IN THE SUPREME COURT OF FLORIDA

ANTONIO LEBARON MELTON, Appellant, v. STATE OF FLORIDA, Appellee. _____/	CASE NO. SC04-1689

AMENDED ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, ANTONIO LEBARON MELTON, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The trial transcript will be referred to as (T. Vol. pg). The postconviction record on appeal will be referred to as (PCR Vol. pg). The evidentiary hearing transcript will be referred to as (EH Vol. pg). The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is an appeal of a trial court's denial of a motion for post-conviction relief following an evidentiary hearing in a capital case.

The facts of the crime, as stated in the direct appeal opinion, are:

> Melton was convicted of fatally shooting George Carter during a robbery of Carter's pawn shop in Pensacola.
>
> The record shows that Melton and a friend, Bendleon Lewis, entered Carter's pawn shop, planning to rob it. Melton and Lewis each testified that the other planned the robbery. Lewis was granted use immunity to testify for the State. He testified that once in the pawn shop, he feigned an interest in pawning a necklace. While Carter weighed the necklace, Lewis testified that he grabbed Carter's arm and Melton pulled a gun he was carrying in his pants. Melton held the gun on Carter while Lewis gathered jewelry and guns from the shop. As Lewis tried to unlock a door so he and Melton could flee, he heard a gunshot.
> Melton testified that while Lewis talked to Carter about jewelry, he put on surgical gloves and reached to pick up a ring. He testified that Carter saw him try to pick up the ring and reached for a gun he was carrying. Lewis grabbed Carter's hands, while Melton pulled his own pistol and took Carter's gun. Melton said while he held his gun on Carter, Carter rushed at him, then fell and hit his head. Melton testified that he told Carter to remain still, but Carter pushed up from the floor and grabbed for the hand with the gun. As the two struggled over the gun, the weapon discharged and hit Carter in the head. Police arrested Melton and Lewis as they were leaving the shop.
> Although there was conflicting testimony about who planned the robbery and whether there was a struggle before Carter was shot, the evidence is clear that Melton held a .38-caliber gun on Carter and fired the fatal shot.

Melton v. State, 638 So.2d 927, 928-929 (Fla. 1994).

Judge William Anderson presided over the jury trial. By special jury verdict, the jury convicted Melton of first-degree felony murder and armed robbery. The jury recommended death by an eight-to-four vote. The trial judge followed the jury's recommendation and sentenced Melton to death. *Melton*, 638 So.2d at 928.

The trial judge found two aggravating factors: (1) Melton was previously convicted of a violent felony (first-degree murder and robbery) and (2) Melton committed the homicide for financial gain. The trial judge found two nonstatutory mitigating factors, but assigned them little weight: (1) Melton exhibited good conduct while awaiting trial and (2) Melton had a difficult family background. The judge also sentenced Melton to life imprisonment for the robbery conviction. *Melton*, 638 So.2d at 929.

On appeal to the Florida Supreme Court, Melton raised four issues in the direct appeal: (1) Whether the trial court erred in not empaneling separate guilt and penalty phase juries; (2) whether the trial court erred in not declaring a mistrial after the prosecutor made several improper comments to the jury; (3) whether the trial court erred in instructing the jury on and later finding the aggravating circumstance that the homicide was

committed for pecuniary gain; and (4) whether the death sentence is disproportionate in this case. *Melton v. State*, 638 So.2d 927, 929 n.1 (Fla. 1994). The Florida Supreme Court affirmed the convictions and death sentence.

Melton filed a petition for writ of certiorari arguing that separate juries should have been empaneled for the guilt and penalty phase. The United States Supreme Court denied certiorari review on October 31, 1994. *Melton v. Florida*, 513 U.S. 971, 115 S.Ct. 441, 130 L.Ed.2d 352 (1994).

On January 16, 1996, Melton filed a shell 3.850 motion to vacate the judgment and sentence.(PCR Vol. I 74-200;II 201-248). On July 5, 2001, collateral counsel filed a first amended motion which raised 27 claims. (PCR VI 907-1083). On August 2, 2001, the State responded agreeing to an evidentiary hearing on claims 3,4,5,6,10,12,13a & 21 but asserted that the remaining claims should be summarily denied. (PCR VI 1089-1108).

A different judge from the trial and sentencing judge, Judge Skievaski, presided over the post-conviction proceedings. On October 18, 2001, the trial court held a *Huff* hearing. On October 19, 2001, the trial court entered an order granting an evidentiary hearing on claims 3,4,5,6, and parts of 10, 12, 13(a) and 21. Two days prior to the scheduled evidentiary

hearing, collateral counsel, Bret Strand, filed a second amended motion. On February 13, 14, and 15, 2002, the trial court held an evidentiary hearing. Both parties submitted written post-evidentiary hearing memorandums following the evidentiary hearing. (PCR XI 1785-1810, 1811-1849;1850-1868). On March 24, 2004, the trial court entered a written order denying the second amended post-conviction motion. (PCR XII 1937-1977). The trial court noted in its order that trial counsel was bar certified criminal trial lawyer. Melton filed a motion for rehearing on April 12, 2004. The trial court denied the motion for rehearing.

SUMMARY OF ARGUMENT

ISSUE I -

Melton asserts his counsel was ineffective for failing to present his background and mental health testimony. There was no deficient performance. Counsel presented background and mental health testimony in the penalty phase. Dr. Lawrence J. Gilgun, a clinical psychologist, testified for the defense during the penalty phase. Nor was there any prejudice. No significant mental health mitigation was omitted from the penalty phase. Both experts - the one actually presented at penalty phase in front of the jury and the post-conviction defense expert - agreed that there is nothing basically wrong with Melton's mental health. Thus, the trial court properly found no ineffectiveness.

ISSUE II -

Melton asserts that the trial court improperly considered lack of remorse as a non-statutory aggravator. The law regarding lack of remorse is limited to the penalty phase and the judge's sentencing decision. This does not amount to non-statutory aggravation because the post-conviction court was not sentencing the defendant. While the sentencing court may not consider lack

of remorse as an aggravating circumstance, the post-conviction court was not determining aggravating circumstances. Aggravating circumstances are not at issue in post-conviction proceedings. The post-conviction court was considering Melton's denial of any involvement in the Saylor taxi cab murder in the context of rejecting a claim of ineffectiveness. The post-conviction court was merely observing that Melton's incredible denial meant that defense counsel lacked any possible defense to the prior violent felony aggravator. Passing references to lack of remorse are not error. Even if an improper consideration in the post-conviction context, legal error by a judge is not judicial bias. Melton received a fair hearing and this claim should be denied.

ISSUE III -

Melton asserts that the prosecutor violated *Brady* when (1) the prosecutor stated in closing that Lewis was subpoenaed;(2) the prosecutor argued in closing that Lewis had no agreement with the State in exchange for his testimony; and (3) the prosecutor in the Saylor case testified in the penalty phase of this case that the evidence was that Melton was the triggerman in the Saylor case. Melton may not premise a *Brady* claim on the

prosecutor's arguments. *Brady* concerns suppressed evidence, not closing argument. The prosecutor's statements were accurate and based on the testimony. The testimony regarding the Saylor murder was accurate. The evidence in the Saylor trial established that Melton was the triggerman. Thus, the trial court properly denied this *Brady* claim.

ISSUE IV -

Melton asserts that his trial counsel was ineffective for failing to locate and present two inmate to impeach Lewis. The inmates testified that Lewis told them that he was involved in the struggle with the victim. Their testimony is not admissible. Collateral counsel does not even attempt to provide a theory of admissibility regarding the hearsay statements. Even if admissible, counsel's performance was not deficient because these inmates were not available. Furthermore, there is no prejudice because the inmates were not credible. Their assertions contradicts Melton's own trial testimony that he was the shooter and that Lewis was in the front of the store at the time of the fatal shooting. Thus, the trial court properly denied the claim of ineffectiveness.

ISSUE V -

Melton argues two inmates testified that the co-perpertrator Lewis told them that he, Melton and the victim were involved in a struggle when the gun went off and that he is entitled to a new trial (or penalty phase) based on this newly discovered evidence. Lewis did not recant his trial testimony. Lewis did not testify at the evidentiary hearing. The trial court found the inmates' testimony to be incredible. The inmates hearsay testimony conflicts with Melton's own trial testimony and the physical evidence. It would not produce an acquittal or life sentence. The trial court properly denied this claim of newly discovered evidence and this Court should affirm.

ISSUE VI -

Melton contends that an invalid prior conviction was used as the prior violent felony aggravator at the penalty phase in violation of *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). IB at 88. The State introduced the first degree felony murder and the armed robbery conviction in the Saylor taxi cab driver murder as a prior violent felony aggravator in this capital case. The First District has

recently affirmed the conviction. So, there is no basis for a *Johnson* claim.

ISSUE VII -

Melton asserts his trial counsel was ineffective for failing to object to the prosecutor's argument. There was no deficient performance because none of the prosecutor's comments were objectionable. Trial defense is not ineffective for not making baseless objections during closing argument. Nor is there any prejudice. Had trial counsel objected, the trial court would have overruled the objection. Thus, the trial court properly denied this claim of ineffectiveness.

ISSUE VIII -

Melton asserts that his trial counsel was ineffective for failing to object to the prosecutor challenging several black female prospective jurors for cause. There was no deficient performance. Trial counsel did object. Furthermore, there was no prejudice. These prospective jurors were properly stricken for cause. Thus, the court properly summarily denied this claim.

ARGUMENT

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ISSUE I

DID THE TRIAL COURT PROPERLY FIND COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRESENT MORE BACKGROUND AND MENTAL HEALTH EXPERTS AS MITIGATING EVIDENCE DURING PENALTY PHASE? (Restated)

Melton asserts his counsel was ineffective for failing to present his background and mental health testimony. There was no deficient performance. Counsel presented background and mental health testimony in the penalty phase. Dr. Lawrence J. Gilgun, a clinical psychologist, testified for the defense during the penalty phase. Nor was there any prejudice. No significant mental health mitigation was omitted from the penalty phase. Both experts - the one actually presented at penalty phase in front of the jury and the post-conviction defense expert - agreed that there is nothing basically wrong with Melton's mental health. Thus, the trial court properly found no ineffectiveness.

Law of the case and jurisdiction

Part of this ineffectiveness claim is not properly before this Court. The First District recently per curiam affirmed Melton's prior convictions relating to the Saylor taxi cab murder in the post-conviction appeal. *Melton v. State*, 909 So.2d 865 (Fla. 1st

DCA 2005)(unanimous panel). Melton raised the same claim in his postconviction appeal to the First District that he presents here, which they rejected. Melton asserted that his lawyer was ineffective for failing to present inmates who would testify as to Lewis statements to them in his post-conviction appeal to the First District. The First District, after expanded briefing and oral argument, rejected this claim.

Melton may not relitigate this issue in this Court. The First District's decision is final and not subject to review by this Court. *State v. Barnum*, 2005 WL 2296638, *8 (Fla. 2005)(noting the district courts have been designed to be the final appellate courts in the state of Florida). The First District issued an unanimous per curiam affirmance and this Court has no jurisdiction to review PCAs. Art. V, § 3, Fla. Const.; *Stallworth v. Moore*, 827 So.2d 974, 978 (Fla. 2002)(holding that Court does not have discretionary review jurisdiction or extraordinary writ jurisdiction to review unelaborated per curiam denials of relief, regardless of whether the denials are in opinion form or by way of unpublished order); *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980)(holding that this Court "lacks jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without

opinion, regardless of whether they are accompanied by a dissenting or concurring opinion . . .”). The First District’s decision is the final word. Melton is appellate court shopping.

Collateral counsel mistakenly seems to believe that trial counsel would have been allowed to retrial the Saylor murder conviction in front of the Carter penalty phase jury. He would not. Trials within trials are not permitted. The most counsel could have done to challenge the Saylor conviction in front of the Carter penalty phase jury was to cross-examine the Saylor prosecutor about the details that he testified regarding the Saylor trial, which he did.

Penalty Phase

At the penalty phase, trial counsel presented six witnesses (1) Jim Jenkins, who was Lewis’ lawyer (T 977-988); (2) Dr. Lawrence J. Gilgun, a clinical psychologist (T 988-1000); (3) Frankie Stoutemire, Melton’s biological father (T 1000-1012); (4) Debbie Thurman, criminal deputy clerk of court; (4) Latricia Davis, Melton’s mother (by videotape) (T 1015-1040); (5) Melton (T 1040-1062) and (6) Eloise Melton, Melton’s grandmother (T

1062-1069). Dr. Gilgun testified that Melton's father had left and his stepfather was not a positive influence. (T. 999)

He also presented: Latricia Davis, Melton's mother,(in person) (CCS 34-35); Barney Booker, Melton's brother (CCS 35-37); and Defendant himself who made a brief statement (CCS 37-38).

Evidentiary hearing testimony

At the evidentiary hearing, collateral counsel presented (1) Dr. Lawrence Gilgun (who had testified in the penalty phase) (EH 309-347); (2) Dr. Henry L. Dee, a clinical psychologist (EH 367-416); (3) Frankie Stoutemire, Defendant's biological father (who had testified in the penalty phase) (EH 557-567); (4) Latricia E. Davis, Defendant's mother (who has testified in the penalty phase) (EH 661-685); and (5) Margaret Parker, Defendant's aunt (EH 744-762).

The trial court's ruling

The trial court ruled:

> Penalty Phase - Ineffective Assistance of Counsel (IAC)
> TDC testified at the EH that he had a busy trial schedule especially at the end of 1991 and early 1992, which period included Melton's two cases. (EH 183-84). TDC maintained contemporaneous records for purposes of recertification as a Board Certified criminal trial attorney and those records showed his very busy schedule immediately surrounding Melton's two trials, the records

showed TDC had eight jury trials and one bench trial. (EH 184-85).

