfare because both Smykowski and his wife were incarcerated. (D.A.R. 4144) The jury knew that Stitzer's wife had taken custody of Smykowski's daughter for a period of time. Mr. Smykowski was impeached with the fact that he regularly acted as an informant, that he hoped he might receive a favorable letter from the State, that he had been convicted of 17 counts of fraud, as well as 3 state convictions for writing bad checks, and that he had previously earned a living selling things to people. (D.A.R. 4096-97, 4124, 4133). (D.A.R. refers to record on direct appeal in Riechmann v. State, 581 So.2d 133 (Fla. 1991))

Furthermore, it must be remembered that:

> Bullets recovered from Riechmann's motel room matched the type used to kill Kischnick. Riechmann possessed two of the only three types of weapons that could have been used to kill Kischnick, showing his preference for that particular type of weapon. An expert testified that particles found on Riechmann's hands established a reasonable scientific probability that Riechmann had fired a gun. Evidence of blood splatter and stains on the car, blanket, and clothes was consistent with the state's theory of what transpired that night. Insurance policies, reciprocal wills, and other evidence established a motive. Meanwhile, the state's scientific evidence

> about blood and gunpowder residue was inconsistent with Riechmann's theory of defense, and the state offered considerable evidence to impeach Riechmann on the witness stand.
>
> Riechmann v. State, 581 So.2d at 141.

In applying the Jones test, this Court concludes that this evidence was not known by the trial court, the defendant or his trial counsel and the State. At the evidentiary hearing, former prosecutors Kevin DiGregory and Beth Sreenan each steadfastly maintained that they did not promise Mr. Smykowski anything in return for his testimony. Therefore, the Court, having considered and weighed the newly discovered evidence, the totality of the evidence presented both at trial and the first post conviction hearing, concludes that this impeachment evidence would have not produced an acquittal had the evidence been known to the jury.

With regard defense exhibit C, Smykowski's letter to Ms. Sreenan, a close review of this exhibit does not conclusively establish that the State received this letter before Smykowski testified at trial. The envelope in which the letter was received plainly shows a receipt date, by the Sexual Battery Unit, State Attorney 11th Circuit, of October 4, 1998. With no contrary evidence to dispute the State's receipt of this letter two months after the jury found the defendant guilty, the court does not find that this letter is material nor impeachment evidence withheld from the defendant.

As to defendant assertion that Smykowski presented false testimony, the court concludes that the State did not knowingly mislead the jury, the Court or defense counsel with false testimony presented by Smykowski. Rather, the Court finds that a review of the trial testimony of Walter Smykowski clearly demonstrated a significant and difficult language barrier between trial counsel and Smykowski, whose verbal command of the English language was at best marginal. Unfortunately, Smykowski, who is a native of Russia, testified without the benefit of a court certified Russian interpreter. Trial counsel, who deposed Smykowski before trial and was aware if his native language, as well as knew Smykowski's level of fluency of the English language, did not request a Russian interpreter either for the witness' deposition

> or trial. Consequently, trial counsel's cross examination of Smykowski proved to be excruciatingly grueling, resulting in a lack of communication or misunderstanding between trial counsel and Smykowski. (See DAR 4112-4184).
>
> Therefore, the Court concludes that if this newly discovered and/or withheld evidence, which could have been used to impeach Smykowski, had been turned over to the defendant, the outcome of the case would have been the same. Moreover, the Court reaches this conclusion after having evaluated and weighed each claim cumulatively to one another, as well as with defendant's previously presented claims coupled with the evidence presented at trial and the 1996 and 2002 evidentiary hearings. See State v. Gunsby, 670 So.2d 920 (Fla. 1996). Therefore, defendant's motion is without merit. Under the circumstances, the defendant's consolidated claims are without merit and denied.

(R. 1126-27, 1334, 1135-40) The factual findings are supported by competent, substantial evidence and given these findings, the lower court properly rejected these claims.

Defendant first attacks the lower court's finding that his motion was time barred. However, this finding is supported by competent, substantial evidence and should be affirmed. Initially, it should be remembered that Defendant never actually filed a motion for post conviction relief claiming that the State withheld evidence of a letter regarding a request for a favor concerning the daughter or information regarding Kool. Instead, his amended motion for post conviction relief, filed on September 14, 2001, raised *Brady* and *Giglio* violations based on Smykowski's affidavit, which was dated November 12, 2000;

