IN THE SUPREME COURT OF FLORIDA

THOMAS OVERTON,

Appellant,

vs. Case No. SC05-964

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTEENTH JUDICIAL CIRCUIT,
IN AND FOR MONROE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, THOMAS OVERTON, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the postconviction record will be by the symbol "PCR," followed by the appropriate page number and reference to the record on direct appeal will be by the symbol “ROA” followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On August 22, 1991, Susan Michelle MacIvor, age 29, and her husband, Michael MacIvor, age 30, were found murdered in their home in Tavernier Key. Susan was eight months pregnant at the time with the couple's first child.

Susan and Michael were last seen alive at their childbirth class, which ended at approximately 9 p.m. on August 21, 1991. Concerned co-workers and a neighbor found their bodies the next morning inside the victims' two-story stilt- house located in a gated community adjacent to a private airstrip.

Once law enforcement officers arrived, a thorough examination of the house was undertaken. In the living room, where Michael's body was found, investigators noted that his entire head had been taped with masking tape, with the exception of his nose which was partially exposed. He was found wearing only a T-shirt and underwear. There was a blood spot on the shoulder area of the tee-shirt. When police removed the masking tape, they discovered that a sock had been placed over his eyes, and that there was slight bleeding from the nostril area. Bruising on the neck area was also visible. The investigators surmised that a struggle had taken place because personal papers were scattered on the floor near a desk, and the couch and coffee table had been moved. A small plastic drinking cup was also found beside Michael's body.

Continuing the search toward the master bedroom, a piece of clothesline rope was found just outside the bedroom doorway. Susan's completely naked body was found on top of a white comforter. Her ankles were tied together with a belt, several layers of masking tape and clothesline rope. Her wrists were also bound together with a belt. Two belts secured her

bound wrists to her ankles. Around her neck was a garrote formed by using a necktie and a black sash, which was wrapped around her neck several times. Her hair was tangled in the knot. Noticing that a dresser drawer containing belts and neckties had been pulled open, officers believed that the items used to bind and strangle Susan came from inside the home. Her eyes were covered with masking tape that appeared to have been placed over her eyes in a frantic hurry. Under the comforter upon which the body rested were several items which appeared to have been emptied from her purse. Also under the comforter was her night shirt; the buttons had been torn off with such force that the button shanks had been separated from the buttons themselves. Near the night shirt were her panties which had been cut along each side in the hip area with a sharp instrument.

Within the master bedroom, the investigators also found a .22 caliber shell casing, and somewhat later a hole in a bedroom curtain was noticed. Also in that bedroom, the officers found an address book with some pages partially torn out.

The sliding glass door in the bedroom was open and a box fan was operating. There had been a heavy rain storm the night before and the heat and humidity were quickly rising. As a result of these conditions, Susan's body was covered with moisture. The investigators used a luma light to uncover what presumptively appeared to be seminal stains on Susan's pubic area, her buttocks, and the inside of her thighs. The serologist later testified that he collected what appeared to be semen from Susan's body with swab applicators. Three presumptive seminal stains also appeared on the fitted sheet. Within close proximity to one of the seminal stains on the fitted sheet, a stain which appeared to be dried feces was located. It was also noticed that Susan had fecal matter in her buttocks area. Ultimately, the officers

took the comforter, fitted sheet, and mattress pad into evidence.

The investigation next proceeded to a spare bedroom, which was then being renovated for use as a nursery for the baby. The sliding glass door in that room was also open. A ladder was found propped up against the balcony outside the nursery. Cut clothesline rope was hanging from the balcony ceiling, and outside the home, the phone wires had been recently cut with a sharp instrument.

The medical examiner's testimony at trial established multiple factors. As to Michael, the autopsy revealed that he suffered a severe blow to the back of the head. The external examination of Michael's neck revealed several bruises particularly around the larynx, along with ligature marks which indicated that the device used to strangle Michael had been wrapped around his neck several times, n1 and that pressure was applied from behind. The internal examination of Michael's neck confirmed that his larynx, as well as the hyoid bone and epiglottis, had been fractured. There was also bruising and an internal contusion indicative of a heavy blow to the back of the neck. The internal examination of the neck area revealed that the neck was unstable and dislocated at the fifth cervical vertebrae. There was also internal bleeding in the left shoulder, indicative of a severe blow to the area. Additionally, Michael had significant bruising in his abdominal area causing a contusion fairly deep within the abdomen. The doctor testified that the injury could have been inflicted by a strong kick to the area. Based on his observations, the doctor opined that the cause of death was asphyxiation by ligature strangulation (rope).

He added that Michael could have been rendered unconscious ten to fifteen seconds after the ligature was applied, or that it

could have taken longer depending on the pressure applied.

With respect to Susan, the external examination of her face revealed that she had received several slight abrasions. The ligature marks around her neck indicated that she was moving against the ligature, thereby causing friction. Also, the discoloration in her face indicated that blood was not exiting the head area as fast as it was entering. According to the medical examiner, this is indicative of an incomplete application of the ligature, which demonstrated that, more likely than not, a longer period of time passed before Susan lost consciousness once the ligature was applied. Her wrists also exhibited ligature marks and her hands were clenched. Moving down to her lower body, an abrasion to her vulva and several abrasions to her legs indicative of a struggle were found. The medical examiner concluded, based on the totality of the circumstances, that she had been sexually battered. When interrogated for an explanation of the presence of feces in the rectal area, the doctor determined that it could have happened either at the time of death or it could have been caused by her fear.