Duty To Investigate Defendant's Background

An attorney has a reasonable duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." Rose v. State, 675 So.2d 567, 571 (Fla.1996) (citing Porter v. Singletary, 14 F.3d 554, 557 (11th Circ.), cert. denied, 513 U.S. 1009, 115 S.Ct. 532, 130 L.Ed.2d 435 (1994)). The failure to do so "may render counsel's assistance ineffective." Bolender v. Singletary, 16 F.3d 1547, 1556-57 (11th Cir.) (citing Strickland, 466 U.S. at 687, 104 S.Ct. at 2064), cert. denied, 513 U.S. 1022, 115 S.Ct. 589, 130 L.Ed.2d 502 (1994)). A relevant question is whether trial counsel had a reasonable basis for his strategic decision that an explication of the defendant's family background would not have reduced the risk of the death penalty. Id., at 1558. It is noted that "the mere incantation of 'strategy' does not insulate attorney behavior from review; an attorney must have chosen not to present mitigating evidence after having investigated the defendant's background, and that choice must have been reasonable under the circumstances." Id., at 1558 (quoting Stevens v. Zant, 968 F.2d 1076, 1083 (11th Cir. 1992)).

In Gudinas v. State, 816 So.2d 1095, 1104 (Fla. 2002), the Florida Supreme Court stated:

The Eleventh Circuit has succinctly outlined the analysis for determining whether counsel's failure to investigate and present mitigating evidence was deficient:

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

to the ineffectiveness of his trial counsel before relief will be granted. Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988) (citation omitted).

Defendant does not claim that his counsel failed to present any mitigation concerning his background. Rather, Defendant claims that he is entitled to relief because the record reflects that counsel failed to adequately investigate possible mitigating evidence and that he presented little evidence of mitigation in the penalty phase - even though substantial mitigating evidence could have been uncovered if counsel had made a reasonable investigation.

At the penalty phase, TDC presented the following witnesses: on February 5, 1992: Jim Jenkins, Esq. (CC 977-988); Dr. Lawrence J. Gilgun, a clinical psychologist (CC 988-1000); Frankie Stoutemire, Defendant's biological father (CC 1000-1012); Debbie Thurman, criminal deputy clerk of court; Latricia Davis , Defendant's mother (by videotape) (CC 1015-1040): and Defendant (CC 1040-1062); Eloise Melton, Defendant's grandmother (CC 1062-1069); and on March 10, 1992: Latricia Davis (in person) (CCS 34-35); Barney Booker, Defendant's brother (CCS 35-37); and Defendant himself who made a brief statement (CCS 37-38).

At the evidentiary hearing, postconviction counsel presented the following witnesses in an effort to show additional significant mitigation evidence which would have been available had his trial counsel chosen to conduct a reasonable investigation: (1) Dr. Lawrence Gilgun (who had testified in the penalty phase) (EH 309-347); (2) Dr. Henry L. Dee, a clinical psychologist (EH 367-416); (3) Frankie Stoutemire, Defendant's biological father (who had testified in the penalty phase) (EH 557-567 concerning mitigation evidence); (4) Latricia E. Davis, Defendant's mother (who has testified in the penalty phase) (EH 661-685); and (5) Margaret Parker, Defendant's aunt (EH 744-762).

Duty to Investigate and Present Mental Health Mitigation Evidencea. Dr. Lawrence J. Gilgun (Defense expert at penalty phase)

TDC testified at the EH that he did not recall having a tactical or strategic reason for not retaining at an earlier date Dr. Lawrence J. Gilgun, a clinical and

forensic psychologist who had testified in 10 to 15 death penalty cases in his 28 plus years of practice. (EH 186, 333). Dr. Gilgun testified that he first met and evaluated Defendant in the Escambia County Jail on January 28, 1991, about one week prior to trial. (CC 991) (EH 309-10). TDC testified that his routine practice was to maintain contemporaneous notes and that he could not find anything within his records to show that he had contact with Dr. Gilgun earlier than one week prior to trial. (EH 186-87). Dr. Gilgun testified that his billing records did not reflect any pretrial discussions with defense counsel in the instant case. (EH 311). Dr. Gilgun testified that it was not his standard practice to get involved in a capital case at such a late date and he could not recall a case where he was not involved at least two months prior to trial. (EH 310). TDE admitted that it was not his standard practice to have a defendant evaluated by a mental health expert only one week before trial for purposes of preparing the penalty phase in a capital defense case. (EH 186).

Dr. Gilgun did testify in the penalty phase, although his testimony appears extremely short (covering only 13 transcript pages) (CC 988-1000). While the number of transcript pages for one's testimony is not dispositive on the issue at hand, the penalty phase testimony and the evidence revealed in the evidentiary hearing clearly show that trial defense counsel did not spend an extensive amount of time in the investigation and preparation of mental health-related mitigation evidence. TDC provided Dr. Gilgun with only Defendant's school records and numerous depositions for purposes of his evaluation of Defendant and testimony at trial; TDC did not provide copies of Defendant's statements to police, the arrest report or any police reports, or any information about Defendant's family or friends (CC 991-92) (EH 312-13, 338) nor any information about Defendant's stepfather other than from Defendant himself (i.e. information that the stepfather was a heroin addict and had abused Defendant's mother) (EH 320-21, 332). In the evidentiary hearing, Dr.Gilgun confirmed that he did not speak with any of Defendant's family or friends during the course of his pretrial evaluation of Defendant. (EH 312). In the penalty phase, Dr. Gilgun testified that he found Defendant to have a full scale IQ of 90, placing Defendant at the

25th percentile (or bottom quarter) in the general adult population. (CC 992). Dr. Gilgun also testified that he found that Defendant began doing "very poorly" around middle school and high school going "from an average student to a failing D student" and that he then exhibited behavioral problems such as truancy and marijuana and alcohol abuse until he dropped out in the 11th grade. (CC 994-95). Although his mother prompted him to return to [Pensacola Junior College] Adult High, Defendant did not finish school there because of his arrest in the instant case; he completed his G.E.D. while in the county jail. (CC 995). Although aware that Defendant had been charged with murder in the Saylor case, Dr. Gilgun was not aware that Defendant had been convicted in that case nor was he aware of the victim's name and apparently the details of that case. (CC 996). Dr. Gilgun testified that the academic achievement tests that he conducted with Defendant were basically consistent with his IQ finding for Defendant, i.e. reading in the 14th percentile; spelling in the 61st percentile; and arithmetic in the 34th percentile. (CC 996). Dr. Gilgun found that Defendant suffered from no major psychiatric disorder or emotional defect and that he did not exhibit any indication of a mental health illness. (CC 997). Dr. Gilgun concluded his direct testimony in the penalty phase by opining that Defendant had no impediments to and could take advantage of rehabilitation opportunities that would be available in prison. (CC 998). Dr. Gilgun found Defendant's childhood to be mostly happy, but that a male role model in his life was a problem for him given his father had left the family early on and that his stepfather was not a positive influence at all. (CC 999-1000).b. Dr. Henry L. Dee (Defense expert at rule 3.850 evidentiary hearing)

At the evidentiary hearing, Defendant called Dr. Henry L. Dee, a clinical psychologist with subspecialty in clinical neuropsychology. Dr. Dee testified that he first met Defendant in January 1996 for purposes related to the defense post-conviction relief proceedings. He met with Defendant again in November 2001. Dr. Dee conducted clinical and neuropsychological evaluations of Defendant, including the administering of tests. (EH 369-370). In addition to the materials that were made available to Dr. Gilgun for the penalty phase at trial, post-conviction counsel provided Dr. Dee with the appellate decisions in

Defendant's cases and the trial records, including transcripts of the testimony of all witnesses who testified at trial. Dr. Dee testified that he interviewed the following family members: Defendant's mother Latricia Davis, his aunt Margaret Faye (Johnson) Parker, and his father Frankie Stoutemire. (EH 380).

Dr. Dee, like Dr. Gilgun, found Defendant did not suffer from any serious or major mental illness nor was there evidence of brain damage of any kind. (EH 372, 410). Dr. Dee agreed with Dr. Gilgun that Defendant's IQ was in the normal range, and Dr. Dee actually found Defendant's IQ to be a bit higher. In regards the intelligence testing, Dr. Dee found Defendant to be in the 44th percentile as compared to Dr. Gilgun finding him in the 25th percentile. (EH 409).

Dr. Dee, like Dr. Gilgun, found evidence of early and frequent alcohol and marijuana use. (EH 372). Dr. Dee also found other mitigation evidence that included "an unusual childhood", specifically, Defendant was "in a sense overprotected" by his mother who practiced her Jehovah's Witness religious faith in a very rigorous manner. (EH 373). Defendant's mother relied upon Defendant from an early age to be an after school caretaker for his younger brother Barney. Defendant's mother, due to her religious practice, insisted or forced her son, a gifted athlete, at about age 14 to give up sports to instead intensely study and be involved in her religion; as a result Defendant became isolated from his peers. Further, as Defendant started high school and given that he had been isolated, he seemed to easily fall in with a group of youth with "some criminal sophistication." (EH 373-74). His troubles with skipping school, talking back, and hanging out in the hallways led to Defendant dropping out of school by age 16. At about that time, Defendant's mother then basically gave him a choice to conform to everything she believed and to do those things in the household or he could leave home. Defense chose to leave home and moved around during this "time of turmoil" between his grandmother, his aunt, or elsewhere until he was arrested in the instant case. (EH 374-75). Dr. Dee testified that he interviewed Defendant's grandmother and aunt and that they did not know exactly where Defendant was during that "time of turmoil" (EH 375); Defendant "had essentially no supervision" during this two year period (EH 378). Finally, regarding Defendant's

relationship with his mother, Dr. Dee testified that Dr. Gilgun's report mentioned that Defendant was completely uncritical of his mother and that he was very positive about her and refused to give any indication that might be considered abuse or negligent. Instead, Defendant almost idealized his mother and tended to gloss over all that might be considered negative having to do with his family. (EH 377-78).

Dr. Dee testified that during his evaluation he discussed Defendant's stepfather with him and Defendant described his stepfather as a "very harsh man" who was abusive towards his mother in his presence. Defendant specifically described an incident where his stepfather broke his mother's arms and that they took her to the hospital for treatment. Defendant also disclosed that he observed his stepfather use heroin in the home and that he brought other women in the home also in his presence. (EH 376).

Dr. Dee testified that during his evaluation he discussed Defendant's biological father, Frankie Stoutemire, with him and that he also interviewed Mr. Stoutemire. Dr. Dee learned that Mr. Stoutemire enlisted in the U.S. Army shortly after Defendant was conceived and that he left the Army after three years due to a very bad back injury that he had suffered. Mr. Stoutemire had a series of operations over a number of years outside the Pensacola area so he rarely had contact with his son. Mr. Stoutemire later returned to the Pensacola area to start a new career but by that time Defendant was an adolescent and it was during the time when Defendant was "living with" his grandmother but rarely there at the residence. Mr. Stoutemire expressed to Dr. Dee that he felt that the grandmother was verbally punitive towards him because she would ask why he had not been involved earlier in his son's life. As a result, Mr. Stoutemire felt rejected by the family. (EH 376-77).

Dr. Dee also testified that he believed Defendant was "very candid" with him about his involvement in the instant case, that Defendant "was very forthcoming about everything that he had done and his involvement and he told me in some detail what he did and who did what and when", but that in the taxi case Defendant "steadfastly denied he had ever been involved, that he had anything at all to do with that [case]". (EH 379). Dr. Dee found Defendant to be one who

would not minimize his responsibility and that Defendant "seemed genuinely remorseful". (EH 379).

Dr. Dee opined that Defendant's emotional maturity at the time of the offense in the instant case was that he was strikingly immature for a boy of just 18 years of age, that Defendant had no social sophistication due to his isolation in caretaking for his younger brother and his involvement in the Jehovah's Witness church. (EH 380-81). Dr. Dee also concluded that at the time of his own evaluation of Defendant (1996-2001), that Defendant in terms of intelligence was performing in the 44th percentile - which still fell within the "average range" that Dr. Gilgun had earlier found near the time of trial. Further, even though Dr. Gilgun had earlier placed Defendant in the 25th percentile, the newer finding in the 44th percentile was "probably not a significant difference" because Defendant was not in a different range. (EH 381-82). On cross-examination in attempting to account for the percentile improvement, Dr. Dee only could speculate that the improvement was due to Defendant's incarceration since trial and that with all that time to read and reflect a great deal that his verbal intelligence probably increased. (EH 382).

Though not rendering an opinion on the question, based upon the combination of factors revealed by Defendant's family background and history as described in Dr. Dee's testimony along with Defendant's "chronological age" of about 18 years at the time of the offenses in both the Saylor case and the Carter case, Dr. Dee testified that he thought that Defendant could have been easily manipulated by this co-defendants Ben Lewis and Tony Houston and another contact at the time by the name of Joe Mims. Dr. Dee testified that Defendant viewed those three individuals as being more sophisticated than himself. (EH 383).

Finally, Dr. Dee testified that, after sort of puling it out from Defendant, he revealed that he and Ben Lewis had consumed together a fifth of wine and about six and seven marijuana cigarettes near the time of the Carter pawn shop killing. (EH 385).

Conclusion

This court rejects the Defendant's claim that his trial counsel was ineffective in his representation of the Defendant during the penalty phase of his trial. In

considering said claim, this Court has reviewed numerous cases involving a defense attorney's performance during the penalty phase. The cases this Court found most relevant on this issue were Cooper v. State, 856 So.2d 969 (Fla. 2003); Ragsdale v. State, 798 So.2d 713 (Fla. 2001); Gaskin v. State, 822 So.2d 1243 (Fla. 2002); and Carroll v. State, 815 So.2d 601 (Fla. 2002).