Schaefer's letter concerning a reward, which he admitted having been told about on June 5, 2000; and Schaefer's testimony that she had visited with her father from a deposition dated August 3, 2001. The claims regarding the letter and Kool were asserted for the first time as part of the post hearing memo filed on August 12, 2002. Moreover, Defendant admitted that he had received the documents upon which these claims were based prior to the first post conviction proceeding. (R. 1737, 1754, SR. 155) Given that these claims were never properly asserted below and that they were based on information that Defendant had possessed for years, the lower court properly found that these claims were time barred. *See Brown v. State*, 894 So. 2d 137, 154 (Fla. 2004); *Moore v. State*, 803 So. 2d 199, 205-06 (Fla. 2002); *Huff v. State*, 762 So. 2d 476, 481-82 (Fla. 2000); *see also Swafford v. State*, 828 So. 2d 966 (Fla. 2002); *Buenoano v. State*, 708 So. 2d 941, 948 (Fla. 1998);*Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997); *Mills v. State*, 684 So. 2d 801, 804-06 (Fla. 1996)..

The lower court also properly denied the other claims as time barred. As the lower court found, the record reflects that Defendant was aware of Smykowski's concern for his daughter before trial. (R. 1358-60, SR. 213-15, 235-28) Moreover, Defendant was given a copy of the letter regarding that concern

before the first post conviction proceeding. However, Defendant did not look for the daughter in connection with the first post conviction proceeding. (SR. 178) He did not make public records requests for Smykowski's jail records either under Florida or Federal law. (SR. 181-83) When pressed, Defendant admitted that his attempts to locate Smykowski at the time of the first post conviction motion were limited to speak to INS and relying on INS's representation that Smykowski had an outstanding warrant and could not be found. (SR. 174-75, 179) Even during the second post conviction proceedings, Defendant waited for Mueller to provide him with information without ever even asking for the information, including failing to request even contact information for Smykowski. (R. 1724-26) This evidence provides the competent, substantial evidence to support the lower court's determination that Defendant did not present this information in a timely manner through the exercise of due diligence. *Swafford*. The claims were properly denied as time barred and should be affirmed.

Defendant next assails the lower court for finding that he had not proved that the State knowingly presented false testimony from Smykowski. However, the lower court's finding that there was a misunderstanding due to a language barrier and no knowing presentation of false testimony is supported by the

record. At trial, Smykowski was asked about the number and timing of discussions with the State about the case. (DAR. 4138-43) He responded that he had given an initial statement to Det. Hanlon and Det. Matthews, that he had subsequently spoken to Ms. Sreenan and the police at Eglin Airforce Base and that he had spoken to the State the day before his testimony. *Id.* During the course of this questioning, it is clear that Smykowski was having difficulty understanding Carhart's questions. At the evidentiary hearing, no one could state when the visit occurred with any specificity. (R. 1580-81, 1618, 1670-74, 1686-88) The record showed that the State had the police assist in transporting Smykowski to depositions conducted at the State Attorney's Office and that Smykowski was deposed on May 24, 1988. (DAR. 706-07, 711, PCR. 1061-1187) Moreover, the record shows that the prosecutors were not told of the visit. (R. 1365, 1374-75, 1671, 1677-78, 1676, 1691, SR. 254-55) Under these circumstances, the lower court properly denied this claim. *Sochor*, 883 So. 2d at 785-86; *Maharaj*, 778 So. 2d 944, 957 (Fla. 2001).

Defendant next contends that the lower court improperly rejected his claim that the State knowingly presented false testimony that Smykowski was not receiving any favors from the State. However, in making this assertion, Defendant takes

testimony out of context. At trial, Defendant asked Smykowski what a federal prosecutor had promised him in exchange for information he had provided in federal prosecutions. (DAR. 4133-35) Smykowski responded that he had been promised and had asked for nothing. (DAR. 4135) Smykowski was then asked if his testimony that he was hoping to receive a letter from the State was false, and he responded that he had not been promised a letter but was hoping that a letter would be written voluntarily. (DAR. 4135-36) Moreover, it should be remembered that Smykowski had voluntarily approached the State long before any visit was ever contemplated and provided evidence against Defendant. Under these circumstances and given the language barrier, Smykowski's failure to volunteer that he had been allowed to visit his daughter does not show that his testimony was false. *Maharaj*, 778 So. 2d at 954. The denial of this claim should be affirmed.