The medical examiner determined that Susan was approximately eight months pregnant at the time and proceeded to examine the fetus. The doctor determined that the baby would have been viable had he been born, and that he lived approximately thirty minutes after his mother died. The doctor testified that there was evidence that he tried to breath on his own.

Dr. Pope, the serologist, examined the bedding and made cuttings in accordance with the markings he had made at the scene. One of the stains from the fitted sheet and another stain from the mattress pad tested positive for sperm. The cuttings were later sent to FDLE for DNA testing. n2 Examination of the swabs from

Susan's body failed to reveal the presence of sperm cells. n3

The discovery of this death scene produced a large-scale investigation, and comparable media coverage focused on the murders. Over the years following the murders, law enforcement agencies investigated several potential suspects. Through this investigatory process, Thomas Overton's name was brought up during a brain-storming session in May 1992. The reason he was considered a suspect was because he was a known "cat burglar," whom police suspected in the murder of 20-year-old Rachelle Surrett. n4 At the time of the MacIvor murders, Overton worked at the Amoco gas station which was only a couple of minutes away from the MacIvor home. Janet Kerns, Susan's friend and fellow teacher, had been with Susan on several occasions when Susan pumped gas at that Amoco station. No further investigation was undertaken with respect to Overton at that time.

In June of 1993, the cuttings from the bedding were sent to the FDLE lab in Jacksonville where James Pollock, an expert in forensic serology and DNA identification, proceeded to examine the cuttings. Through a process known as restriction fragment length polymorphism ("RFLP"), Dr. Pollock was able to develop a DNA profile from two of the cuttings (i.e., one cutting from the fitted sheet and another from the mattress pad). Specifically, the profile was developed by examining the DNA at five different locations, known as loci, within the chromosomes. Dr. Pollock compared the profile to samples from several potential suspects. No match was made at that time.

In late 1996, Overton, then under surveillance, was arrested during a burglary in progress. Once in custody, officers asked him to provide a blood sample, which Overton refused. Days later, Overton asked correction officers for a razor, and one was provided. Overton removed the blade from the plastic

> razor using a wire from a ceiling vent, and made two cuts into his throat. n5 The towel that was pressed against his throat to stop the bleeding was turned over to investigators by corrections officers. Based on preliminary testing conducted on the blood from the towels, police obtained a court order to withdraw the defendant's blood for testing.
>
> In November of 1996, over five years after the murders, Dr. Pollock was able to compare the profile extracted from the stains in the bedding to a profile developed after extracting DNA from Overton's blood. After comparing both profiles at six different loci, n6 there was an exact match at each locus. Dr. Pollock testified that the probability of finding an unrelated individual having the same profile was, conservatively, in excess of one in six billion Caucasians, African- Americans and Hispanics.

Overton v. State, 801 So.2d 877 Fla. 2001).

Appellant filed a second amended motion for postconviction relief in November 2003. The state's response was filed on December 30, 2003. A case management hearing was conducted on March 26, 2004. On April 4, 2004, the trial court rendered its decision granting a hearing on several claims. The evidentiary hearing commenced on November 15, 2004 and terminated on November 18, 2004. Post hearing memorandums were filed on December 20, 2004. On February 14, 2005, the trial court rendered a forty-three page opinion denying all relief. (PCR 2823-2870). Appellant timely appealed.

SUMMARY OF ARGUMENT

Issue I - The trial court correctly found that trial counsel did provide effective assistance of counsel at the guilt phase.

Issue II - The trial court properly found that defense counsel made reasonable strategic decisions involving the impeachment of state witness James Zeinteck.

Issue III - The trial court correctly determined that defense counsel adequately investigated all possible defenses for the guilt phase, including a potential alibi defense.

Issue IV - The trial court properly denied appellant's claim that defense counsel was ineffective for failing to challenge the burglary count based on the statute of limitations.

Issue V - The trial court correctly denied appellant's claim that counsel was should have argued that the pre-indictment delay prejudiced his defense and required a dismissal of the charges.

Issue VI - The trial court correctly determined that there was no conflict of interest between Overton and counsel.

Issue VII - The trial court correctly determined that the state did not withhold evidence any evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963).

Issue VIII - Appellant's challenge to the trial court's summary denial of several claims is waived due to the cursory fashion in which it has been presented.

ARGUMENT

ISSUE I

THE TRIAL COURT DENIED PROPERLY FOLLOWING A FULL AND FAIR HEARING, APPELLANT'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE

Overton claims that trial counsel, Manny Garcia and Jason Smith, made no meaningful attempt to investigate and prepare to challenge the admissibility of DNA evidence at a Frye[1] hearing and later at trial in violation of Strickland v. Washington, 466 U.S. 668 (1984). Specifically appellant asserts that trial counsel was ineffective for failing to present evidence at the Frye hearing that "STR DNA" testing was not generally accepted within the scientific community. Second, the "STR DNA" testing procedures conducted in the instant case did not adhere to the applicable procedures and protocols. **Initial brief at 58-59**. And third, "the methods used by the Monroe County Sheriff's office in collecting and storing the evidence was below the standards in the scientific community for acceptable preservation. **Initial brief at 68**. Following an evidentiary

[1] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

hearing on these claims,[2] the trial court denied all relief. Prior to detailing its findings the Court noted,

> The Defendant's claims at the evidentiary hearing generally just echoed the arguments and mirrored the evidence presented at trial. Even the ineffective assistance of counsel claims were basically restatements of the issues raised on appeal under a different label.