The strongest evidence presented and argument made by the Defendant against his trial counsel on this issue is that the mental health expert retained by the defense counsel, Dr. Larry Gilgun, was not retained until a week before the trial. Also, it does not appear that defense counsel consulted with this expert to a great degree directly before presenting his testimony, nor discussed with him any specific trial strategy. There was no explanation offered by defense counsel as to why he waited until a short time before the trial to retain Dr. Gilgun for his evaluation of the Defendant. Regardless of when the doctor was retained, the significant point is that he was retained and was provided with sufficient materials with which to do an evaluation of the Defendant. There was also enough time to allow for the appropriate testing to assist the doctor in reaching his opinions. Ultimately, at the evidentiary hearing it was not established that Dr. Gilgun was deprived of any significant information which would have changed or magnified the scope of his testimony during the penalty phase.

During the evidentiary hearing, the defense attorney was not questioned regarding his specific trial strategy for the penalty phase. However, it is apparent from a review of the evidence presented during the penalty phase, trial counsel's closing argument and the trial court's sentencing order, that the efforts by the defense were to focus on: (a) the absence of a good role model in the Defendant's life; (b) the negative influence of a male role models in his life; (c) the Defendant's abuse of drugs and alcohol; (d) the Defendant's immaturity and lack of sophistication; (e) the Defendant's relative culpability as to the other co-defendants and their disparate treatment; and (f) the Defendant's amenability to rehabilitation and ability to be productive within a prison environment.

It is clear that the evidence to support these arguments on these issues was brought out during the penalty phase of the trial and argued by defense counsel. These factors

were considered and weighed by the court against the devastating impact of the two aggravating factors, especially the aggravating factor of the prior commission of another murder.

The primary deficits in the mitigation evidence suggested by the defense during the evidentiary hearing were the failure to explore the evidence regarding the stepfather's heroin use and abuse of the Defendant's mother and the impact of the Defendant's involvement with a rigorous religion, i.e., Jehovah's Witness, his departure from that religious environment and subsequent exposure to the "street" element. The record reflects evidence of the stepfather's abuse of the Defendant's mother was presented to the jury and to the court and indeed was commented upon by the trial court in his sentencing order. It is interesting to note that the Defendant's testimony in the penalty phase (CC 1048) where he testified that his stepfather, Mr. Booker, "wasn't really around enough to be recognized, you know, to make an influence or whatever. He wasn't, you know, around that much." This testimony is important considering the questioning of the defense attorney at the evidentiary hearing. When questioned whether he would have presented the information regarding the stepfather's alleged heroin abuse he responded "possibly, if it had an impact on Mr. Melton's development" (EH 186). It is apparent that the absence of a role model in the Defendant's life rather than the presence of a negative male role model was the salient factor in the Defendant's mitigation evidence. The evidence was clearly presented by the Defendant's attorney. As reflected in his sentencing order, the trial court found that the fact that the Defendant was raised with no male guidance and that his mother was abused by his stepfather was mitigating evidence. However, he found that this was balanced out by a loving mother who tried to instill good conduct in the defendant. Sadly, as recognized by the court and his own mother, the Defendant elected to go his own way.

The Defendant presented the testimony of Dr. Henry Dee at the evidentiary hearing regarding his evaluations of the Defendant. His findings were similar to those of Dr. Gilgun in that the Defendant demonstrates no major mental illness or evidence of brain damage. There is no evidence of any kind of significant impairment of cognitive function because of any cerebral disease, insult or injury. The

evidence that could be offered through Dr. Dee related to his determination that the Defendant exhibited evidence of early and frequent drug and alcohol abuse to the extent of using pot daily. He had an unusual childhood in that he was overprotected and was involved in a very rigorous religion which he fell out of and was therefore exposed thereafter to the street element. In his later teen years he was shuffled around a bit and ultimately was exposed to the bad conduct by his stepfather and had very little contact with his biological father. He had very positive feelings about his mother and Dr. Dee agreed with Dr. Gilgun's testimony regarding the Defendant's below average intelligence in the 25th percentile which goes hand in hand with his observation that the Defendant at the time of the offense was strikingly immature and probably easily manipulated. This court finds that, in essence, this information was presented to the jury during the penalty phase and to the trial court who ultimately decided that the death penalty was appropriate. In the penalty phase, the Defendant steadfastly denied his involvement in the Saylor murder. It is this Court's belief that the steadfast denial of his involvement in the Saylor murder may have been one of the strongest condemning factors against him during the penalty phase. The complete denial of culpability must, of necessity, reflect a complete lack of remorse regarding the death of Ricky Saylor. The judge and the jury had before it the overwhelming aggravating factor of the Defendant's murder of another human being prior to the murder of Mr. Carter. Defense counsel was at an overwhelming disadvantage and this Court finds that he presented the best evidence and argument that could be made for the benefit of the Defendant. This court concludes that the defense counsel's decision regarding what evidence to present at trial was completely reasonable. Furthermore, to the extent that trial counsel erred in any respect, it would still be necessary for the Defendant to demonstrate that but for those errors he probably would have received a life sentence. See Gaskin v. State, 822 So.2d 1243 (Fla. 2002). In the instant case, this Court finds that any additional information that the Defendant suggests could be presented to a jury is nothing more than cumulative information that was already considered and rejected by the trial court and none of the additional information presented through the evidentiary hearing was

> such as to undermine this Court’s confidence in the outcome of the original proceedings.

(PCR XII 1964-1976).

Standard of review

The standard of review for ineffective assistance of counsel is *de novo*. *Cave v. State*, 899 So.2d 1042, 1052 (Fla. 2005)(explaining that because “both prongs of the *Strickland* test present mixed questions of law and fact, we employ a mixed standard of review, deferring to the circuit court's factual findings (if they are supported by competent, substantial evidence) but reviewing the circuit court's legal conclusions *de novo* citing *Stephens v. State*, 748 So.2d 1028, 1033 (Fla.1999)).

Merits

The Florida Supreme Court recently explained the *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) test for ineffective assistance of counsel:

> To establish a claim of ineffective assistance of trial counsel, a defendant must prove two elements: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the

> "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. In evaluating whether an attorney's conduct is deficient, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' " and the defendant "bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected. Moreover, to establish prejudice [a defendant] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Arbelaez v. State, 898 So.2d 25, 31-32 (Fla. 2005)(citations omitted).

Counsel was not ineffective in presenting mental health expert testimony in the penalty phase. There was no deficient performance. Counsel presented a mental health expert at the penalty phase. Dr. Gilgun testified for the defense.

Nor was there any prejudice. No significant mental health mitigation was omitted from the penalty phase. Dr. Gilgun found that Defendant suffered from no major psychiatric disorder or emotional defect and that he did not exhibit any indication

of a mental health illness. Dr. Dee, like Dr. Gilgun, found Defendant did not suffer from any serious or major mental illness nor was there evidence of brain damage of any kind. (EH 372, 410). Dr. Dee agreed with Dr. Gilgun that Defendant's IQ was in the normal range. So, both experts - the one actually presented at penalty phase in front of the jury and the post-conviction defense expert - agreed that there is nothing basically wrong with Melton's mental health.

Melton argues that the mental health expert was retained "too late" by trial counsel. The trial court found that, while the expert was not retained until a week before trial, there was enough time for Dr. Gilgun to perform his evaluations and that it was not established that the expert lack any information that would have changed his opinion. Counsel was not ineffective. There is no deficient performance. The Sixth Amendment does not require that counsel hire experts at any particular time prior to the penalty phase. There is no such thing as "too late" provided that the expert has enough time to evaluate the defendant prior to the penalty phase. Even in the tick of time is sufficient performance. Nor was there any prejudice. There was no harm from the delay in hiring the mental health expert. Collateral counsel has not established that there was any

different mental health diagnosis because of the delay, as he must to establish prejudice. "Could have potentially given more mitigation" is not a showing of prejudice. IB at 46. Collateral counsel was granted an evidentiary hearing to establish exactly what different diagnosis could have been presented to the jury and did not do so.

Collateral counsel seems to be raising an *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) claim. The *Ake* claim is procedurally barred. *Ake* claims should be raised on direct appeal. *Whitfield v. State*, 2005 WL 2898729, *2 (Fla. Nov. 3, 2005)(explaining that the *Ake* claim should have been raised on direct appeal); *Marshall v. State*, 854 So.2d 1235, 1248 (Fla.2003)(holding an *Ake* claim contained within an ineffective assistance of counsel claim "procedurally barred because it could have been raised on direct appeal"); *Moore v. State*, 820 So.2d 199, 203 n. 4 (finding *Ake* claim procedurally barred because it could have been raised on direct appeal); *Cherry v. State*, 781 So.2d 1040, 1047 (Fla.2000) ("[T]he claim of incompetent mental health evaluation is procedurally barred for failure to raise it on direct appeal.").

Melton's actual claim is not an *Ake* claim or an ineffectiveness of counsel claim; rather, it is an ineffective

assistance of expert claim. As to the Sixth Amendment claim, there is no Sixth Amendment right to effective assistance of a mental health expert. The Sixth Amendment is a right to counsel guarantee. The basis of *Ake* was the Fifth Amendment due process right. *Wright v. Moore*, 278 F.3d 1245 (11th Cir. 2002)(noting that an Sixth Amendment right to a mental competency examination is a "non-starter"); *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir.1998) (rejecting the notion that there is either a procedural or constitutional rule of ineffective assistance of an expert witness); *Thomas v. Taylor*,170 F.3d 466, 472 (4th Cir. 1999)(rejecting, yet again, the effort to recast a claim concerning the effectiveness of a court-appointed psychological expert as a claim of ineffective assistance of counsel); *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir.1990)(explaining that the ultimate result of recognizing a right to effective assistance of a mental health expert would be a never-ending battle of psychiatrists appointed as experts for the sole purpose of discrediting a prior psychiatrist's diagnosis). The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. To entertain such claims would immerse judges in an endless battle of the experts to determine whether a particular psychiatric examination was

appropriate. *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir.1998) . Although *Ake* refers to an appropriate evaluation, the Due Process Clause does not prescribe a malpractice standard for a court-appointed psychiatrist's performance. *Wilson*, 155 F.3d at 401. It is the expert that has the responsibility for obtaining the materials he needs and conducting any required interviews, not trial counsel. *Moody v. Polk*, 408 F.3d 141, 150 (4 th Cir. 2005)(rejecting a claim of ineffectiveness premised on the expert uncertainties because the expert, “not trial counsel, had ultimate responsibility for his own expert report.”) Thus, the trial court properly denied this claim of ineffectiveness.

ISSUE II

DID THE TRIAL COURT'S CONSIDERATION OF THE EFFECT OF MELTON'S DENIAL OF ANY INVOLVEMENT IN THE PRIOR MURDER IN THE FACE OF A CONVICTION FOR THE PRIOR MURDER RESULT IN JUDICIAL BIAS? (Restated)

Melton asserts that the trial court improperly considered lack of remorse as a non-statutory aggravator. The law regarding lack of remorse is limited to the penalty phase and the judge's sentencing decision. This is not non-statutory aggravation because the post-conviction court was not sentencing the defendant. While the sentencing court may not consider lack of remorse as an aggravating circumstance, the post-conviction court was not determining aggravating circumstances. Aggravating circumstances are not at issue in post-conviction proceedings. The post-conviction court was considering Melton's denial of any involvement in the Saylor taxi cab murder in the context of rejecting a claim of ineffectiveness. The post-conviction court was merely observing that Melton's incredible denial meant that defense counsel lacked any possible defense to the prior violent felony aggravator. Passing references to lack of remorse are not error. Even if an improper consideration in the post-conviction context, legal error by a judge is not judicial bias. Melton received a fair hearing and this claim should be denied.

The trial court's ruling

The trial court in rejecting a claim of ineffectiveness in the penalty phase for failing to present additional evidence of mitigation stated:

> In the penalty phase, the Defendant steadfastly denied his involvement in the Saylor murder. It is this Court's belief that the steadfast denial of his involvement in the Saylor murder may have been one of the strongest condemning factors against him during the penalty phase. The complete denial of culpability must, of necessity, reflect a complete lack of remorse regarding the death of Ricky Saylor. The judge and the jury had before it the overwhelming aggravating factor of the Defendant's murder of another human being prior to the murder of Mr. Carter. Defense counsel was at an overwhelming disadvantage and this Court finds that he presented the best evidence and argument that could be made for the benefit of the Defendant. This court concludes that the defense counsel's decision regarding what evidence to present at trial was completely reasonable. Furthermore, to the extent that trial counsel erred in any respect, it would still be necessary for the Defendant to demonstrate that but for those errors he probably would have received a life sentence. See *Gaskin v. State*, 822 So.2d 1243 (Fla. 2002). In the instant case, this Court finds that any additional information that the Defendant suggests could be presented to a jury is nothing more than cumulative information that was already considered and rejected by the trial court and none of the additional information presented through the evidentiary hearing was such as to undermine this Court's confidence in the outcome of the original proceedings.

(PCR XII 1975-1976).

Preservation

This issue was not preserved. Melton did not raise this claim of judicial bias in his motion for rehearing. (PCR XII 2019-2023).

Merits

The post-conviction court was merely observing defendant's denial of involvement in the prior violent felony and the position that such a denial placed defense counsel in. While lack of remorse may not be considered in aggravation, remorse may be consider in mitigation. Had Melton admitted his involvement in the Saylor taxi cab driver, defense counsel could have used Melton's remorse to attempt mitigate the prior violent felony aggravator. The trial court was merely noting that Melton's denial closed this line of defense and put defense counsel "at an overwhelming disadvantage." Taking in context, the observation was proper.