To the extent that Defendant is claiming that the lower court erred in rejecting his claim that the State failed to disclose the visit to his daughter, the lower court properly denied this claim. Smykowski was amply impeached at trial with the fact that he regularly acted as an informant, that he hoped he might receive a favorable letter from the State, that he had been convicted of 17 counts of fraud, as well as 3 state

convictions for writing bad checks, and that he had previously earned a living selling things to people. (DAR. 4096-97, 4124, 4133) Moreover, the jury knew that Smykowski had once plead guilty to two bad check charge where Smykowski's wife had actually written the check because he wanted his wife to be able to be with his daughter, that Smykowski was concerned about his daughter's welfare because both Smykowski and his wife were incarcerated and that Stitzer's wife had taken custody of Smykowski's daughter for a period of time. (DAR. 4113-14, 4144-45) Under these circumstances, the lower court properly found that the failure to disclose the visit was not material. *Routly v. State*, 590 So. 2d 397 (Fla. 1991); *Palmes v. Wainwright*, 460 So. 2d 362 (Fla. 1984). This is particularly true when one considers that Defendant had more gunshot residue on his hands that did the victim, Defendant owned weapons similar to the murder weapon and that he had owned ammunition similar to that used in the crime, blood was found in places in the car that would have been blocked had Defendant been in the car, Defendant stood to gain financial from the large amount of life insurance on Ms. Kischnick, and Defendant gave a completely implausible account of his actions after the murder, which included driving a great distance after the shooting had occurred passed any number of places where he could have sought assistance and into

a seclude area before he contacted anyone. The claim was properly denied.

Defendant next assails the lower court for rejecting his claim regarding the letter. The lower court found that Defendant did not prove that the State was aware of the letter at the time of trial. The lower court's finding is supported by competent, substantial evidence. Defendant introduced the letter with a received stamp on its envelope from after trial. (Defense Exhibit C) While Defendant asserts that Sreenan testified that she received the letter before trial, she did not. Sreenan, instead, testified that she had seen the letter before the 2002 evidentiary hearing and that she did not recall when it was received. (R. 1353-57) Since Defendant never proved that the State actually possessed the letter prior to trial, the lower court properly denied this claim. *State v. Knight*, 866 So. 2d 1195, 1201 n.6 (Fla. 2003).

Moreover, the failure to prove that the State received the letter makes it difficult to understand how the State could have knowingly presented false testimony regarding Stitzer caring for Smykowski's daughter. This is particularly true, given that Smykowski testified that Stitzer had cared for his daughter at trial. (DAR. 4144-45) As such, the claim was properly denied.

Maharaj, 778 So. 2d at 956-57.[18]

Defendant next asserts that the lower court erred in failing to consider his claims regarding Off. Veski. However, as argued in Issue I, the lower court properly summarily denied this claim because it is procedurally barred and without merit.

Defendant next assails the lower court for failing to consider the alleged reward promised to Smykowski and Smykowski's affidavit. However, Defendant fails to note that he was given an evidentiary hearing regarding these claims and instead relies upon allegations he made. However, once an evidentiary hearing is ordered, it is incumbent upon a defendant to prove his claims. *See Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983).

Here, Defendant utterly failed to do so. As argued in Issue II, the lower court properly refused to consider the affidavit and Defendant never presented Smykowski. Moreover, both the prosecutors and police officers denied having any knowledge of any reward. (R. 1374, 1380, 1680-81, 1691-92, 1701, SR. 259)

[18] Moreover, it does not appear that this evidence would have been admissible, and therefore, immaterial. *Wood v. Bartholomew*, 516 U.S. 1 (1995). The only evidence was that the State did nothing in response to the request. *See Francis v. State*, 473 So. 2d 672, 674-75 (Fla. 1985). In fact, Defendant failed to disclose that he had offered a $15,000 reward because he was not going to pay it.

Since the State did not know of any reward,[19] it could not have committed a *Brady* violation by failing to disclose it. *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000). As such, these claims were properly denied.

Defendant next asserts that the lower court improperly failed to consider an alleged *Brady* violation regarding "Kool." However, Defendant never pled a claim that the State violated *Brady* by withholding information about Kool. Instead, Defendant simply attempted to present evidence concerning Kool at the evidentiary hearing and then sought leave to amend his motion for post conviction relief after the evidentiary hearing. However, the lower court properly refused to consider this claim. *See Brown v. State*, 894 So. 2d 137, 154 (Fla. 2004); *Moore v. State*, 803 So. 2d 199, 205-06 (Fla. 2002); *Huff v. State*, 762 So. 2d 476, 481-82 (Fla. 2000).