(PCR 2844). In rejecting relief the Court found,

> The problem with this part of the Defendant's claim (and many of the others) is that while he alleges that Counsel was ineffective by failing to participate in the *Frye* hearing, he does not allege how he was prejudiced. At the time of the hearing in November 2004, almost six years had passed since the Defendant was convicted. Yet in all that time, the Defendant has been unable to discern a basis for a claim of prejudice. With the evidence against him a matter of record and subject to the most exacting scrutiny, even in hindsight the Defendant has not pointed out one prejudicial error in the science in general of the methodology used in this case in particular. As the cases make clear, the subjective assertion that Counsel should have done something different is not enough unless one can also point how that action or absence of action had a prejudicial impact on the Defendant's defense.

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[2] Appellant was granted a hearing on the following claims related to the admissibility of DNA testing: counsel was ineffective for failure to prepare for the Frye hearing; counsel was ineffective for failing to educate themselves in DNA analysis, counsel failed to utilize his expert witness to rebut the State's DNA expert and in particular, failed to impeach the State's witnesses with respect to the chain of custody; counsel was ineffective for failure to present the Defendant's affirmative defense that his DNA had been planted on the evidence after the fact; counsel failed to obtain the additional testing recommended by the Defendant's DNA expert. (PCR 2839-2840).

(PCR 2849)(emphasis added).

The trial court also rejected completely appellant's assertion that the DNA evidence was unreliable because of a suspect chain of custody. The Court determined,

> The Defendant seeks to give some credence to his claim by alleging that the chain of custody was flawed. To establish this, the Defendant uses a selective reading of the trial transcript. Specifically, the Defendant points out that the Detective Robert Petrick, Sr. who signed the bedding collected at the crime scene into the evidence room, testified that the paper bag containing the sheet stained with the semen was not the same one as he used, not attached and the writing on it was not his. Dr. Donald W. Pope, the forensic serologist, cleared up the mystery. The writing was his.

(PCR 2846).

> As a result of this review of this trial testimony, there can be no doubt that the chain of custody was absolutely intact and well documented. There was never an opportunity for the DNA evidence to become corrupted or contaminated through inadvertance, negligence, or malice. Indeed both Dr. Bever and Dr. Pollack testified at the evidentiary hearing that the DNA was minimally degraded if at all.

(PCR 2847).

On appeal, appellant states that the trial court, "failed to conduct a proper analysis, failed to cumulatively consider the trial counsel's deficiencies, and failed to recognize the prejudice Mr. Overton suffered because of counsel's errors." **Initial brief at 49.** The state asserts that the trial court's

factual and legal conclusions are supported by both the original record on appeal and the postconviction record and therefore must be affirmed on appeal. See Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999)(recognizing deference given to trial court's assessment of credibility and findings of fact); Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997)(reasoning standard of review following Rule 3.850 evidentiary hearing is that if factual findings are supported by substantial evidence, appellate court will not substitute its judgment for trial judge's on questions of fact, credibility, or weight). However, the trial court's legal conclusion regarding the attorneys' performance is subject to an independent *de novo* review. Stephen 748 So. 2d at 1034 (Fla. 1999).

In order to be entitled to relief on this claim, Overton must demonstrate the following:

> 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.

Strickland, 466 U.S. at 687 The Court explained further what it meant by "deficient":

> Judicial scrutiny of counsel's performance must highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every

> effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 689 (citation omitted).).

The Court also makes clear in Williams v. Taylor, 529 U.S. 362 (2000) that the focus is on what efforts were undertaken in the way of an investigation of the defendant's background and why a specific course of strategy was ultimately chosen over a different course of action. The inquiry into a trial attorney's performance is not an analysis between what one attorney could have done in comparison with what was actually done. The Eleventh Circuit Court of Appeals recounts the state of law as follows:

> I. The standard for counsel's performance is "reasonableness under prevailing professional norms." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); accord Williams v. Taylor, --- U.S. ----, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389 (2000) (most recent decision reaffirming that merits of ineffective assistance claim are squarely governed by Strickland). The purpose of ineffectiveness review is not to grade counsel's performance. See Strickland, 104 S.Ct. at 2065; see also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir.1992) ("We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately."). We recognize that "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in

> another." Strickland, 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or "what is prudent or appropriate, but only what is constitutionally compelled."[12] Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L. Ed.2d 638 (1987)(emphasis added).
>
> [12] "The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is ... whether what they did was within the 'wide range of reasonable professional assistance.'" Waters, 46 F.3d at 1518 (en banc) (citations omitted)(emphasis added).

Chandler v. United States, 218 F.3d 1305, 1313 n. 12 (11th Cir. 2000).

It is always possible to suggest further avenues of defense especially in hindsight. Rather the focus is on what strategies were employed and was that course of action reasonable in light of what was known at the time. See also Henry v. State, 862 So. 2d 679 (Fla. 2003). With these principles in mind, it is clear that counsel, Jason Smith and Manny Garcia, provided constitutionally adequate representation.

Appellant argues that counsel should have challenged the methodology and protocol of FDLE and the Bode Laboratory as they related to the DNA testing conducted in this case. Also,

counsel should have argued at a Frye hearing, that the "alleged suspect chain of custody" theory would have somehow led the trial court to determine that the DNA testing conducted herein did not pass the Frye analysis. Overton's claim was denied properly as he failed to meet his evidentiary burden. Overton did not present any evidence that the DNA evidence had been tampered with; no evidence that "STR DNA" testing was inadmissible under Frye; no evidence that the semen, which contained the DNA, had been degraded; and no evidence that degraded DNA affects the science of DNA testing.