Passing references to lack of remorse are not error. In *Koon v. State*, 513 So.2d 1253, 1257 (Fla. 1987), this Court held that a "passing reference" to Koon's lack of remorse at the end of the sentencing order was not error because this factor was not considered in determining the aggravating circumstances. See also *Suarez v. State*, 481 So.2d 1201, 1210 (Fla. 1985)(finding a

mention of lack of remorse in the "Conclusion of Court" in the trial court's sentencing order did not constituted an improper consideration of a non-statutory aggravating circumstance, which came after the judge concluded that there were sufficient aggravating circumstances, because the balancing and weighing had already been done and concluding that the mention of lack of remorse merely constituted an observation and expression of opinion and philosophy by the trial judge). Here, as in *Suarez*, the passing reference merely constituted an observation and expression of opinion and philosophy. But here, unlike either *Koon* or *Suarez*, the passing reference was in a order denying post-conviction relief, not the sentencing order. Surely, if a passing reference to lack of remorse in the actual sentencing order is not error, then a passing reference to lack of remorse in a post-conviction order is not error either.

Melton's reliance on *Shellito v. State*, 701 So.2d 837, 842 (Fla.1997) and *Pope v. State*, 441 So.2d 1073 (Fla. 1983) is misplaced. These cases hold that a trial court may not consider lack of remorse <u>as an aggravating circumstance</u>. These cases do not apply to post-conviction proceedings. The post-conviction court was not determining aggravating circumstances. Aggravating circumstances are not at issue in post-conviction

proceedings. None of these cases concern a post-conviction court noting the defendant's denial of involvement in the prior violent felony and the position that such a denial placed defense counsel in, as part of the analysis of an ineffectiveness claim.

Even if the post-conviction judge's comment is viewed as improper, it does not mean that the sentencing judge improperly considered lack of remorse. Judge Skievaski did not try this case or sentence Melton to death. Judge Anderson sentenced Melton to death. There is no evidence that either the jury or the sentencing judge considered lack of remorse. The law presumes that judges know and follow the law and that juries follow their instructions to consider only statutory aggravators.

Even if an improper consideration in the post-conviction context, the trial court's reasoning in denying the claim of ineffectiveness does not establish judicial bias. Legal error is not judicial bias. *Chamberlain v. State*, 881 So.2d 1087, 1097 (Fla. 2004)(concluding that "[t]he fact that the judge has made adverse rulings in the past against the defendant, or that the judge has previously heard the evidence, or 'allegations that the trial judge had formed a fixed opinion of the defendant's

guilt, even where it is alleged that the judge discussed his opinion with others,' are generally considered legally insufficient reasons to warrant the judge's disqualification" citing ***Rivera v. State***, 717 So.2d 477, 481 (Fla.1998)); ***Hasbrouck v. Texaco, Inc.***, 842 F.2d 1034, 1046 (9th Cir. 1987)(rejecting a claim of judicial bias as “wholly without merit” because even if the ruling were erroneous, they could not justify a finding of judicial bias.) Judge Skievaski’s comment, even if improper, is not judicial bias. ***Arbelaez v. State***, 898 So.2d 25, 42 (Fla. 2005)(finding that a motion to disqualify was properly denied were the judge stated the Defendant would be getting a jolt of electricity in an unrelated capital case because the facts were not sufficient to establish a "well-grounded fear" that he would not receive a fair and impartial hearing). Melton was not denied a fair post-conviction proceeding. This claim should be denied.

ISSUE III

DID THE TRIAL COURT PROPERLY DENY THE *BRADY V. MARYLAND*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) CLAIM? (Restated)

Melton asserts that the prosecutor violated *Brady* when (1) the prosecutor stated in closing that Lewis was subpoenaed;(2) the prosecutor argued in closing that Lewis had no agreement with the State in exchange for his testimony; and (3) the prosecutor in the Saylor case testified in the penalty phase of this case that the evidence was that Melton was the triggerman in the Saylor case. Melton may not premise a *Brady* claim on the prosecutor's arguments. *Brady* concerns suppressed evidence, not closing argument. The prosecutor's statements were accurate and based on the testimony. The testimony regarding the Saylor murder was accurate. The evidence in the Saylor trial established that Melton was the triggerman. Thus, the trial court properly denied this *Brady* claim.

Law of the case and jurisdiction

Part of this *Brady* claim is not properly before this Court. The alleged *Brady* material relating to Officer O'Neal concerns the Saylor taxi cab murder, not the Carter pawn shop murder. The First District recently per curiam affirmed Melton's prior

convictions relating to the Saylor taxi cab murder in the post-conviction appeal. *Melton v. State*, 909 So.2d 865 (Fla. 1st DCA 2005)(unanimous panel). Melton raised the same claim in his postconviction appeal to the First District that he presents here, which they rejected. Melton asserted a *Brady* violation based on Officer O'Neal's notes in his post-conviction appeal to the First District. The First District, after expanded briefing and oral argument, rejected this claim.

Melton may not relitigate this issue in this Court. The First District's decision is final and not subject to review by this Court. *State v. Barnum*, 2005 WL 2296638, *8 (Fla. 2005)(noting the district courts have been designed to be the final appellate courts in the state of Florida). The First District issued an unanimous per curiam affirmance and this Court has no jurisdiction to review PCAs. Art. V, § 3, Fla. Const.; *Stallworth v. Moore*, 827 So.2d 974, 978 (Fla. 2002)(holding that Court does not have discretionary review jurisdiction or extraordinary writ jurisdiction to review unelaborated per curiam denials of relief, regardless of whether the denials are in opinion form or by way of unpublished order); *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980)(holding that this Court "lacks jurisdiction to review per curiam decisions of the several

district courts of appeal of this state rendered without opinion, regardless of whether they are accompanied by a dissenting or concurring opinion . . .”). The First District’s decision is the final word. Melton is appellate court shopping.

Trial

Bendleon Lewis testified during the guilt phase. (T. IV 624). He was currently charged with the murder and robbery of Mr. Carter. Lewis testified that no promises from the State Attorney had been made regarding his trial testimony. (T. IV 624). Lewis was subpoenaed. (T. IV 625). On cross, Lewis admitted that his testimony could not be used against him because he had use immunity.(T. IV 641-643). Defense counsel explained while Lewis may not have a formal deal, if Lewis say something that the prosecutor did not like, the prosecutor would not be happy and the prosecutor could deny him a deal in the future. (T. IV 645). Defense counsel pointed out that, while Lewis did not have a deal, he was hoping for one. (T. IV 645). Lewis admitted that he was hoping for probation on the murder charge. (T. IV 645). Defense counsel pointed out that he could get the death penalty or life in prison (T. IV 646).

In the penalty phase, the prosecutor in the Carter case called the prosecutor in the Saylor case, Mr. Schiller, to establish the prior violent felony aggravator. (T. VI 921). Mr. Schiller had prosecuted Melton for first degree felony murder and armed robbery.(T. VI 922). The victim, Ricky Saylor, was a taxi cab driver. (T. VI 922). The taxi cab murder occurred on November 17, 1990. (T. VI 922). Mr. Carter was murdered on January 23, 1991. (T. VI 923). The prosecutor introduced, as State's Ex. #1, a certified copy for case, No. 91-1219, the conviction in the Saylor taxi cab driver case.(T. VI 923,924). Mr. Terrell noted that he represented Melton at that trial as well as in this trial. (T. VI 923). On cross, defense counsel introduced, as Defense Ex. #4, the jury verdict in the Saylor case. (T. VI 924-925). The Saylor prosecutor noted that the Saylor jury had scratched out premeditated murder and circled only felony murder. (T. VI 925). Melton was sentenced to life with no possibility of parole for 25 years in the Saylor case (T. VI 926). Melton was also sentenced to life for Count II, the robbery conviction in the Saylor case (T. VI 928). Melton was sentenced consecutively in the Saylor case. (T. VI 931). Defense counsel referred to a question that the Saylor jury asked and the prosecutor objected because he viewed it as an

attempt to impeach the Saylor verdict (T. VI 934-935). Defense counsel argued that it showed a principal theory of conviction that was mitigating. The trial court agreed that the Carter jury should not consider the Saylor jury's question but allowed it in an abundance of caution. (T. VI 935). Defense counsel introduced the Saylor jury's question as Defense exhibit #3. (T. VI 936-937). The prosecutor quoted the Saylor jury's question and ask the Saylor prosecutor what he thought. (T. VI 937-938). The Saylor prosecutor testified that there was no evidence whatsoever that anyone other than the defendant was the triggerman. (T. VI 940). Defense counsel objected to the question on the basis that the question was "impeaching the verdict" (T. VI 939). Defense counsel argued that the question was a comment on the defendant's right to remain silent. (T. VI 939). The trial court ruled that the question had been "raised by the defense's questions." (T. VI 940). The evidence in the Saylor case showed that the victim was shot in his right temple. (T. VI 941). Defense counsel questioned the Saylor prosecutor about statements that Lewis had made to other inmates in the jail regarding the Saylor murder. (T. VI 942). Lewis was never indicted in the Saylor murder despite his involvement. (T. VI 943). Defense counsel pointed out that Lewis had given

inconsistent statements regarding the Saylor murder and referred to it as perjury. (T. VI 935). Lewis was not charged with perjury. (T. VI 944). The prosecutor in the Saylor case, Mr. Schiller, was made a defense witness. (T. VI 947). Defense counsel introduced a plea agreement between Houston and the State and the judgment & sentence relating to Houston in the Saylor case. (T. VI 947). When Houston testified for the State in the Saylor case he had no plea deal but after his testimony, Houston signed the plea agreement. (T. VI 948). Houston's plea agreement called for a recommended sentence of 10 to 25 years. (T. VI 950). Houston received 20 years. (T. VI 951). The Saylor prosecutor recounted the details of the Saylor trial. (T. VI 954-955,957,958). The Saylor prosecutor explained to the jury that a person who is subpoenaed has use immunity via a Florida statute. (T. VI 961). On cross, he explained transactional versus use immunity. (T. VI 962). Defense counsel pointed out the State Attorney has sole discretion regarding bringing criminal charges. (T. VI 966). Defense counsel pointed out that there was some evidence that Lewis was more involved in the Saylor murder than he acknowledged. (T. VI 968). Defense counsel made a motion for mistrial based on the testimony of the Saylor prosecutor, Mr. Schiller, that there was no evidence that

anyone other than Melton was the triggerman in the Saylor murder. (T. VII 976). The trial court denied the motion for mistrial.

The Defense called Lewis' lawyer, Jim Jenkins, during the penalty phase. (T. VII 977). He testified that he was representing Lewis at the time. (T. VII 978). He testified that there were no plea offers. (T. VII 979). He was also Lewis' attorney during the Saylor case and advised him regarding that case. (T. VII 980). He had advised Lewis to cooperate and testify against Melton. (T. VII 980). He was hoping that something could be worked out with the prosecutors, so that Lewis could pled to a lesser offense in the Carter case. (T. VII 981). He testified that there were no negotiations on the table. (T. VII 981). On cross, he also testified that there was no deal in the Saylor case either. (T. VII 985). He acknowledge that Lewis could have been charged in the Saylor case but was not surprised that he was not. (T. VII 985). He was not approached by law enforcement; rather, he had contacted the State Attorney Office. (T. VII 986). He admitted that Lewis had lied under oath and had suborned perjury. (T. VII 986).

<u>The trial court's ruling</u>

The trial court ruled:

To establish a claim under Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), a defendant must show: (1) the evidence must be favorable to the defendant because it is either exculpatory or because it is impeaching; (2) the evidence must have been withheld by the State, either willfully or inadvertently; and (3) prejudice to the defendant must have ensued. *See* Guzman v. State, 2003 Fla. LEXIS 1993, 28 Fla.L.Weekly S829 (Fla. Nov. 20, 2003) (revised March 4, 2003) (clarifying the Brady and Giglio standards and the important distinction between them); *see also* Walton v. State, 847 So.2d 438, 452 (Fla. 2003) (Brady claim without merit because there was no reasonable probability of a different outcome had the handwritten police notes been used by the defense at trial; finding police officer's handwritten notes were not exculpatory, nor did they have any impeachment value); Foster v. State, 810 So.2d 910 (Fla. 2002), *cert. denied*, 537 U.S. 990, 154 L.Ed.2d 359, 123 S.Ct. 470 (2002), and Occhicone v. State, 768 So.2d 1037, 1041 (Fla. 2000) (citing Strickler v. Green, 527 U.S. 263, 281-82, 144 L.Ed.2d 286, 119 S.Ct. 1936 (1999)). The third prong of "prejudice is measured by 'whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" Id. at 1041. Defendant bears the burden to establish the three factors and his failure to establish all three is fatal to his claim. Stewart v. State, 801 So.2d 59, 70 (Fla. 2001).

"Although the 'due diligence' requirement is absent from the [United States] Supreme Court's most recent formulation of the Brady test [in Strickler v. Green], it continues to follow that a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because evidence cannot then be found to have been withheld from the defendant." Occhicone v. State, 768 So.2d 1037 (Fla. 2000); *see also* Walton v. State, 847 So.2d at 453.

Giglio claim

To prove a violation of Giglio v. United States, 405 U.S. 150, 31 L.Ed.2d 104, 92 S.Ct. 763 (1972), a defendant must show: (1) the testimony given was false; (2) the

prosecutor knew the testimony was false; and (3) the statement was material. *See* Guzman v. State, 2003 Fla. LEXIS 1993, 28 Fla.L.Weekly S829 (Fla. Nov. 20, 2003) (*revised* March 4, 2003) (clarifying the Brady and Giglio standards and the important distinction between them); *see also* Cooper v. State, 856 So.2d 969, 973 (Fla. 2003), *cert. denied*, 2004 U.S. LEXIS 1700 (Mar. 1, 2004); Spencer v. State, 842 So.2d 52, 70 (Fla. 2003); and Ventura v. State, 794 So.2d 553 (Fla. 2001).