Even if the claim had been properly before the lower court, it still would have been properly denied. Defendant never proved that any information about "Kool" would have been admissible. Police reports are not admissible in criminal trials. *See Riechmann*, 777 So. 2d at 363. Defendant did not present any

[19] In fact, Defendant never even proved there was a reward. The only evidence of an alleged reward was Schaefer's testimony that her mother had claimed that Smykowski had said something about a reward. (R. 1585-86) However, Schaefer stated that she had no knowledge of any reward. (R. 1586)

evidence regarding the person who alleged heard "Kool" bragging about committing a robbery and murder in Coconut Grove (which is not anywhere near where this crime allegedly occurred). As the Supreme Court made clear in *Wood v. Bartholomew*, 516 U.S. 1 (1995), the point of a *Brady* claim is that a defendant must show that admissible evidence was suppressed; not that extraneous information was not revealed. As Defendant did not show that this allegedly suppressed report would have been admissible, it was not material and the claim was properly denied.

Defendant finally asserts that the lower court improperly failed to consider the cumulative effect of his other alleged *Brady* violations. However, the lower court repeatedly stated that it was considering the cumulative effect of both the trial and prior post conviction proceeding. As such, Defendant's claim that it failed to do so is without merit.

Moreover, in making this claim, Defendant mischaracterizes this Court's prior rulings. Defendant first asserts that found that the State had committed a *Brady* violation with regard to 37 allegedly withheld German witness statements.[20] However, this

[20] While Defendant contends that the State's assertion that a summary of the statements was disclosed during Bernd Schlieth is belied by the record, it is Defendant's contention that is contrary to the record. When the issue can up pretrial, Carhart admitted that he had been provided with 10 of the statements and was only seeking the other 27. (DAR. 657-60) Moreover, Carhart acknowledged that the statements were those discussed during

Court found this claim was procedurally barred. *Riechmann*, 777 So. 2d at 363. Defendant next contends that this Court found that Smykowski had a deal with the State. However, this Court found there was "no undisclosed deal." *Id.* Defendant asserts that this Court found a *Brady* violation regarding a police report of an interview with a waiter and regarding a statement from Ms. Kischnick's father. However, this Court found no *Brady* regarding the waiter because the information was cumulative to disclosed evidence and there was no evidence that the father's statement was admissible. *Id.* Defendant next asserts that this Court found a *Brady* violation regarding crime scene photographs. However, this Court found that the claim was barred and there was no evidence that crime scene photographs had not been disclosed. *Id.* at 361 n.20. Defendant also claims that he proved a *Brady* violation regarding reports about his demeanor at the time of the crime. However, Defendant never even raised such a *Brady* claim. (PCR. 219-315) Instead, the claim was raised as a claim of ineffective assistance of counsel and rejected because the evidence was presented at trial. (PCR. 55-62, 6048-51) Moreover, the record fully supports this determination. (DAR. 2458, 2481-82, 2681-82, 2933, 3417) This Court affirmed, finding no deficiency or prejudice. *Id.* at 356-58. Since this Court

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Schlieth's deposition and that "**[he had] 27 names, and from the detective, a one sentence summary**." (DAR. 664-65)

found that these claims were procedurally barred and without merit, they do not add to the cumulative error analysis.

The only claims that this Court rejected based on the materiality aspect of the *Brady* analysis was the claims regarding the opening of the window. However, this Court rejected that portion stating:

> Any evidence that the window was open no more than 6 inches is not much different from that presented at trial that the window was open 3 1/2 inches. Moreover, the statement by the crime lab that the window was completely down would not be completely favorable to Riechmann, because he testified at trial that the window was only open half-way. Additionally, it would have also been inconsistent with the testimony of his expert, who stated that the window was only 3 3/4 inches open.

Id. at 362. Given the nature of this Court's holding, the lower court properly rejected this claim even considering this claim cumulatively. It should be affirmed.

V. THE LOWER COURT PROPERLY REJECTED THE NEWLY DISCOVERED EVIDENCE CLAIM.

Defendant next asserts that the lower court erred in denying his claim that newly discovered evidence merits reversal of his conviction. Specifically, Defendant asserts that Doreen Bezner was a newly discovered eyewitness and that Donald Williams could provide information corroborating Bezner's account. Defendant asserts that the trial court did not conduct a cumulative analysis, relied on allegedly improper factors in

finding the witnesses not to be credible and improperly rejected the claim because his witnesses were not credible. However, the lower court properly rejected this claim.

In order to prevail on a claim of newly discovered evidence, a defendant must prove the evidence was unknown to defendant, his counsel or the court at the time of trial, that it could not have been learned through the exercise of due diligence, and that it would probably produce an acquittal on retrial. *Jones v. State*, 591 So. 2d 911, 915-16 (Fla. 1991). In determining whether the evidence would produce probably produce an acquittal on retrial, the court must consider whether the evidence is credible. *See State v. Riechmann*, 777 So. 2d 342, 360-61 (Fla. 2000); *Jones v. State*, 709 So. 2d 512, 521-22 (Fla. 1998); *Blanco v. State*, 702 So. 2d 1250, 1251 (Fla. 1997); *Parker v. State*, 641 So. 2d 369, 376 (Fla. 1994), *cert. denied*, 513 U.S. 1131 (1995). A lower court's findings in this regard will not be overturned so long as they are supported by competent substantial evidence. *Melendez v. State*, 718 So. 2d 746, 749 (Fla. 1998); *Blanco*, 702 So. 2d at 1252.