In contrast, the state's presentation of evidence consisted of the following. Both former counsel Smith and Garcia detailed the efforts undertaken during their investigation, and the reasoning behind the tactical decisions employed. As part of the trial preparation, they hired two investigators and two scientific experts. The theories of defense considered and investigated pretrial were; an alibi defense; the chain of custody was suspect and therefore the evidence was planted; the "STR DNA" testing did not meet the Frye test; and state witness James Zeintech was not credible. (PCR 62-63, 76-79, 95-98, 159-160, 174-177, 184-189, 193-194, 749, 758, 766, 781-782, 787-788).

Additionally, counsel hired Dr. Litman, who came recommended by other defense attorneys. He was responsible for reviewing all the discovery, he provided background information regarding the DNA process and the doctors involved in the testing, he provided material and information for the attorneys to read, and he identified what types of information should be requested in discovery. (PCR 152-154). Defense counsel also discussed with Litman the theory that the chain of custody of the DNA evidence may have been broken.[3] However, the main focus of all the in depth conversations centered a round the propriety of "STR DNA" testing procedures. (PCR 174).

Smith requested and received several continuances throughout trial preparation. Defense counsel worked closely with their experts reviewing all the information obtained through discovery. At some point, Litman requested information from the BODE lab. However, because the information was so voluminous and counsel would have been required to visit BODE lab to review the materials, Smith requested a continuance, which was denied. (PCR 759). Regardless of the BODE materials, Litman told Smith that based on his view of the evidence, he

[3] Manuel Garcia testified that they had a concern about the chain of custody because Detective Petrick did not recognize his signature on a property receipt and counsel also questioned the accuracy of other property receipts as well. (PCR 62-63).

could not be of any use to them because "STR DNA" testing was admissible under a Frye analysis. (PCR 156, 759). So rather than expend the limited resources on traveling to BODE Lab, Smith decided to preserve the continuance issue for appeal and devote the remainder of their time to preparation for the chosen defense that the evidence was planted. (47, 73-74, 174, 176, 759). Counsel explained,

> QUESTION: And according to Dr. Litman, Dr. Litman as told you as long as the methodology is correct that this evidence is coming in; is that correct?
> ANSWER: That's true.
> QUESTION: So at that point did you feel that it was the best use of your time to go up to the laboratory?
> ANSWER: No. I mean that was a concern to spend that amount of time when it could be better spent in preparing other areas for trial as that point in time, plus you know that added fact that we felt we could make an issue of appeal on that because we felt were weren't given adequate discovery and that it shouldn't have been either/or that we, well weren't given discovery and we would have to go up and spend a week, you know, with the trial coming up.
> QUESTION: All right. So let me get this straight. You're presented with an opportunity to go up to Bode Technology. You understand that if you go up there, you're going to be spending time you could be spending concentrating on the trial itself. You weigh that against the fact that it's unlikely that you're going to keep the STR out. And you couple that with the fact that if you don't go up there that you're setting up an appellate issue. Then you made a strategic decision not to go up to Bode Technology; is that correct?
> ANSWER: That's correct, plus it did not really fit with our theory.
> QUESTION: Your theory of defense?
> ANSWER: Kind of, yes.
> QUESTION: because your theory of defense is not that the DNA isn't his, it's that it's planted.

ANSWER: Right.
QUESTION; And you also knew that you were getting the RFLP in anyway as well?
ANSWER: True.

(PCR 760-761).

Defense counsel also retained the services of former chief medical examiner of Broward County, Dr. Ronald Wright. His expertise was in "cause of death" and "crime scene analysis." (PCR 155-156). Counsel testified that the chain of custody issue was considered, and explored with their DNA expert Dr. Litman and medical examiner Dr. Wright. However it became clear that any claim that the chain of custody was suspect was strictly an evidentiary hearing issue and was in no way associated with the science of DNA testing. They were two separate issues. (PCR 769). In fact, Dr. Litman downplayed the potential effect of chain of custody on the DNA testing. (PCR 785-786). Litman did not offer counsel any information that counsel could use to establish that a suspect chain of custody would change the DNA. (PCR 786). In fact, Litman rejected any notion that suspect storage would have effected the reliability of the DNA. (PCR 786).

The state also presented the testimony of Dr. Beaver, from BODE lab and Dr.Pollock from FDLE lab.[4] Consistent with their previous testimony in 1999, they opined that "STR DNA" testing procedures were generally accepted in the scientific community in 1999. Neither expert rendered any contrary opinion regarding the continued validity of the testing done in this case.

Beavers acknowledged that STR is sensitive and is susceptible to contamination. He stated that the BODE lab had considerable experience in the area of testing degraded DNA samples, as they tested in excess of twelve thousands samples from the Word Trade Center tragedy. (PCR 667). He unequivocally stated that the level of degradation associated with this evidence would not affect the DNA analysis. And even if degraded, the tests would not produce a false positive result. (PCR 668). Beaver stated that the DNA evidence in the instant case did not show any signs of degradation. (PCR 668, 669). His lab has as quality assurance program that includes ways to detect degradation in the sample. (PCR 686).

Dr. Pollock who has a great deal of experience in studying degraded DNA testified that the DNA samples in this case were minimally and insignificantly degraded. The degradation did not

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[4] Both testified before at the Frye hearing and at trial. During his trial testimony Beaver invited defense counsel to

affect the testing. (PCR 721, 729). The storage techniques or events that occurred during collection of the bed sheet did not effect the ability to test the semen stained sheet for DNA. (PCR 722). In fact, the semen here had intact sperm head which is more than suitable for DNA testing. (Id.) Dr. Pollock also opined consistent with Dr Beaver, that degraded DNA when tested, will not produce a false positive result. Degradation will produce no results. (PCR 725).