In Guzman, the Florida Supreme Court receded from Rose v. State, 774 So.2d 629, 635 (Fla. 2000) and Trepal v. State, 846 So.2d 405, 425 (Fla. 2003) to the extent that they stood for the incorrect legal principle that the "materiality" prongs of Brady and Giglio are the same. "Under Brady, the undisclosed evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Guzman, 2003 Fla. LEXIS at 16. "Under Giglio, where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Id. at 18. "Thus, while materiality is a component of both a Giglio and a Brady claim, the Giglio standard of materiality is more defense friendly." Id. at 20. In other words, "the proper question under Giglio is whether there is any reasonable likelihood that the false testimony could have affected the court's judgment as the factfinder in this case." Id. at 21.

As the State aptly noted in its written Closing argument at pp. 27-28, and which this Court adopts[1] for its findings and conclusions, the record clearly refutes Defendant's claims that the State withheld a plea agreement document between the State and Tony Houston and allowed Houston to lie about it. The trial record shows that trial defense counsel was in possession of Houston's unsigned plea document and not only cross-examined him about it (NC 411-412), but introduced it into evidence (NC 427-429) and read

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[1] Those portions of the argument adopted herein are not verbatim as slight modifications have been made for purposes of this Court making its findings and conclusions.

it aloud to the jury in its entirety (NC 429-431). Defendant attempts to make something out of the fact that prosecutor Schiller signed Houston's waiver of speedy rial, suggesting that "It seems likely that while negotiating in the back room, Houston refused to sign the plea but agreed to sign the speedy trial waiver." (Defendant's written Closing argument, at p. 16). This does not appear to be material. Although there was no finalized deal, the fact that Houston hoped for a benefit from his testimony was something he expressly admitted. Houston was cross-examined about the unsigned plea bargain, and he explicitly acknowledged having been told by the prosecutor that, if he testified against Melton, he could get his charges reduced to second degree murder (NC 410). Houston further acknowledged that his sentence, if he testified, could be 10 to 25 years (NC 412). The record clearly refutes any claim that material and "critical" evidence was withheld or that the State knowingly allowed the presentation of materially false evidence.

The same can be said for the various allegations about the State's dealings with Lewis. Defendant makes a salient point in his argument that attorney Jim Jenkins initiated calls to the State Attorney's Office on behalf of his client Mr. Lewis. This Court finds that it is not that significant who contacted who first; obviously, there were discussions about Lewis testifying in exchange for a benefit and he had the fervent desire to do so. However, Defendant's trial counsel was aware that there had been discussions and that Lewis had no deal, but did have an expectation of a benefit in exchange for his testimony. Trial defense counsel examined Lewis about these matters on direct examination in the taxi driver case (NC 505), and examined Lewis' counsel on direct examination at the penalty phase of the pawn shop case (CC 977-987). *See* Ventura v. State, 794 So.2d 553, 561-65 (Fla. 2001) (rejecting defendant's Brady and Giglio claims where defense counsel was unable to expose major components of any deals during cross-examination).

Finally, as to Defendant's Brady and/or Giglio claims concerning the co-defendant Phillip Parker, Defendant failed to present any evidence on that claim at the evidentiary hearing.

Accordingly, this Court finds Defendant's Brady and Giglio claims to be without merit.

(PCR XII 1956-1959).

Standard of review

The standard of review for a *Brady* claim is *de novo*. However, the factual findings made by the trial court in relation to the *Brady* claim, such as whether the evidence was, in fact, suppressed, are reviewed for competent, substantial evidence. *Lightbourne v. State*, 841 So.2d 431, 437 (Fla. 2003)(stating: "In reviewing Lightbourne's *Brady* claims, this Court defers to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but reviews *de novo* the application of those facts to the law); *Guzman v. State*, 868 So.2d 498, 508 (Fla. 2003)(stating: "We review *de novo* the postconviction court's determination that the suppressed evidence was not material under *Brady* citing, *Way v. State*, 760 So.2d 903, 913 (Fla.2000)).

Merits

To establish a *Brady* violation, a defendant must demonstrate: (1) the State possessed evidence favorable to the accused because it was either exculpatory or impeaching; (2) the State willfully or inadvertently suppressed the evidence; and (3) the

defendant was prejudiced. *Mordenti v. State*, 894 So.2d 161, 169 (Fla. 2004)(citing *Allen v. State*, 854 So.2d 1255, 1259 (Fla.2003); *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) and *Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 1272, 157 L.Ed.2d 1166 (2004)). To satisfy the prejudice prong of *Brady*, a defendant must establish that the suppressed evidence was material. Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. The United States Supreme Court has defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Mordenti v. State*, 894 So.2d at 170.

Neither of the prosecutor's remarks is *Brady* material. Argument by the prosecutor does not fall under the rubic of *Brady* or *Giglio*. It is not withheld or suppressed evidence or false testimony. It is not evidence or testimony of any kind - it is argument. *Campiti v. Matesanz*, 186 F.Supp.2d 29, 47 (D.Mass. 2002)(rejecting a *Brady* claim regarding prosecutor remarks because a "necessary condition of a *Brady* claim is that evidence was suppressed" and the remarks are not evidence and rejecting a *Giglio* claim because such a claim requires the

admission of false testimony and the prosecutor's statement to the judge obviously was not evidence itself). Melton may not premise a *Brady* or *Giglio* claim on the prosecutor's remarks.

Furthermore, the prosecutor's comments were accurate. Lewis was subpoenaed. The Saylor prosecutor explained use immunity to the jury. There was no formal deal with Lewis regarding his testimony. Both Lewis and his lawyer, Jim Jenkins, testified that there was no plea agreement. Jim Jenkins testified that there were no plea offers. (T. VII 979). He also testified that there were no negotiations on the table. (T. VII 981). The jury was aware that Lewis, while not having a formal deal, had an expectation that he would benefit from his testimony against Melton. Both he and his lawyer testified that they hoped Lewis would benefit from his testimony.

The prosecutor's testimony regarding the Saylor taxi cab murder was accurate. The evidence established that Melton was the triggerman in that murder as well as in this case. The Carter penalty phase jury was aware that the Saylor jury had convicted of felony murder only, not premeditated murder. The Carter penalty phase jury was aware that the Saylor jury had a question regarding personally using the gun. There was no false testimony as required to establish a *Giglio* claim.

Any cumulative analysis must exclude any alleged *Brady* violations involving Officer O'Neal. First of all, there was no *Brady* violation in the Saylor case as the First District so held. A cumulative error analysis does not mean across cases.

ISSUE IV

DID THE TRIAL COURT PROPERLY DENY THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR NOT PRESENTING TWO UNAVAILABLE, INCREDIBLE INMATES TO IMPEACH LEWIS? (Restated)

Melton asserts that his trial counsel was ineffective for failing to locate and present two inmate to impeach Lewis. The inmates testified that Lewis told them that he was involved in the struggle with the victim. Their testimony is not admissible. Collateral counsel does not even attempt to provide a theory of admissibility regarding the hearsay statements. Even if admissible, counsel's performance was not deficient because these inmates were not available. Furthermore, there is no prejudice because the inmates were not credible. Their assertions contradicts Melton's own trial testimony that he was the shooter and that Lewis was in the front of the store at the time of the fatal shooting. Thus, the trial court properly denied the claim of ineffectiveness.

Law of the case and jurisdiction

This ineffectiveness claim is not properly before this Court. The First District recently per curiam affirmed Melton's prior convictions relating to the Saylor taxi cab murder in the post-conviction appeal. *Melton v. State*, 909 So.2d 865 (Fla. 1st DCA

2005)(unanimous panel). Melton raised the same claim in his postconviction appeal to the First District that he presents here, which they rejected. Melton asserted that his lawyer was ineffective for failing to locate and present several of these inmates in his post-conviction appeal to the First District. The First District, after expanded briefing and oral argument, rejected this claim.

Melton may not relitigate this issue in this Court. The First District's decision is final and not subject to review by this Court. *State v. Barnum*, 2005 WL 2296638, *8 (Fla. 2005)(noting the district courts have been designed to be the final appellate courts in the state of Florida). The First District issued an unanimous per curiam affirmance and this Court has no jurisdiction to review PCAs. Art. V, § 3, Fla. Const.; *Stallworth v. Moore*, 827 So.2d 974, 978 (Fla. 2002)(holding that Court does not have discretionary review jurisdiction or extraordinary writ jurisdiction to review unelaborated per curiam denials of relief, regardless of whether the denials are in opinion form or by way of unpublished order); *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980)(holding that this Court "lacks jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without

opinion, regardless of whether they are accompanied by a dissenting or concurring opinion . . .”). The First District’s decision is the final word. Melton is appellate court shopping.

Collateral counsel mistakenly seems to believe that trial counsel would have been allowed to retrial the Saylor murder conviction in front of the Carter penalty phase jury. He would not. Trials within trials are not permitted. The most counsel could have done to challenge the Saylor conviction in front of the Carter penalty phase jury was to cross-examine the Saylor prosecutor about the details that he testified regarding the Saylor trial, which he did.

Abuse of process

This Court should find that this issue is an abuse of the process. Counsel filed an amended 3.850 raising these claims for the first time two days before the evidentiary hearing. The trial court noted that postconviction counsel had filed amended 3.850 motions in both cases the Friday before the evidentiary hearing and he had not had an opportunity to fully review the new claims due to the last minute nature of the filing of the amended motions. (EH. Vol. I 4). The prosecutor explained that the allegations in the amended motion in the Saylor cab case

were complete changes. (EH. Vol. I 5). The prosecutor noted that the amendments were prejudicial because the State had no opportunity to investigate these new witnesses. (EH. Vol. I 14). During the evidentiary hearing, postconviction counsel refused to explain the reason for the last minute nature of the amendments. (EH. Vol. I 8-9). Postconviction counsel claimed that it was "reversible error" to require him to provide the name of the witness.[2] (EH. Vol. I 8). The trial court noted that he was "a little shagreeded" and "a little disturbed" that postconviction counsel refused to explain the reason for the last minute nature of the amendments. (EH. Vol. I 8-9,12). The trial court expressed his worry that it would come back if he did not permit the late amendment. (EH. Vol. I 16). The State argued that this was an abuse of the process. (EH. Vol. I 17).

The trial court could have and should have denied the attempt to amend the postconviction pleadings when counsel refused to explain the reasons for the late amendment. *Moore v. State*, 820 So.2d 199, 205 (Fla. 2002)(finding that the trial court did not

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[2] This was an incorrect statement of the law. Postconviction counsel was required to provide the postconviction court with the names of the witnesses. *Nelson v. State*, 875 So.2d 579 (Fla.2004)(concluding that identity and availability to testify are necessary allegations in a facially

abuse its discretion in striking the third amended 3.850 motion because "a second or successive motion for postconviction relief can be denied on the ground that it is an abuse of process if there is no reason for failing to raise the issues in the previous motion."); *Huff v. State*, 762 So.2d 476, 481 (Fla. 2000)(finding that the trial court did not abuse its discretion by not allowing new counsel to amend the 3.850 motion with new issues that were not raised in the previous motion where the defendant was given ample opportunities to prepare and amend his rule 3.850 motion). As the *Moore* Court noted, it is an abuse of the process to amend postconviction motions without a reason. A trial court is well within its discretion to deny a motion to amend the 3.850 motion filed two days before the scheduled evidentiary hearing when counsel refuses to explain the reasons for the late amendment. Postconviction counsel should at least be required to explain the reasons to this Court. Furthermore, while counsel could have filed a successive 3.850 motion raising a newly discovered evidence or *Brady* claim with an explanation for the delay, he cannot for this ineffective assistance of counsel claim. This claim should be denied as an abuse of the process.

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sufficient claim of ineffective assistance of counsel for

Trial

Melton testified in the guilt phase of the Carter pawn shop case. (T. IV 679).[3] Melton testified that they went to the pawn shop because they needed some money. (T. IV 683). Melton testified that Lewis and the owner were talking about Lewis pawning his necklace while he was walking around looking around the store. (T. IV 685). Melton put on gloves because the was going to try to get the rings. (T. IV 685). Lewis also had gloves. (T. IV 686). As Melton was trying to get the rings thinking that Mr. Carter would not see him, Mr. Carter turned real quick and saw him and ask him what he was doing. (T. IV 686). Mr. Carter reached for his own gun that he had in his pocket and Lewis grabbed Mr. Carter's arms. (T. IV 686). Melton, who had a gun in the back of his waistband, pulled his gun. (T. IV 686). Melton got Mr. Carter's gun. (T. IV 686).

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failure to investigate, interview, or call witnesses).

[3] This Court noted that Melton's own testimony at the Carter trial, was "that he carried a gun when he went to the pawn shop to steal some rings and he held a gun on Carter while Lewis gathered up proceeds from the robbery." *Melton*, 638 So.2d at 930 n.5.