Here, the lower court rejected the claim of newly discovered evidence regarding Bezner and Donald Williams:

> After having reviewed: (1) the testimony of the thirteen witnesses who testified at the nine day evidentiary hearing; (2) all matters and exhibits introduced at that hearing; (3) other matters

presented to the Court through the file, record and transcript; (4) the Florida Supreme Court's opinions in Riechmann v. State, supra 581 So.2d 133; and State v. Riechmann, supra 777 So.2d 342; and (5) written argument of counsel, together with the Court's opportunity to consider the credibility of the witnesses who testified during the post conviction proceedings, the Court hereby finds:

NEWLY DISCOVERED EVIDENCE

12. The Florida Supreme Court previously noted in State v. Riechmann, 777 So. 2d at 359, that:

> [Defendant] alleges three categories of newly discovered evidence: (1) two newly discovered eyewitnesses to the murder (Early Stitt and Hilton Williams); (2) newly discovered evidence that the testimony of jailhouse informant Smykowski was knowingly false; and (3) newly discovered evidence of subsequent similar murders confirming [Defendant's] accounts of the murder.
>
> The Court has held that defendants must satisfy two requirements in order to have a conviction set aside on the basis of newly discovered evidence:
>
> > First . . . newly discovered evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of due diligence."
> >
> > Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial . . . .
> >
> > 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 . . . . The trial court should further consider the materiality and relevance of the

> evidence and any inconsistencies in the newly discovered evidence.
>
> Jones v. State, 709 So.2nd 512, 521 (Fla. 1998)(quoting Torres-Arboleda v. Dugger, 636 So.2d at 1324-25)(alteration in original)(citations omitted).

13. Once again, the defendant asserts three categories of newly discovered evidence: (1) two newly discovered eyewitnesses to the murder (Donald Williams and Doreen Bezner-Glenn) and newly discovered evidence showing that Mark Dugan confessed to Peter Mueller that he murdered Kersten Kischnick; (2) newly discovered impeachment evidence (Smykowski's arranged visit with his daughter) establishing defendant's innocence; and (3) the State knowingly allowed misleading or false testimony.

1. NEWLY DISCOVERED EVIDENCE OF INNOCENCE IN THE FORM OF AN EYEWITNESS ACCOUNT OF THE SHOOTING OF KERSTEN KISCHNICK

14. In 1994, the defendant in his first motion to vacate asserted two newly discovered eyewitnesses to the murder (Early Stitt and Hilton Williams). The Florida Supreme Court found that the evidence presented at the hearing presided by Judge Alan Gold would not have produced an acquittal in the prosecution against the defendant. The Supreme Court further concluded that Judge Gold's findings were supported by competent and substantial evidence, which he summarized as followed:

> The exculpatory testimony of Hilton Williams and Early Stitt was discovered after trial, would have been admissible at the trial, and is material to Defendant's guilt or innocence . . . .
>
> The Court further concludes that these witnesses were not previously known to the Defendant or trial counsel and were not discoverable in an exercise of due diligence. Trial counsel was not able to determine the location of the shooting with any precision. As a result, he could not reasonably investigate potential witnesses. Even if these witnesses could have been found, they would have been reluctant to testify at the time for fear of prosecution by the State for drug or other offenses, or

from possible retribution.

State v. Riechmann, 777 So.2d at 360.

The Supreme Court further cited Judge Gold's application of the materiality prong of the Jones test:

> The Court find the testimony of Mr. Stitt and Mr. Williams to be less than credible and "rife with inconsistencies" with the Defendant's own testimony at trial. Mr. Stitt suffers from a drug problem that affects his memory. Mr. Williams has multiple convictions, is current incarcerated for robbery, and initially lied to the court during his testimony. He worked for the Defendant's investigator and received compensation, which he first denied, but then admitted. Finally, his testimony is inconsistent with the Defendant's own recollection of the events as well as the undisputed evidence that the victim was shot through the passenger's window, not the driver's window. Furthermore, the Defendant mentioned only one person, the shooter, on the street at the time described, not several as described by Mr. Williams.
>
> The Court concludes that the testimony of Mr. Stitt and Mr. Williams, without more, would probably not create a reasonable doubt in the minds of the jury. The Court reached this conclusion after evaluating the weight of both the newly discovered evidence and the totality of the evidence at trial.
>
> *Order on Motion to Vacate Judgment of Conviction and Sentence (hereinafter cited as Order) at pages 40-41. id.*