The record on appeal corroborates the state's presentation. The theory developed and presented at trial was that the chain of custody was broken and the evidence had been planted. Overton v. State, 801 So. 2d 877, 887 (Fla. 2001). In trial preparation, defense witness, Dr. Wright directed counsel to test for nonoxynol, a chemical found in condoms. (PCR 755, 782-784). If this chemical was present, that would support the theory that the semen had been planted, i.e., it was carried and deposited on the bed sheet long after the murders. Because traces of nonoxynol were counsel argued that the Monroe Sheriff's Department planted the semen. Overton, 801 So. 2d at 896-897. (PCR 784-786, 797, 800). Dr. Pope and detective Petrick were thoroughly cross-examined on the chain of custody issue. (ROA 3221-3282, 3442-3575). Dr. Pollock from BODE lab

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visit BODE lab. (ROA 4095).

was also questioned regarding the collection techniques. (ROA 4032-40430.

In his case-in-chief, appellant challenged the quality of the investigation, suggesting that other leads were not fully explored and that Overton's semen had been planted. (ROA 4399-4411, 4311-4385, 4433-4447, 4491-4551, 4729-4746). However, as this Court pointed out on direct appeal "the defense failed to produce a scintilla of evidence that Detective Visco planted the seminal fluids." Id.

Appellant presented no evidence in these proceedings to alter that finding. His expert witness Dr. Libby, testified that generally the collection and storage of DNA samples is important and that every effort should be made to secure the crime scene area to avoid against contamination and degradation of the DNA. (PCR 339). Contamination can occur as result of how the DNA was collected, how it was stored and also how it was handled during testing. (PCR 340). Improper storage may result in an inaccurate result. (PCR 364). Libby further stated that a compromised chain of custody would cause him great concern because you are not certain form where the items originated. (PCR 368-374). The collection and storage of this DNA caused him such concerns. (Id.) Libby also stated that in his opinion you cannot place a person at a scene of a crime

based on the presence of his DNA if there was suspect chain of custody. (PCR 379-380).

However, Libby did not provide any scientific testimony regarding the admissibility of the DNA evidence in this case. Dr. Libby freely stated that RFLP and STR DNA testing was widely accepted and is in fact a valid science. (PCR 383-384). At no point did Libby state that STR testing was not generally accepted in 1999, nor that he or any other DNA expert would have been available to state such an opinion in 1999.

At best, Libby stated degraded evidence if tested could render a false positive "identification." And that a degraded piece of evidence could coincidentally result in the identical false positive "identification" on two separate occasions in two separate labs. Libby was unable to give any percentages regarding the likelihood of that phenomenon nor could he detail the specifics of such an occurrence from his own personal knowledge. (PCR 395-402).

Libby conceded that he did not examine the evidence in this case to determine if indeed it was degraded, he never performed any independent testing on the semen stained bed cuttings, and

he was unable to offer an opinion regarding the validity of the tests actually performed by BODE and FDLE.[5]

The trial court correctly concluded that Overton did not present any evidence in support of his claim that STR DNA testing would not pass the Frye test, that DNA testing in this case was suspect, nor that the DNA evidence was degraded or had been tampered with or contaminated in any way. Overton failed miserably in demonstrating that Smith and Garcia provided constitutionally deficient performance at pre-trial hearings in 1999 or during the actual trial in 1999. See Carroll v. State, 815 So. 2d 601, 613 (Fla. 2002)(finding no deficiency in trial counsel's tactical decision in not obtaining services of DNA expert as well as finding no prejudice as postconviction counsel did not present any evidence that DNA expert would have uncovered new evidence that DNA was inaccurate); see also Shannon v. State, 754 So. 2d 172 (Fla. 5th DCA 2000)(upholding counsel's decision not to attack state's DNA results as there was no evidence to dispute findings at time of trial or during postconviction proceedings.)

[5] He has never reviewed the protocols or methodology of BODE technology or the FDLE labs. Libby requested the materials from Overton's lawyers. He has no idea why he was never provided that information. (PCR 406-408).

The state will also address Overton's sub-issues that his evidentiary presentation had been compromised because the trial court failed to provide him with a fair and full hearing.[6] He also recklessly accuses the state of intentionally withholding information regarding the protocols from the BODE lab which hampered his presentation. **Initial brief at 59 and 68.** A review of the record below in conjunction with the record on direct appeal completely refutes these two allegations.[7]

The protocol and procedure information Overton insists has been unfairly kept from him in these proceedings is the identical information that he alleged he was "unable" to obtain in 1998. As noted elsewhere, the "unavailability" of this information was the subject of an issue on direct appeal. This Court rejected completely that claim in the following manner:

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[6] Appellant alleges that Judge Jones became a "second prosecutor" when he asked improper questions of many of the witness in an attempt to rebut appellant's allegations. **Initial brief 52-54.** He also alleged that the trial court was more interested in expediency than due process, and the court sought to limit appellant's claims. **Initial brief at 45-47.**

[7] The state asserts that these allegations are not properly before this Court as they had never been presented below. Appellant did not file a motion to disqualify Judge Jones nor did he ever bring to the trial court's attention or the state that he required further information from BODE lab prior to the evidentiary hearing. Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990)(explaining that "[i]n order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court.").

Overton's second issue on appeal concerns the discovery of certain documents from the Bode lab relating to the STR/DNA tests conducted in this case, namely, the lab's validation studies, the protocol manuals, and proficiency tests. According to Overton, these documents were essential to the defense DNA expert's independent assessment of the reliability of the State's test. His specific argument on appeal is that the trial court erred in not compelling discovery of these materials and in not granting a continuance so that defense counsel could review them.