Lewis let Mr. Carter go after Melton got Carter's gun. (T. IV 685). Melton told Mr. Carter to open the cases. (T. IV 686-867). Mr. Carter opened the cases and Lewis collected the stuff out of the cases. (T. IV 687). Mr. Carter had two other guns on him but Melton did not know this. (T. IV 687). Melton and Mr. Carter went into a little back room with two safes in it.(T. IV 688). After Lewis collected some of the stuff in the safe, Lewis went to the front of the store. (T. IV 688,690). Melton and the victim, Mr. Carter were in the back hallway. (T. IV 688). Melton had a gun on the victim. (T. IV 691). Melton claimed that the victim rushed him and they fell to the floor. (T. IV 691). Lewis came over and hit the victim in his right eye. (T. IV 692). Both of the victims eyes were "bleeding real bad". (T. IV 693). The victim kept saying "don't shoot me." (T. IV 693). Lewis went back to the front of the store. (T. IV 693). Melton testified that Mr. Carter grabbed his hand with the gun in it. (T. IV 694). Melton had his finger on the trigger. (T. IV 695). The gun discharged during this "big struggle." (T. IV 695). Melton testified that he had no intent to kill when he entered the pawn shop (T. 697). On cross, Melton admitted an intent to rob. (T. 699). On cross, the

prosecutor asked: “after you shot Mr. Carter in the head, did he get up?” (T. IV 710).

Melton also testified in the penalty phase. (T. VII 1040). Melton denied any involvement in the Saylor murder but admitted his involvement in the Carter murder. (1040-1041). He was sorry for Mr. Saylor’s family but he “had nothing to do with it at all” and knew nothing about his death” (T. 1054,1055). He apologized to Mr. Carter’s family but said that “it was an accident” (T. 1054). Melton denied being a cold-blooded killer or murderer. Melton testified that he had not purposely killed Mr. Carter. (T. 1054).

Evidentiary hearing

Paul Sinkfield, who knew Lewis “from the streets” selling drugs testified. (EH Vol. III 450). Lewis was into robbing drug dealers. (EH Vol. III 451). He was in the Escambia County jail with Lewis in late ‘90 or ‘91. (EH Vol. III 452). According to Sinkfield, Lewis and the owner were struggling and Melton “ran over there to help and that’s when the gun went off and the struggle and killed the man.” (III 456). Sinkfield admitted that, if he had been asked about Lewis’ statements back in 1991, he “most likely” would not have told anyone about them because he had his “own issues to worry about.” (EH Vol. III 460).

Sinkfield admitted that although he know that Melton had been sentenced to death, he did not disclose this information because nobody asked him. (EH Vol. III 466). Sinkfield had no explanation for his delay is coming forward. (EH Vol. III 472).

Fred Harris, who was an inmate in the county jail with Lewis, also testified. (EH Vol. IV 632-633). He was close friends with Lewis (EH Vol. IV 633). While Lewis talked to him about the pawn shop murder, Lewis never talked to him about the taxi cab murder during this time. (EH Vol. IV 638). According to Harris, Lewis told him that all three men, Lewis, Melton and the victim Carter, were wrestling when "the gun went off and, boom, we realized that the owner was shot." (634-635). In 1991, someone from the Public Defender's office came to talk with him but he refused to go into details with them because he did not want to be involved. (EH Vol. IV 640). Harris reason for waiting 10 or 11 years to say anything was he is not under any pressure now. (EH Vol. IV 648). Harris has "maybe about 12" felony convictions. (EH Vol. IV 650).

Standard of review

The standard of review for ineffective assistance of counsel is *de novo*. *Cave v. State*, 899 So.2d 1042, 1052 (Fla.

2005)(explaining that because "both prongs of the *Strickland* test present mixed questions of law and fact, we employ a mixed standard of review, deferring to the circuit court's factual findings (if they are supported by competent, substantial evidence) but reviewing the circuit court's legal conclusions *de novo* citing *Stephens v. State*, 748 So.2d 1028, 1033 (Fla.1999)).

The trial court's ruling

The trial court ruled:

> Applying the foregoing ineffective assistance of counsel analysis here and having fully considered Defendant's First and Second Amended Rule 3.850 Motions and the evidence (including the sworn testimony of TDC) and argument at the evidentiary hearing, this Court finds that Defendant has failed to prove the two elements for IAC under Strickland and **claims 3 and 6 related to the guilt phase**. Further, this Court finds that TDC was justified in his actions (to include his trial strategy and tactics) in the guilt phase. Accordingly, this Court concludes that TDC was not ineffective in the guilt phase and, therefore, claims 3 and 6 are denied to the extent that they relate to the guilt phase.

(PCR XII 1962).

Merits

The Florida Supreme Court recently explained the *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) test for ineffective assistance of counsel:

> To establish a claim of ineffective assistance of trial counsel, a defendant must prove two elements: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. In evaluating whether an attorney's conduct is deficient, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' " and the defendant "bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected. Moreover, to establish prejudice [a defendant] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Arbelaez v. State, 898 So.2d 25, 31-32 (Fla. 2005)(citations omitted).

Judge Terrell was the Chief Assistant Public Defender at the time of the trial, he had “a lot of experience handling capital cases.” (EH Vol. I 154). He represented Melton both in the non-capital Saylor trial and the capital Carter trial. (EH Vol. I 155). He was a Board Certified Criminal Trial attorney. (EH

Vol. I 184-185). While Judge Terrell was lead counsel, Judge Terrell also had co-counsel, Samuel Hall, in the Carter case.[4]

There was no deficient performance. Because these inmate witnesses' testimony would be inadmissible, Melton's ineffectiveness claim necessarily fails. There is no point in investigating inadmissible evidence. While Judge Terrell testified that he would have presented the inmates at trial, he did not explain how such testimony would be admissible. (EH Vol. I 169).

Both inmate Sinkfield and Harris were unavailable according to their own testimony. Sinkfield admitted that, if he had been asked about Lewis' statements back in 1991, he "most likely" would not have told anyone about them because he had his "own issues to worry about." (EH Vol. III 460). Harris refused to talk to someone from the Public Defender's office because he did not want to be involved. (EH Vol. IV 640). Counsel is not

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[4] The fact there was co-counsel increases the defendant's burden in postconviction litigation. The *Strickland* standard requires that no reasonable attorney would have adopted the trial tactic at issue, but when there are two attorneys trying the case, it can be presumed that lead counsel at least discussed the tactic with the other attorney. Melton did not call co-counsel to testify at the evidentiary hearing. While Judge Terrell was lead counsel with ultimate responsibility for strategic decisions, Melton did not establish that co-counsel disagreed with any strategic decision.

ineffective for failing to present unavailable witnesses who would have refused to talk with counsel if they were located. *Nelson v. State*, 875 So.2d 579, 583 (Fla. 2004)(explaining that a witness would have been available to testify at trial is integral to the prejudice allegations because if a witness would not have been available to testify at trial, then the defendant will not be able to establish deficient performance or prejudice from counsel's failure to call, interview, or investigate that witness).

Furthermore, as the trial court noted and trial counsel testified, random interviews "are almost uniformly unproductive." It is not an effective use of an attorney's time to randomly investigate inmates that happen to share a cell with co-perpetrators, especially after he has interviewed one inmate to no avail. *Chandler v. United States*, 218 F.3d 1305, 1314 n.14 (11th Cir. 2000)(observing that "courts must recognize that counsel does not enjoy the benefit of unlimited time and resources" and stating "[e]very counsel is faced with a zero-sum calculation on time, resources, and defenses to pursue at trial). While trial counsel may attempt such long shots when it is the only option available, here trial counsel knew that he already had impeachment evidence of Lewis. Lewis testified

that, while he had no deal, he hoped to get probation in the Carter case. Lewis had not been prosecuted in the Saylor murder case. Nor had Lewis been prosecuted for perjury regarding his inconsistent statements in the Saylor case. Counsel had more powerful impeachment evidence already available. Counsel, to be effective, need not seek out less effective impeachment when he has more powerful impeachment at his fingertips.

Nor is there any prejudice. Lewis was extensively impeached at trial. Trial counsel could and did impeach Lewis. Indeed, defense counsel called Lewis lawyer to establish that they both expected Lewis to benefit from his testimony against Melton. These inmates were not believable, just as the trial court found. Their testimony contradict Melton's own trial testimony. Melton admitted shooting the victim in front of the jury. They jury would not have believed them either.

Melton asserts that his lawyer admitted his own ineffectiveness at the evidentiary hearing. IB at 82. Trial counsel's opinion regarding his own effectiveness at trial does not matter. *Mills v. State*, 603 So.2d 482, 485 (Fla.1992)(observing, relying on *Routly v. State*, 590 So. 2d 397, at 401 n.4 (Fla. 1991) and *Kelley v. State*, 569 So.2d 754, 761 (Fla. 1990), that an attorney's own admission that he or she

was ineffective is “of little persuasion”); *Chandler v. United States*, 218 F.3d 1305, 1315 n.16 (11th Cir. 2000)(en banc)(observing that trial counsel’s admission that his performance was deficient at a post-conviction evidentiary hearing “matters little”); *Tarver v. Hopper*, 169 F.3d 710, 716 (11th Cir. 1999) (noting that “admissions of deficient performance are not significant”); *Atkins v. Singletary*, 965 F.2d 952, 960 (11th Cir. 1992) (stating that “ineffectiveness is a question which we must decide, [so] admissions of deficient performance by attorneys are not decisive.”). This is because the *Strickland* standard is objective. If a lawyer testifies that he should have investigated the matter but a reasonable lawyer would not have investigated, there is no deficient performance.

Being busy is not ineffective. *United States v. Zackson*, 6 F.3d 911, 921 (2d Cir. 1993)(observing: “to classify [a busy schedule] as a per se sixth amendment violation, we would have to conclude that virtually all busy defense attorneys . . . who have more than one client . . . are inherently incapable of providing an adequate defense . . . ." and “[t]hat, we are not prepared to do.”); *Commonwealth v. Dahl*, 724 N.E.2d 300, 304 (Mass. 2000)(observing that being busy is inherent in the

practice of any successful criminal lawyer). The trial court properly denied this ineffectiveness claim.

ISSUE V

DID THE TRIAL COURT PROPERLY DENY THE NEWLY DISCOVERED EVIDENCE CLAIM BASED ON TWO INMATES HEARSAY TESTIMONY REGARDING STATEMENTS MADE TO THEM BY THE CO-PERPETRATOR WHO HAS NOT RECANTED? (Restated)

Melton argues two inmates testified that the co-perpertrator Lewis told them that he, Melton and the victim were involved in a struggle when the gun went off and that he is entitled to a new trial (or penalty phase) based on this newly discovered evidence. Lewis did not recant his trial testimony. Lewis did not testify at the evidentiary hearing. The trial court found the inmates' testimony to be incredible. The inmates hearsay testimony conflicts with Melton's own trial testimony and the physical evidence. It would not produce an acquittal or life sentence. The trial court properly denied this claim of newly discovered evidence and this Court should affirm.

Law of the case and jurisdiction

Regarding the other four inmates' testimony about the Saylor taxi cab murder, that issue is not properly before this Court. The First District recently per curiam affirmed Melton's prior convictions in the post-conviction appeal. *Melton v. State*, 909 So.2d 865 (Fla. 1st DCA 2005)(unanimous panel). Melton raised the same claim in his postconviction appeal to the First

District that he presents here, which they rejected. Melton asserted a newly discovered evidence claim based on the six inmates' testimony. Those inmates testified that the evidentiary hearing that Lewis made statements to them that Melton was not the actual shooter in the Saylor taxi cab driver murder. The First District, after expanded briefing and oral argument, rejected this claim.

Melton may not relitigate this issue in this Court. The First District's decision is final and not subject to review by this Court. *State v. Barnum*, 2005 WL 2296638, *8 (Fla. 2005)(noting the district courts have been designed to be the final appellate courts in the state of Florida). The First District issued an unanimous per curiam affirmance and this Court has no jurisdiction to review PCAs. Art. V, § 3, Fla. Const.; *Stallworth v. Moore*, 827 So.2d 974, 978 (Fla. 2002)(holding that Court does not have discretionary review jurisdiction or extraordinary writ jurisdiction to review unelaborated per curiam denials of relief, regardless of whether the denials are in opinion form or by way of unpublished order); *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980)(holding that this Court "lacks jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without

opinion, regardless of whether they are accompanied by a dissenting or concurring opinion . . .”). The First District’s decision is the final word. Melton is appellate court shopping.

Standard of review

A trial court’s denial of a newly discovered evidence claim is reviewed for abuse of discretion. *Mills v. State*, 786 So.2d 547, 549 (Fla. 2001)(noting that “[a]bsent an abuse of discretion, a trial court's decision on a motion based on newly discovered evidence will not be overturned on appeal” citing *Woods v. State*, 733 So.2d 980 (Fla.1999); *State v. Spaziano*, 692 So.2d 174 (Fla.1997); *Parker v. State*, 641 So.2d 369 (Fla.1994)). However, here, the trial court determined that the six inmate witnesses were not credible. A trial court’s credibility findings are findings of fact reviewed under the competent, substantial evidence standard of review. *Lightbourne v. State*, 841 So.2d 431, 438 (Fla. 2003)(concluding that the trial court's finding regarding a witness’ lack of credibility was supported by competent, substantial evidence). The appellate court may "not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses

as well as the weight to be given the evidence by the trial court." *Melendez v. State*, 718 So.2d 746, 747-48 (Fla.1998).