15. As to the two newly-discovered eyewitnesses to the murder (Donald Williams and Doreen Bezner-Glenn), the defendant presented at the evidentiary hearing the testimony of **Donald Williams** (no relation to Hilton Williams), who explained that he vaguely recalled an incident at 63rd Street and Biscayne Boulevard in October 1987. Although Donald Williams stated that he was present in the area, he explained that he did not witness the shooting; but rather, he heard people discuss the crime at a bar. He also testified that he

observed Mark Dugen and his girlfriend, Doreen Bezner, in the area.

Moreover, on cross examination, Donald Williams, admitted stating in his deposition that: (1) he was homeless; (2) he did not recall the exact month and year of the crime; and (3) he has had a fifty-year drug and alcohol addicition.

16. The defendant also presented the testimony of **Doreen Bezner-Glenn** who testified that she lived in a hotel on Biscayne Boulevard with Mark Grey since March 1987. Ms. Bezner explained that she witnessed a crime that was committed at 62nd and Biscayne Boulevard during the early evening hours between 6:00 p.m. and 7:00 p.m. She described this location as a "dope hole." She further testified that she was positioned ten or fifteen feet away in some bushes, smoking crack cocaine, when she saw a blonde lady, who was wearing a lot gold jewelry, and man pull up in a car. She stated that her boyfriend, Mark Grey, instructed the blonde lady and man to stop. She stated that her boyfriend, Mark Grey, instructed the blonde lady and man to stop. She then described how two young "jits" or black boys ran to the side of the car where she heard a shot and saw the car drive off.

Ms. Bezner further explained that her boyfriend locked her in their hotel room, where he threatened her if she told anyone about the crime.

She stated that Mark Grey talked earlier about having lots of money, and that they would not have to work anymore. She also testified that for one week the police had not come to the area to investigate the crime.

On cross examination, Ms. Bezner further testified that Mary Grey whom she never heard referred to as Mark Dugen, was her pimp and a drug dealer. She explained that she l\has lived on the streets since the age of seven, has worked as a prostitute, and that she has at least eleven (11) felony convictions, included several prostitution and/or misdemeanor convictions. She also stated in her deposition that she saw the same man, who she described as having black hair with gray in it, and the lady earlier in the day at a Denny's parking lot talking to Mark Gray about what assumed was drugs.

Ms. Bezner again explained that she always used crack cocaine and that she witnessed the shooting from

bushes while smoking crack cocaine. She stated that she did not remember the type or color of the car which was occupied by the lady and man when the two black boys approached. Moreover, Ms. Bezner testified that Mark Grey did not fire any shots into the car.

The Court concludes that the testimony of Donald Williams and Doreen Bezner qualify as newly discovered evidence under the test enunciated in Jones v. State, 591 So.2d at 915. Their testimony was discovered after trial, would have been admissible at trial, and is material to defendant's guilt or innocence.

The Court further concludes that the defendant or his counsel could not have known of these witnesses by the exercise of due diligence because trial counsel was not able to determine the location of the shooting, and these witnesses testified that they were homeless and addicted to drugs. Therefore, trial counsel could not reasonably investigate or locate Mr. Williams and Ms. Bezner.

The Court now addresses whether the defendant has shown that the testimony of Donald Williams and Doreen Bezner, in conjunction with the evidence introduced in defendant's first 3.850 post conviction hearing, as well as the evidence introduced at trial, would have probably produced as acquittal. Swafford v. State, 828 So.2d 966 (Fla. 2002).

The Court concludes that the defendant has not demonstrated this prong of his newly discovered evidence claim. Donald Williams clearly testified that he did not witness the crime, and that he only heard about it from others at a local bar. Although his testimony could corroborate the fact that Doreen Bezner frequented the area of 62nd Street and Biscayne Boulevardm his testimony is less than credible due to his fifty-year drug addiction and his inability to reliably recall the time of day, month or year of the crime.

The Court finds the testimony of Doreen Bezner utterly unreliable and full of inconsistencies. Ms. Bezner is an eleven-time convicted felon and drug addict. The details of her testimony, as previously discussed, are inconsistent with (1) the description and appearance of both defendant and Kersten Kischnick; (2) the trial testimony of the defendant; and (3) the evidence presented at trial and the 1996 and 2002 post conviction hearings.