We review the trial court's decision that no discovery violation occurred under an abuse o discretion standard. See State v. Evans, 770 So. 2d 1174, 1183 (Fla. 2000); Pender v. State, 700 So. 2d 664, 667 (Fla. 1997). The trial judge's decision to deny the defense's motion for continuance is likewise reviewed under an abuse of discretion standard. See Scott v. State, 717 So. 2d 908, 911 (Fla. 1998); Gorby v. State, 630 So. 2d 544, 546 (1994). Under this standard, the trial court's ruling should be sustained unless no reasonable person would take the view adopted by the trial court. See Huff v. State, 569 So. 2d 1247 (Fla. 1990).

Based on the record below, we conclude that the trial court did not abuse its discretion by not finding a discovery violation or by denying the motions for continuance. Primarily, the defense was aware, as early as June of 1998, that Bode would be conducting independent testing. When the final report was submitted on October 14, 1998, the trial was still approximately three months away. The defense was notified by the State at the December status conference and by Bode that the requested manuals, tests and studies were much too voluminous to copy and ship. Because of this, defense counsel and experts were invited to review the materials at the Bode lab in Virginia. The defense declined to visit the lab, phone its director (Dr. Bever), set a deposition, or even question Dr. Bever at the Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923) hearing with respect to the information defense counsel

> sought. Moreover, and to be sure, the record does not indicate that defense counsel requested the continuances so that he or the defense expert could consult with the lab in Virginia. Rather, defense counsel sought the continuances in the event that the court were to grant the defense's accompanying motions to compel. In sum, we determine that no abuse of discretion occurred.

Overton, 801 So. 2d at 877.

Noted elsewhere, Libby asked Overton's postconviction counsel to provide him with a myriad of documents from BODE lab and from FDLE. Such information was needed in order to discuss the reliability of the testing done at both facilities. However, postconviction counsel did not request the information from those labs, nor did counsel notify the trial court that this information was needed prior to the evidentiary hearing.[8] (PCR 681, 683). Appellant does not explain what has impeded his ability for the past seven years to obtain the information, he claims he so desperately needs. The argument is frivolous. The trial court's findings are supported by the record. Relief was denied properly.

In any event, event if this Court should determine that counsel was deficient, Overton cannot establish prejudice. Smith

[8] Libby failed to mention in his testimony that he was well aware of the techniques and procedures of the BODE lab as he in fact visited the lab in 1999 in connection with other cases. (PCR 682).

conceded that even if he were ultimately successful in challenging the admissibility of the STR results, the RFLP results were still admissible. The jury heard that under the RFLP analysis, there was one in six million chance that the semen found on the bed where Missy Overton was left dead, belonged to someone other than Thomas Overton. Cf. Van Poyck v. State, 908 So. 2d. 326 (Fla. 2003)(upholding the denial of DNA testing as even favorable evidence would not have exonerated defendant).

ISSUE II

THE TRIAL COURT DENIED PROPERLY APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO EXPOSE THE ALLEGED RELATIONSHIP BETWEEN LAW ENFORCEMENT AND A JAILHOUSE INFORMANT

Overton alleged that trial counsel was ineffective for failing to present evidence to rebut the trial testimony of James Zeintek. Specifically Overton complained that former counsel did not adequately investigate several avenues of potential impeachment that would have undermined Zeintek's credibility. This evidence consisted of the following: (1) eyewitness accounts that Zeintek was able to secretly gain access to Overton's cell and in fact was in Overton's cell in his absence; (2) Zeintek had a prior relationship with FDLE agent Scott Daniels; (3) Zeintek's personal notes regarding details of other crimes committed by Overton illustrate that Zeintek simply copied portions of police reports rather than obtaining that information through conversations with Overton.

Overton was granted an evidentiary hearing on these claims. In denying relief, the trial court found:

> The Court disagrees with the Defendant's claim and finds that his attorneys exercised due diligence in investigating Mr. Zeinteck's access to the Defendant's cell and made professionally acceptable and well-reasoned strategic decisions as to how to handle the issue. While the Defendant urges the Court to focus

> on the one potential witness to the cell door being open who left the jail before he could be interviewed by defense counsel, the Court believes that it is appropriate to consider the complete picture. The fact of the matter is that Counsel did provide the States with the names of some of the witnesses who the Defendant said could substantiate his claim that Mr. Zeinteck had access to his cell. Yet those witnesses who were deposed did not provide testimony favorable to the Defendant on this issue. Moreover, in response to the Defendant's witnesses, the State provided the names of 2 correction offices who were prepared to testify that the Defendant's cell door was locked when he was not his cell.

(PCR 2863-2864). The trial court's findings are supported by the record.

Garcia and Smith testified that Overton gave them the names of various inmates who would say that they saw Zeintek in Overton's cell. Those inmates were deposed but no one could say that they in fact witnessed Zeintek in the cell.[9] Had counsel found any credible evidence in support of that, they would have presented that information to the jury. There simply was none. (PCR 58, 78-81, 87, 93-95, 179-180, 193-194, 746-747, 749, 766, 788.

Overton did not present any evidence at this hearing to rebut Smith's and Garcia's testimonies. Cf. Pietri v. State, 885 So. 2d 245 (Fla. 2004)(upholding rejection of claim of ineffective assistance of counsel as defendant failed to

establish the existence of any available evidence in support of the new theory of defense).

In sub-issue 2, Overton claims that counsel was ineffective for failing to pursue a claim that Daniels and Zeintek had "worked" together on other prosecutions which in essence transformed Zeintek into a professional snitch. The trial court rejected this claim as follows:

> Further, at the evidentiary hearing, Agent Daniels's testimony made it clear that his first contact with Mr. Zeinteck was in connection with this case and was arranged by an agent from the local FBI field office. It was not based on some prior relationship.