Trial

Bendleon Lewis testified during the guilt phase. (T. IV 624). He was currently charged with the murder and robbery of Mr. Carter. Lewis testified that no promises from the State Attorney had been made regarding his trial testimony. (T. IV 624). Lewis was subpoenaed. (T. IV 625). Melton asked him to help rob the pawn shop. (T. IV 626). They obtained a gun from Phillip Parker and promised him some jewelry and a gun in exchange for use of his gun. (T. IV 627). Lewis went to get the gun and Melton put it in his pants. (T. IV 628,630). They got rubber gloves from the bathroom. (T. IV 629). Melton told him the act like he wanted to pawn a necklace. (T. IV 632). Mr. Carter had a gun in a holster. (T. IV 632). Lewis grabbed Mr. Carter hands to get his gun while Melton pulled his gun on the victim. (T. IV 633). Lewis took the victim's gun from him. (T. IV 634). Melton told Lewis to get the jewelry and put it in the black bag. (T. IV 634). The victim said: "please don't hurt me."(T. IV 635). Melton told him to get jewelry out of the safe while Melton held the gun on the victim. (T. IV 635). Lewis did that and then went

to the front of the store to get more jewelry out of the cases. (T. IV 635). Lewis asked the victim if they could leave by the back door but they could not, so Lewis got the victim's keys to open the side door. (T. IV 636). As Lewis was attempting to open the side door, he heard a shot. (T. IV 636). The victim had cooperated and was not aggressive. (T. IV 637). Lewis testified that there was no struggle between Melton and Mr. Carter. (T. IV 637). Lewis turned around and saw the victim falling from a kneeling position. (T. IV 638). Lewis could not open the side door, so he throw down the keys and ran toward the front door. (T. IV 638). There were two cops at the front door. (T. IV 638).

On cross, Lewis admitted that his testimony could not be used against him because he had use immunity.(T. IV 641-643). Defense counsel explained while Lewis may not have a formal deal, if Lewis said something that the prosecutor did not like, the prosecutor would not be happy and the prosecutor could deny him a deal in the future. (T. IV 645). Defense counsel pointed out that while Lewis did not have a deal, he was hoping for one. (T. IV 645). Lewis admitted that he was hoping for probation on the murder charge. (T. IV 645). Defense counsel pointed out

that he could get the death penalty or life in prison (T. IV 646).

Melton testified in the guilt phase of the Carter pawn shop case. (T. IV 679).[5] Melton testified that they went to the pawn shop because they needed some money. (T. IV 683). Melton testified that Lewis and the owner were talking about Lewis pawning his necklace while he was walking around looking around the store. (T. IV 685). Melton put on gloves because the was going to try to get the rings. (T. IV 685). Lewis also had gloves. (T. IV 686). As Melton was trying to get the rings, thinking that Mr. Carter would not see him, but Mr. Carter turned real quick and saw him and ask him what he was doing. (T. IV 686). Mr. Carter reached for his own gun that he had in his pocket and Lewis grabbed Mr. Carter's arms. (T. IV 686). Melton, who had a gun in the back of his waistband, pulled his gun. (T. IV 686). Melton got Mr. Carter's gun. (T. IV 686). Lewis let Mr. Carter go after Melton got Carter's gun. (T. IV 685). Melton told Mr. Carter to open the cases. (T. IV 686-

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[5] This Court noted that Melton's own testimony at the Carter trial, was "that he carried a gun when he went to the pawn shop to steal some rings and he held a gun on Carter while Lewis gathered up proceeds from the robbery." *Melton*, 638 So.2d at 930 n.5.

867). Mr. Carter opened the cases and Lewis collected the stuff out of the cases. (T. IV 687). Mr. Carter had two other guns on him but Melton did not know this. (T. IV 687). Melton and Mr. Carter went into a little back room with two safes in it.(T. IV 688). After Lewis collected some of the stuff in the safe, Lewis went to the front of the store. (T. IV 688,690). Melton and the victim, Mr. Carter were in the back hallway. (T. IV 688). Melton had a gun on the victim. (T. IV 691). Melton claimed that the victim rushed him and they fell to the floor. (T. IV 691). Lewis came over and hit the victim in his right eye. (T. IV 692). Both of the victims eyes were “bleeding real bad”. (T. IV 693). The victim kept saying “don’t shoot me.” (T. IV 693). Lewis went back to the front of the store. (T. IV 693). Melton testified that Mr. Carter grabbed his hand with the gun in it. (T. IV 694). Melton had his finger on the trigger. (T. IV 695). The gun discharged during this “big struggle.” (T. IV 695). Melton testified that he had no intent to kill when he entered the pawn shop (T. 697). On cross, Melton admitted an intent to rob. (T. 699). On cross, the prosecutor asked: “after <u>you</u> shot Mr. Carter in the head, did he get up?” (T. IV 710).

Melton also testified in the penalty phase. (T. VII 1040). Melton denied any involvement in the Saylor murder but admitted his involvement in the Carter murder. (1040-1041). He was sorry for Mr. Saylor's family but he "had nothing to do with it at all" and knew nothing about his death" (T. 1054,1055). He apologized to Mr. Carter's family but said that "it was an accident" (T. 1054). Melton denied being a cold-blooded killer or murderer. Melton testified that he had not purposely killed Mr. Carter. (T. 1054).

Evidentiary hearing

Paul Sinkfield, who knew Lewis "from the streets" selling drugs testified. (EH Vol. III 450). Lewis was into robbing drug dealers. (EH Vol. III 451). He was in the Escambia County jail with Lewis in late '90 or '91. (EH Vol. III 452). According to Sinkfield, Lewis and the owner were struggling and Melton "ran over there to help and that's when the gun went off and the struggle and killed the man." (III 456). Sinkfield admitted that, if he had been asked about Lewis' statements back in 1991, he "most likely" would not have told anyone about them because he had his "own issues to worry about." (EH Vol. III 460). Sinkfield admitted that although he know that Melton had been sentenced to death, he did not disclose this information because

nobody asked him. (EH Vol. III 466). Sinkfield had no explanation for his delay is coming forward. (EH Vol. III 472).

Fred Harris, who was an inmate in the county jail with Lewis, also testified. (EH Vol. IV 632-633). He was close friends with Lewis (EH Vol. IV 633). While Lewis talked to him about the pawn shop murder, Lewis never talked to him about the taxi cab murder during this time. (EH Vol. IV 638). According to Harris, Lewis told him that all three men, Lewis, Melton and the victim Carter, were wrestling when “the gun went off and, boom, we realized that the owner was shot.” (634-635). In 1991, someone from the Public Defender’s office came to talk with him but he refused to go into details with them because he did not want to be involved. (EH Vol. IV 640). Harris reason for waiting 10 or 11 years to say anything was he is not under any pressure now. (EH Vol. IV 648). Harris has “maybe about 12" felony convictions. (EH Vol. IV 650).

Lewis did not testify at the evidentiary hearing. Lewis has not recanted his trial testimony. Melton has not explained his failure to call Lewis to testify. This Court should take this opportunity to inform the capital defense bar that it will not reverse capital cases when critical witnesses are not called to testify at the post-conviction evidentiary hearing.

The trial court's ruling

The trial court ruled: "This Court finds that the six inmate witnesses were not credible and their testimony, either individually or cumulatively, falls short of the standard required to grant a new trial based upon newly discovered evidence." citing *Melendez v. State*, 718 So.2d 746 (Fla. 1998). (PCR. XII 2011). The trial court, adopting the State's closing argument, noted that Melton did not call Lewis to testify at the evidentiary hearing to confirm or deny that he made these statements to these inmates. (PCR. XII 2012). The witnesses to these alleged statements of Lewis' are convicted felons who failed to come forward for years. (PCR. XII 2013).

Regarding the two inmates, Sinkfield and Harris, the trial court found, the alleged NDE about the Carter pawnshop murder does not meet the requisite standard to afford defendant relief on the postconviction motion. The trial court repeated its findings in the non-capital Saylor taxi cab murder case "relating to the credibility of the inmate witnesses." (PCR XII 1961). The postconviction court also noted that the inmates testimony that "Lewis was the one who had the gun and who shot

Carter is contrary to Melton's own trial testimony at the pawn shop trial in which he admitted having a gun when he and Lewis entered the pawn shop and admitted shooting and killing the victim." (PCR XII 1961 citing CC 686, 695, 698, 700). The postconviction court also noted:

> Further, when Melton and Lewis were caught red-handed trying to leave the store immediately after the shooting, the murder weapon was in Melton's possession (CC 503, 562), and the Victim's blood was on Melton's pants and gloves (CC 568). Given this damning evidence and Melton's own testimony that he was the shooter, it is not probable that the jury or the Court have credited testimony from two jail inmates indicating that Lewis was the shooter. (PCR XII 1961 citing CC 503,562).

(PCR XII 1961).

Merits

In *Jones v. State*, 709 So.2d 512 (Fla.1998), the Florida Supreme Court addressed the two-prong test for determining whether a conviction should be set aside on the basis of newly discovered evidence: (1) to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence, and (2) the newly discovered evidence must be of such nature that it would probably produce an acquittal on

retrial. To reach this conclusion the trial court is required to consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial. *Jones*, 709 So.2d at 521.

In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. Once this is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether the evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence. *Lightbourne v. State*, 841 So.2d 431, 440 (Fla. 2003).

Melton does not meet the requirements for a new trial based on newly discovered evidence established in *Jones* and *Lightbourne*. First, Melton does not explain his theory of admissibility even in the face of the trial court's expressions of doubt as to the admissibility of this evidence. (PCR XII 2012). Counsel does

not even attempt to establish a hearsay exception to cover the admissibility of these statements. *Kokal v. State*, 901 So.2d 766, 775-776 (Fla. 2005)(finding an inmate's testimony would not have been admissible at trial because it constituted inadmissible hearsay and was not admissible pursuant to the statement against interest exception to the hearsay rule, since the defendant failed to demonstrate that the declarant was unavailable to testify and concluding "on this basis alone the trial court properly denied Kokal's newly discovered evidence claim." but also noting that Hutto could be easily impeached because Hutto's testimony contradicted other evidence presented at trial, most notably the testimony of Kokal himself.).

The trial court properly weighed the newly discovered evidence against the evidence which was introduced at the trial. The trial court found the inmates' testimony to be incredible. The inmates did not explain their long delay in coming forward. *Herrera v. Collins*, 506 U.S. 390, 423-424, 113 S.Ct. 853, 872, 122 L.Ed.2d 203 (1993)(observing, in a capital case, where the inmates affidavits exonerating the defendant were given over eight years after petitioner's trial, that "[n]o satisfactory explanation has been given as to why the affiants waited until the 11th hour--and, indeed, until after the alleged perpetrator

of the murders himself was dead--to make their statements.). As Justice O'Connor noted:

> Affidavits like these are not uncommon, especially in capital cases. They are an unfortunate although understandable occurrence. It seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism. These affidavits are no exception. They are suspect, produced as they were at the 11th hour with no reasonable explanation for the nearly decade-long delay.

Herrera v. Collins, 506 U.S. 390, 423-424, 113 S.Ct. 853, 872, 122 L.Ed.2d 203 (1993) (O'Connor, J., concurring). She also noted that the defendant had delayed presenting his new evidence until eight years after conviction – without offering a "semblance of a reasonable excuse for the inordinate delay." The trial court may consider both the length of the delay and the reason the witness failed to come forward sooner. *Lightbourne v. State*, 841 So.2d 431, 438-440 (Fla. 2003)(finding competent, substantial evidence to support the trial court findings that an inmate who was in the same jail cell as the defendant was not credible based in part on evasive answer to questions as to why he waited so long to tell the truth and on his prior convictions and agreeing with the trial court's conclusion that the testimony of all the jailhouse informants was "just not worthy of much belief" in a case where the two

other inmates' testimony "was sufficiently undermined during the original trial.").

The trial court here did just as the United States Supreme Court suggested it do - it treated such testimony with a fair degree of skepticism and found it to be suspect, because it was produced at the 11th hour with no reasonable explanation for the delay. Moreover, the trial court did just as this Court has done in numerous similar cases. *Kokal v. State*, 901 So.2d 766, 775-776 (Fla. 2005)(denying a newly discovered evidence claim based an inmate affidavit of an inmate who shared a cell with the another inmate who allegedly told this inmate that he, not the defendant, was the actual shooter); *Melendez v. State*, 718 So.2d 746, 747-48 (Fla.1998)(denying a newly discovered evidence claim where the defendant claimed that another man was the killer and presented five other witnesses at the evidentiary hearing who testified the killer had made incriminating statements to them about the murder but the trial court found these witnesses not credible);*Jones v. State*, 709 So.2d 512 (Fla.1998)(denying relief on a newly discovered evidence claim); *Lightbourne v. State*, 841 So.2d 431, 440 (Fla. 2003)(denying relief on a newly discovered evidence claim).

Of course, these inmates also could be impeached with their extensive prior felony convictions. Sinkfield had 20 prior convictions. Harris has “maybe about 12" felony convictions. Both these inmates have numerous felony convictions.

Melton’s own testimony at the Carter trial was that he shot the victim during a struggle. Melton did not testify that Lewis was involved in the struggle, according to Melton it was just him and Mr. Carter involved in the final struggle.(T. 695). Melton’s own trial testimony was that Lewis was in the front of the store at the time of the fatal shooting. Melton was an eyewitness (albeit perpetrator/eyewitness); whereas, these inmates were not. No jury would believed these two inmates over the defendant’s own confession on the stand. *Kokal v. State*, 901 So.2d 766, 775-776 (Fla. 2005)(noting that Hutto could be easily impeached because Hutto's testimony contradicted other evidence presented at trial, most notably the testimony of Kokal himself.). Furthermore, Melton was caught just outside the pawn shop with a gun and with the victim’s blood on him. So, Melton’s version at trial matched the physical evidence; whereas, the inmates’ hearsay version does not. Nor does this hearsay evidence provide much impeachment. Both Melton and Lewis’ trial testimony was that Lewis was at the door at the

time of the fatal shooting; whereas, the inmates asserted that Lewis told them he was involved in the struggle. According to inmate Harris, Lewis told him that all three men, Lewis, Melton and the victim Carter, were wrestling when “the gun went off and, boom, we realized that the owner was shot.” According to inmate Sinkfield, Lewis and the owner were struggling and Melton “ran over there to help and that’s when the gun went off and the struggle and killed the man.”. Lewis’s alleged statements to Harris or Sinkfield, does not identify who was the actual shooter. Melton could still be the actual shooter even if Lewis was involved in a three man struggle. Even if Lewis was involved in the struggle, that does not change the fact that Melton fired the fatal shot. Furthermore, the State’s case was that there was no struggle at the time of the shooting.