> After considering, comparing and weighing the newly discovered eyewitness evidence, the totality of the evidence presented both at trial and the first post conviction hearing, the court concludes that the testimony of Ms. Bezner, in conjunction with the other evidence presented at the evidentiary hearing, would not produce an acquittal. See Kyles v. Whitley, 514 U.S. 419 (1995).

(R. 1127-32)

Here, the lower court's finding that Bezner and Donald Williams were not credible and, as such, would not probably produce an acquittal on retrial is amply supported by the law and the evidence. As such, it should be affirmed.

At the evidentiary hearing, Bezner did testified that she had previously described Defendant as having black hair with gray in it. (R. 1653-54) She repeatedly described Ms. Kischnick as wearing a lot of gold. (R. 1643, 1645, 1658-59) She did admit that she was using drugs both at the time of the crime and presently. (R. 1657-58) She did testify that she had 11 prior felony convictions, as well as numerous convictions for prostitution.[21] (R. 1658, 1659, 1661-62) She asserted that the crime occurred between 6 and 7 p.m, when it was still light out. (R. 1642, 1653) Moreover, Bezner testified that Defendant was in

[21] In his brief, Defendant appears to claim that the trial court erred in refusing to allow him to present a printout of Bezner's criminal history to impeach Bezner's testimony concerning the number and type of prior convictions she had. However, the lower court's ruling was proper because rap sheet cannot be used in this manner. ***Ross v. State***, 601 So. 2d 1190, 1993 (Fla. 1992).

the area as a result of a meeting that had been arranged earlier in the day. She further stated that Mark Gray stopped the car by standing in front of it with his hand up and that two young black men jumped out and opened fire as soon as the car stopped. She stated that Mark Gray was not known as Mark Dugen. (R. 1650-51)

Donald Williams testified that he had heard of an incident in the neighbor of 63rd Street and Biscayne Boulevard but had seen nothing. (R. 1627) He knew a Mark Dugan who had a girlfriend named Doreen but had never heard anything associating Dugan with the incident. (R. 1630-31, 1638) He admitted to having a 50 year history of drug addiction. (R. 1634) He claimed that he had stated in deposition that he did not know the year of the incident because he did not realize he was being questioned concerning the incident. (R. 1632-33)

At the time of trial, Defendant’s version of the crime was that he and Ms. Kischnick spent the morning of the crime on the beach and at their hotel. They then proceeded to Bayside where they shopped and eat dinner. Between 10 and 10:30 p.m., they left Bayside planning to go over the Julia Tuttle Causeway to videotape the Welcome to Miami Beach sign. He claimed that they missed the turn off for that causeway and that when he reached 163rd Street, he realized he had gone too far. In an attempted

to go around the block and go back south, Defendant had stated that he turned onto West Dixie Highway. He then got lost. He stopped a lone black man on the street and asked directions. The man provided directions. Defendant allegedly attempted to retrieve the video camera from the back seat and as he turned back, the man fired the shot. Defendant claims that he then sped away and ended up on the side street in Miami Beach looking for help. (PCT. 1657-59, DAR. 3242-45, 4470-97)

Moreover, the crime scene photographs show that Ms. Kischnick was not wearing a lot of gold. (DAR. 259, 279) Further, Defendant had blond hair at the time.

During the first post conviction proceeding, Defendant presented the testimony of Early Stitt and Hilton Williams as alleged eyewitnesses to the crime, which was now committed in the area of 63rd Street and Biscayne Boulevard. Stitt, a person with 38 prior convictions, testified that the crime occurred 3 to 4 years before it actually did. (T. 1173-75) He stated that the crime occurred around 10 p.m. but admitted that he had previously stated that the crime occurred after midnight. (T. 1175-76, 1191-93) He initially stated that both of the occupants in the car when the murder occurred were male. (T. 1176-77) He was unable to remember any details of the crime but stated that he was not with Mr. Williams. (T. 1173-82) He admitted that

Defendant's investigator had to refresh his recollection regarding the limited information he was able to recall. (T. 1185-86)

Hilton Williams, who had 10 prior convictions, testified that he was with Mr. Stitt and a group of other people. (T. 1204-06) He admitted that he had altered the other members of the group from his previous affidavit and that he did so because his testimony depended on his purpose at the time he was giving it. (T. 1220-22) He stated that the car was approached by two groups of people and that the shot was fired through the driver's window. (T. 1204-06, 1225, 1231) He also stated that he was not compensated by Defendant for his testimony but later admitted that Defendant had paid for a hotel for him. (T. 1239-40, 1243)