(PCR 2858. The record supports the trial court findings.

Daniels testified that he was introduced to Zeinteck through FBI agent, Gary More. (PCR 558). Daniels met Zeiteck for the first time on October 17, 1997 at the FDLE office. Zeinteck was transported there by Moore. (PCR 558-560). The conversation was tapped. (PCR 560). Zeintech was instructed not to elicit any conversation with Overton. (PCR 560). Zeinteck asked to speak with Daniels again three days later in an effort to clarify some of his statements. (Id.). Zeintech was again reminded not to elicit any conversations with Overton.

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[9] Smith also added that at least one of inmates he talked to wanted to be a witnesses <u>against</u> Overton. (PCR 749).

(PCR 561). Zeintech was moved to a another facility shortly after the October 20th, meeting. (PCR 562, 567).

Zeinteck provided accurate information to Daniels in at least two other cases subsequent to 1997. Each time he was moved to another facility. (PCR 562-565). The information provided in the other cases led to arrests and ultimately to convictions. (PCR 564-565).

Smith, testified that he was aware that Zeinteck provided information to Daniels in other cases. Smith chose not to focus on the Zeinteck/Daniels connection at trial because it would have revealed that Zeinteck's information to Daniels had consistently been proven true and it would lend credibility to Zeintek. (PCR 752, 754). Smith's decision were reasonable. Relief was denied properply.

In sub-issue 3, Overton alleges that counsel was ineffective in failing to present Zeintek's handwritten notes regarding Overton's statements to him about other crimes in an attempt to further impeach Zeintek. Zeintek's notes include words or phrases that are very similar to words and phrases that appear in a police report, including identically misspelled words. Overton claims that counsel should have presented these two documents side by side to the jury to highlight the similarities. This evidence would have corroborated Overton's

claim that Zeintek was aware of the details of the crime from reading the reports rather than from any conversations with Overton.

The trial court rejected this claim as follows:

> Counsel decided that the Defendant would be best be served by keeping any evidence of his prior criminal history away from the jury and in furtherance of this goal, a motion in limine was prepared. The motion in limine was well-founded but could have very well been rendered moot had Counsel insisted on pursuing Mr. Zeintek's access to the documents in Defendant's cell. The documents in question contained references to the Defendant's serious criminal history and had Counsel cross-examined Mr. Zeintek on certain portions of the documents, the State made it clear that it would have attempted to introduce the entirety of each document which could have been very prejudicial to the Defendant. In light of the foregoing, Counsel decided it was counter-productive to further pursue the issue of Mr. Zeintek's access to the Defendant's cell either thorough investigation or cross-examination. Counsel were not ineffective by making this strategic decision.

(PCR 2864). The record supports the trial court's finding.

Smith was shown the two documents referenced above, and testified that he remembered looking at them and discussed with Overton the possibility of presenting them to the jury. (PCR 752, 763, 778). However, by admitting those documents at trial, it would have opened the door to details about other unsolved crimes that were contained in those two documents. The jury would have then been aware of Overton's further admissions to Zeintek regarding other unsolved crimes for which Overton was a

prime suspect. Those crimes include other burglaries as well as the murder of Rachelle Surrett. (PCR 749-752, 763, 778). Garcia corroborated this testimony. (PCR 792). Counsels' decision was constitutionally sound and cannot form the basis for a claim of ineffective assistance of counsel. Cf. Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997)(finding counsel's decision to forego mental health testimony based on limited value weighed against other damaging evidence likely to be revealed); Van Poyck v. State, 694 So. 2d 686 (Fla. 1997)(same).

Moreover, even if counsel been able to present testimony that Zeintek was seen in Overton's cell, its impact would have been negligible as the jury was told that Overton did provided details of the crime to Zeintek so that Zeintek would then tell authorities that he received this information/confession from another inmate named Ace. (ROA 4148). Overton v. State, 801 So. 2d 877, 885 (Fla. 2002). Therefore, it would have been reasonable to assume that Overton did provide Zeintek with all the necessary information.[10]

Overton has not been able to establish that former counsel were deficient in their investigation and preparation or

unreasonable in any of their chosen strategies regarding the testimony of Zeintek.

And finally, Overton cannot establish the requisite prejudice. In addition to Zeintek, the state presented the testimony of inmate Guy Green which corroborated much of Zeintek's testimony. Overton, 801 So. 2d at 899.

ISSUE III

THE TRIAL COURT DENIED PROPERLY APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE ALTERNATIVE THEORIES OF DEFENSE INCLUDING ONE OF ALIBI

Overton alleges that counsel was ineffective for failing to investigate the viability of an alibi defense. The trial court denied this claim as follows:

> The Defendant was indicted for the murders in December 1996. Defense counsel Smith was appointed by the court on January 16, 1997. Defense counsel Garcia was appointed on May 6, 1997.
>
> Rather obviously, Counsel could not have promptly investigated the alibi defense. When Counsel was in a position to investigate it, the records and witnesses' recollections were not longer available.

(PCR 2861).

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[10] Overton even admitted in these proceedings that he in fact did show Zeintek all the photographs of the scene. (PCR 896-897).

Appellant claims that these obstacles did not relieve counsel of their duty to investigate this defense. The state disagrees and asserts that the trial court's findings are supported by the record and must be affirmed.

Smith testified that they did consider an alibi defense. He cannot remember the specifics but he does remember that former co-workers were spoken to but nothing useful came of it. (PCR 159-160). And because Overton could not tie any particular witness to any specific dates, they did not file a notice of alibi. (PCR 186).