The trial court found the these inmates’ testimony incredible. The trial court properly denied this claim of newly discovered evidence and its factual finding that these inmates are not credible should be affirmed.

ISSUE VI

WHETHER THE PRIOR VIOLENT FELONY AGGRAVATOR IS VALID? (Restated)

Melton contends that an invalid prior conviction was used as the prior violent felony aggravator at the penalty phase in violation of *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). IB at 88. The State introduced the first degree felony murder and the armed robbery conviction in the Saylor taxi cab driver murder as a prior violent felony aggravator in this capital case. The First District has recently affirmed the conviction. So, there is no basis for a *Johnson* claim.

In *Phillips v. State*, 894 So.2d 28, 36 (Fla. 2004), this Court explained that to state a claim under *Johnson*, a defendant must show that the conviction on which the prior violent felony aggravator is based has been reversed. In *Phillips*, the State had presented evidence of two prior felony convictions. The *Phillips* Court noted that Phillips failed to demonstrate and the record did not indicate that either of the two convictions has been set aside, vacated, or reversed. So, *Johnson* simply did not apply. *Phillips*, 894 So.2d at 36 (citing *Henderson v. Singletary*, 617 So.2d 313, 316 (Fla. 1993)(noting because the "the Putnam County convictions have not been vacated, *Johnson v.*

Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), is inapplicable.")).

Melton's prior convictions, in fact, were affirmed in both the direct appeal and the post-conviction appeal. The First District affirmed Melton's convictions for first degree felony murder and armed robbery on direct appeal. *Melton v. State*, 611 So.2d 116 (Fla. 1st DCA 1993). The First District also recently per curiam affirmed Melton's prior convictions in the post-conviction appeal. *Melton v. State*, 909 So.2d 865 (Fla. 1st DCA 2005)(unanimous panel). Melton raised the same claims in his postconviction appeal to the First District that he presents here, which they rejected. Melton argued (1) the prosecutor in the Saylor case violated the dictates of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) by withholding a defense witness' statement to another inmate in which the defense witness, Lewis, admitted being closer to the shooting than his testimony; (2) an ineffective assistance of counsel for failing to discover that the defense witness Lewis was making these statements and (3) newly discovered evidence based on the six inmates' testimony that Lewis made statements that Melton was not the actual shooter in the cab driver murder. The First District, after oral argument, rejected all these claims as well

as the additional issues raised. A defendant, whose prior convictions have been affirmed rather reversed, lacks any basis for a *Johnson* claim. Here, as in *Phillips* and *Henderson*, *Johnson* simply does not apply.

ISSUE VII

DID THE TRIAL COURT PROPERLY FIND COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S ARGUMENT? (Restated)

Melton asserts his trial counsel was ineffective for failing to object to the prosecutor's argument. There was no deficient performance because none of the prosecutor's comments were objectionable. Trial defense is not ineffective for not making baseless objections during closing argument. Nor is there any prejudice. Had trial counsel objected, the trial court would have overruled the objection. Thus, the trial court properly denied this claim of ineffectiveness.

The trial court's ruling

The trial court ruled:

> Defendant alleges prosecutorial error by making improper and highly prejudicial comments during guilt phase closing argument. These claims present direct appeal issues, and therefore are summarily denied. *Griffin v. State*, 866 So.2d 1, 15 (Fla. 2003)(citing *Valle v. State*, 705 So.2d at 1335 and *Harvey v. Dugger*, 656 So.2d at 1256). Further, an incidental IAC claim may not be used to circumvent a procedural bar. In other words. a defendant may not relitigate procedurally barred claims by couching them in terms of ineffective assistance of counsel. *Ventura v. State*, 794 So.2d 553, 560 n.6 (Fla.2001); see also *Arbelaez v. State*, 775 So.2d 909, 915 (Fla.2000).

(PCR XII 1952-1953).

Procedural bar

The straight prosecutorial comment claim is procedurally barred. *Griffin v. State*, 866 So.2d 1, 15 (Fla. 2003)(rejecting a claim that the prosecutor engaged in improper argument and concluding that the circuit court properly summarily denied this claim as being procedurally barred in relation to the substantive claims which were preserved by objection at trial are procedurally barred as they could have and should have been raised on direct appeal). Melton is improperly attempting to morph the issue into an ineffectiveness claim on appeal but it was not presented as an ineffectiveness claim to the trial court.

Merits

There was no deficient performance. The prosecutor's comments were not objectionable. Trial counsel is not ineffective for not objecting to proper comments.

Collateral counsel complains that the prosecutor described the victim's wounds. This is perfectly proper. Those were the facts of the case. Melton's won trial testimony was that both of the victims eyes were "bleeding real bad". (T. IV 693). A

prosecutor may describe the victim's wounds. This is not objectionable. Any objection would have been baseless.

Collateral counsel also quotes the prosecutor statements regarding the victim pleading for his life. This is not a golden rule argument. A "golden rule" argument asks the jurors to place themselves in the victim's position, to imagine the victim's pain and terror, or to imagine how they would feel if the victim were a relative. *Zack v. State*, 911 So.2d 1190, 1207 (Fla. 2005) The prosecutor was not asking the jurors to place themselves in the victim's shoes. *Pagan v. State*, 830 So.2d 792, 813 (Fla.2002)(rejecting a golden rule argument because "[t]he argument Pagan complains of in no way violates the prohibition against such arguments and "[t]he prosecutor did not ask the jury to place themselves in the victim's position, to imagine the victim's pain and terror, or to imagine that their relative was the victim.). Any objection based on golden rule would have been overruled.[6]

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[6] The proper objection would have been based on imaginary script. However, the caselaw regarding such scripts did not exist in 1992 when this case was tried. Trial counsel is not effective for failing to make objections based on caselaw that does not yet exist. Furthermore, there was evidence to support the prosecutor's argument. According to Melton's own trial testimony, the victim "kept saying don't shoot me." (T. IV 693). Lewis testified that the victim said: "please don't hurt me."(T.

Collateral counsel quotes the prosecutor's comments regarding the professional conduct of the officer as vouching for the credibility of the officers. The prosecutor was describing the swift actions of the officers responding to the call. The officers "were in the right spot at the right time". They caught the defendants as they were coming out of the pawn shop. He explained that the officer got "control of the situation and the individuals". This is not vouching. This is characterizing the officers' actions at the crime scene, not the credibility of their testimony at trial. Any objection would have been baseless.

Collateral counsel quotes the prosecutor's description of the medical examiner's testimony and argues that this is bolstering. The prosecutor may highlight an expert's qualification. This is not improper bolstering. Any objection would have been baseless.

Nor is there any prejudice. Had trial counsel objected to the comments, the trial court would have merely overruled any objection. Melton argues that the prejudice is that he was convicted only of felony murder, not premeditated murder. This

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IV 635). So, in this particular case, the prosecutor argument was supported by the evidence, unlike cases where this Court has

cannot be the prejudice. The prejudice is limited to whether the trial court would have sustained the objection and granted a mistrial. To the extent that one can look at after the fact jury verdicts for prejudice, the verdict is evidence that the prosecutor's comment did not sway the jury.

Melton seems to believe that a jury convicting him of only felony murder is somehow an acquittal of being the actual triggerman. It is not. It is merely a finding of no premeditation. One may be convicted of felony murder and be the actual shooter. Furthermore, this Court found Melton to be the actual triggerman in the direct appeal. The Melton Court stated: "the evidence is clear that Melton held a .38-caliber gun on Carter and fired the fatal shot." *Melton v. State*, 638 So.2d 927, 929 (Fla. 1994). There was no prejudice from counsel's failure to object. Thus, the trial court properly summarily denied this claim of ineffectiveness.

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held imaginary script argument were beyond the testimony. Any imaginary script objection would have been overruled as well.

ISSUE VIII

DID THE TRIAL COURT PROPERLY SUMMARILY DENY THE INEFFECTIVENESS CLAIM RELATING TO JURY SELECTION? (Restated)

Melton asserts that his trial counsel was ineffective for failing to object to the prosecutor challenging several black female prospective jurors for cause. There was no deficient performance. Trial counsel did object. Furthermore, there was no prejudice. These prospective jurors were properly stricken for cause. Thus, the court properly summarily denied this claim.

The trial court's ruling

Melton raised his fair cross-section issue as claim 9 in his first amended motion. Melton did not frame the issue as an ineffective assistance of trial counsel claim. The trial court ruled:

> Defendant claims that he was tried by a petit jury which was not a fair cross-section of the community resulting in the systematic exclusion of a significant portion of the non-white population form the jury pool. This claims presents a direct appeal issue, and therefore is summarily denied. See Moore v. State, 820 So.2d at 203.

(PCR XII 1951).

Procedural Bar

This issue is procedurally barred. The straight fair cross-section claim is an issue should have been raised in the direct appeal. *Reaves v. State* 826 So.2d 932, 936, n.3 (Fla. 2002)(finding a claim on whether the jury was a fair cross-section of the community to be procedurally barred because it either was or should have been raised on direct appeal.); *Bottoson v. State*, 674 So.2d 621, n.1 (Fla.1996)(finding *Neil* claim was procedurally barred in postconviction litigation because he had failed to raise the issue in his direct appeal). Melton is improperly attempting to morph the issue into an ineffectiveness claim on appeal but it was not presented as an ineffectiveness claim to the trial court.

Jury selection

Jury selection began on January 27, 1992. The prosecutor challenged prospective Juror Rosetta King for cause because she did not believe the death penalty was appropriate under any circumstances. (T. Vol. I 184). Defense counsel objected and the trial court allowed defense counsel to individual question her. (T. Vol. I 186). She knew the defendant's grandmother which she thought would influence her decision. (T. Vol. I 187,188). Prospective Juror King stated that she could not find

the defendant guilty even if the evidence was overwhelming and the defendant was clearly guilty (T. Vol. I 190). The trial court then granted the challenge for cause. (T. Vol. I 190).

Prospective Juror Lila Hopkins also knew the defendant's family.

(T. Vol. I 191). Defense counsel again requested individualized voir dire (T. Vol. I 192). Defense counsel then noted that he would like the record to reflect that Prospective Juror Williams, King and now Hopkins were black. (T. Vol. I 192). The trial court stated that there were "four blacks on the jury who almost in sequence pretty well disqualified themselves." (T. Vol. I 192). Defense counsel then attempted to rehabilitate Ms. Hopkins (T. Vol. I 193). She said it would be stressful to find the defendant guilty because she knew the family and she did not believe in capital punishment. (T. Vol. I 193-194). She knew the family for 30 years. (T. Vol. I 196). She probably could find the defendant guilty and it would not embarrass her but she could not vote for death. (T. Vol. I 196,199). The trial court then granted a challenge for cause. (T. Vol. I 200).

Prospective Juror Williams had a close cousin that was prosecuted for drugs. (T. Vol. II 238). The prosecutor was concerned about using a peremptory challenge due to her race, so

he challenged her for cause. The trial court denied the challenge for cause and the prosecutor requested individualized voir dire. (T. Vol. II 239). She assured the prosecutor that she could be a fair and impartial jury. (T. Vol. II 240). The prosecutor then withdrew any challenge. (T. Vol. II 241).

Prospective Juror Campbell was 69 years old and taking medication every two hours. (T. Vol. II 261-262). Defense counsel asked to individually voir dire her. (T. Vol. II 261). She was having a difficult time. (T. Vol. II 262). She had headaches, arthritis, high blood pressure and a heart condition. (T. Vol. II 263). She did not think she could sit through the trial and "barely made it through" jury selection. (T. Vol. II 263-264). She just could not sit through the trial due to her "very bad" health. (T. Vol. II 265-266). Defense counsel then noted that he did not have any objections to Ms. Campbell being excused. (T. Vol. II 266).

Prospective Juror Stanley objected to the death penalty and had the flu. (T. Vol. II 329-330). Defense counsel again requested individualized voir dire.(T. Vol. II 330). She did not think that the death penalty was appropriate. (T. Vol. II 331). She did not believe in the death penalty.(T. Vol. II 332,333). There were no circumstances under which she could

recommend the death penalty. (T. Vol. II 334). While she was not sick now, she was just recovering from the flu and still had a sore throat. (T. Vol. II 332). The trial court then granted the challenge for cause. (T. Vol. II 334).

Merits

There was no deficient performance. Trial counsel did object. Defense counsel noted the race of three of the prospective jurors who were stricken. (T. Vol. I 192). These prospective jurors were stricken for cause, so defense counsel did not have to renew his objection prior to the jury being sworn to preserve the issue for appeal. That requirement applies to peremptory challenges, not challenges for cause. Counsel performance's during jury selection was not deficient.

Furthermore, there was no prejudice. Melton has not established a prima facie case of juror discrimination. Melton complains about the prosecutor's "grilling" of black prospective jurors. Most of the individualized voir dire was requested by defense counsel in an effort to rehabilitate the prospective jurors, who had, in the trial court words, "disqualified themselves." Furthermore, the challenges for cause were proper. Most of the challenges for cause were based on the prospective

jurors stating under oath that they could not find the defendant guilty or impose the death sentence under any circumstances or both. One prospective jurors was in such poor health that she had difficulty sitting through jury selection and obviously could not sit through an entire trial. These challenges for cause were perfectly proper. So, there was no prejudice. This claim of ineffectiveness should be denied.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of the 3.851 motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing AMENDED ANSWER BRIEF has been furnished by U.S. Mail to D. Todd Doss, 725 SE Baya Drive Suite 102, Lake City FL 32025 this 12th day of December, 2005.

_____

Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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