Moreover, at the evidentiary hearing on this motion for post conviction relief, Hilton Williams admitted that he had lied and arranged for the other alleged eyewitnesses to lie at the first evidentiary hearing and had produced a false Mark Dugan to confess to Peter Mueller in the hope of receiving a $15,000 reward that Defendant had offered but not disclosed. (R. 1408-10, 1412) He and Backhus were caught on tape having conversations regarding "charitable contributions to the Hilton Williams Be Free Fund." (R. 1415-16)

This evidence amply supports the lower court's determination that Bezner and Donald Williams were not credible. Since the determination that the witnesses were not credible is supported by competent, substantial evidence, it should be affirmed. *Melendez v. State*, 718 So. 2d 746, 749 (Fla. 1998); *Blanco*, 702 So. 2d at 1252.

Defendant first attacks the lower court's order by claiming that the lower court did not conduct a cumulative error analysis. However, the lower court's order belies this contention. The lower court repeatedly stated that it considered the evidence presented in connection with this motion in conjunction with the evidence presented at the hearing on the first motion for post conviction relief and at trial. The mere fact that the lower court did not reach the conclusion that Defendant wanted does not indicate that the lower court failed to conduct a proper cumulative error analysis. This is particularly true given that this Court has stated that "claims of cumulative error are properly denied where the individual claims have been found without merit or procedurally barred" and conditioned the need for a cumulative error analysis on the finding that the newly discovered evidence is credible. *Roberts v. State*, 840 So. 2d 962, 972 (Fla. 2002). Here, the Court found that the newly discovered evidence was not credible, especially

when considered cumulatively with the evidence previously presented. As such, the lower court properly rejected the claim of cumulative error.

Defendant next contends that the lower court's analysis of the credibility of Bezner was flawed because she did not give inconsistent descriptions. However, Bezner did give inconsistent descriptions of Defendant and Ms. Kischnick. Bezner admitted she had described Defendant as having black hair with gray in it. (R. 1653-54) She repeatedly described Ms. Kischnick as wearing a lot of gold. (R. 1643, 1645, 1658-59) However, Defendant did not have black hair with gray in it and the crime scene photographs do not show Ms. Kischnick wearing a lot of gold. (DAR. 259, 279) The fact that Bezner identified pictures of Defendant and Ms. Kischnick from their photographs in a magazine does not negate the fact that her description of them was inconsistent with the evidence.[22] Since Bezner did give inconsistent descriptions, the lower court properly considered this in determining that Bezner was not credible.

Defendant next assails the lower court for considering the inconsistencies between Bezner's version and the prior versions

[22] In fact, Bezner admitted that the only photographs she was shown were a couple in a magazine, including one of Defendant in handcuffs. (R. 1656) However, such single picture lineups are considered unduly suggestive. *Fitzpatrick v. State*, 900 So. 2d 495 (Fla. 2005)

of the crime given by Defendant and his witnesses. However, this Court has held a lower court is supposed to consider the allegedly newly discovered evidence in connection with all of the prior versions of the events in determining whether the newly discovered evidence would probably produce an acquittal at retrial. *Jones v.* State, 709 So. 2d 512, 521 (Fla. 1998). In fact, one of the reasons for rejecting Defendant's last claim of newly discovered evidence that this Court affirmed was that it was inconsistent with Defendant's own testimony. *Riechmann*, 777 So. 2d at 360. As such, the fact that the lower court considered the inconsistencies between the versions of the crime that Defendant had presented was proper. The lower court should be affirmed.

Defendant finally assails the lower court's rejection of this claim, asserting that it is improper to deny the claim because the witnesses were not credible. However, this Court has repeatedly held that it is proper to deny a claim of newly discovered evidence because the newly discovered evidence was not credible, including in the last appeal in this matter. *Riechmann*, 777 So. 2d at 360-61; *Lightborne v. State*, 841 So. 2d 431, 439-42 (Fla. 2003); *Rogers v. State*, 783 So. 2d 980, 1003-04 (Fla. 2001); *Melendez v. State*, 718 So. 2d 746, 748 (Fla. 1998); *Jones v. State*, 709 So. 2d 512 (Fla. 1998); *Blanco v.*

State, 702 So. 2d 1250, 1252 (Fla. 1997). As such, the lower court properly rejected the claim based on its finding that the witnesses were incredible. It should be affirmed.

CONCLUSION

For the foregoing reasons, denial of the successive motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **Terri Backhus**, 303 South Westland Avenue, P.O. Box 3294, Tampa, Florida 33601, this ___ day of June 2005.

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CERTIFICATE OF COMPLIANCE

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

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