Garcia testified although appellant never told counsel that he had a specific alibi, counsel did assign investigator David Burns to investigate the potential defense. (PCR 787-788). The time cards records from the Amoco station had been destroyed, consequently there were no way of verifying whether appellant worked on the night of August 21st. (PCR 77 76, 95, 98). Overton always worked the "graveyard" shift, 11:00 p.m.- 7:00 a.m. but he did not have any set scheduled days off. (PCR 247, 787-788). Counsel chose not to pursue this issue any further, given the lack of evidentiary support.

Appellant presented the testimony of three former co-workers, including his two former managers. No one could say that appellant was working on that specific night. Both

managers remembered Overton but neither had any independent knowledge regarding whether he worked on the night of August 21, 1991. (PCR 231-233, 245). Overton also alleged that trial counsel failed to pursue alternate theories of the crime including that three others had confessed to the murders; the murders were motivated by the victim Michael MacIvor's suspected drug involvement; the crimes were committed by more than one person; they were not committed at the victims' home ;and Missy McIvor was not sexually assaulted. The trial court denied relief finding that appellant failed to present any facts in support of any viable alternate theory of defense. (PCR 2862).

In support that argument, Overton presented the testimony of a retired medical examiner Dr. Katsnelson. This witness disagreed with the findings of the state's medical examiner on several points. He claimed that (1) the cause of death of Michael MacIvor was due to manual strangulation as opposed to ligature strangulation; (2) Michael MacIvor did not loose consciousness after being struck, (3) he was not paralyzed as a result of his injuies; (4) both victims were killed someplace else and were brought back to the home; and (5) Missy MacIvor was not sexually assaulted.

Simply because Overton can present evidence from another medical examiner who may disagree on certain points does not

amount to evidence that "an alternate theory" of the crime existed that would have led to Overton's exoneration. A disagreement among experts regarding conclusions and opinions based on the same information, does not establish that trial counsel was ineffective in his presentation of the defense. See Johnson v. State, 769 So. 2d 990 (Fla. 2000)(refusing to find counsel's performance deficient simply because new doctors would take issue with failure of prior doctors to detect the existence of organic brain damage); Rose v. State, 617 So. 2d 291, 295 (Fla. 1993)(rejecting claim that initial findings of mental health experts was deficient simply because defendant obtains different diagnosis now); Provenzano v. Dugger, 561 So. 2d 546 (Fla.1991)(finding no basis for relief by mere fact that defendant has found expert who can offer more favorable testimony).

Moreover, Dr. Katsnelson's testimony in part was incredible and not worthy of belief. For instance, his assertion that Missy MacIvor was not the victim of a sexual assault is belied by the evidence. This Court recounted the evidence as follows:

> Susan's completely naked body was found on top of a white comforter. Her ankles were tied together with a belt, several layers of masking tape and clothesline rope. Her wrists were also bound together with a belt. Two belts secured her bound wrists to her ankles. Around her neck was a garrote formed by using a necktie and a black sash, which was wrapped around her neck several times. Her hair was tangled in the knot.

> Noticing that a dresser drawer containing belts and neckties had been pulled open, officers believed that the items used to bind and strangle Susan came from inside the home. Her eyes were covered with masking tape that appeared to have been placed over her eyes in a frantic hurry. Under the comforter upon which the body rested were several items which appeared to have been emptied from her purse. Also under the comforter was her night shirt; the buttons had been torn off with such force that the button shanks had been separated from the buttons themselves. Near the night shirt were her panties which had been cut along each side in the hip area with a sharp instrument.

Overton, 801 So. 2d 877, 882 (Fla. 2001)(emphasis added). This Court further noted:

> With respect to Susan, the external examination of her face revealed that she had received several slight abrasions. The ligature marks around her neck indicated that she was moving against the ligature, thereby causing friction. Also, the discoloration in her face indicated that blood was not exiting the head area as fast as it was entering. According to the medical examiner, this is indicative of an incomplete application of the ligature, which demonstrated that, more likely than not, a longer period of time passed before Susan lost consciousness once the ligature was applied. Her wrists also exhibited ligature marks and her hands were clenched. Moving down to her lower body, an abrasion to her vulva and several abrasions to her legs indicative of a struggle were found. The medical examiner concluded, based on the totality of the circumstances, that she had been sexually battered. When interrogated for an explanation of the presence of feces in the rectal area, the doctor determined that it could have happened either at the time of death or it could have been caused by her fear

Id. at 883.(emphasis added).

Katsnelson's opinion on this point is ridiculous in light of the un-assailed evidence detailed above. His testimony would have been completely discounted. The state asserts that relief was denied properly as the record below is void of any evidence to support these claims. See Breedlove v. State, 595 So. 2d 8, 10 (Fla. 1992)(affirming summary denial of claim of ineffective assistance of counsel for failing to pursue voluntary intoxication defense as record demonstrates a total lack of available facts to establish defense); See also Tompkins v. Moore, 193 F.3d 1327, (11th Cir. 1999)(finding that a jury will not be swayed by expert testimony from a doctor whose palpable bias is evidenced in doctor's refusal to acknowledge that a kidnaping committed at gun point is a violent crime); Davis v. Singletary, 119 F.3d 1471, 1476 (11th Cir. 1997)(rejecting claim of ineffectiveness since decision not to pursue expert since the state would "slaughter" witness on cross was reasonable). Trial counsel was not ineffective for failing to present such compromised testimony. Walls v. State, 641 So. 2d 381, 390-391 (Fla. 1994)(recognizing that credibility of expert testimony increases when supported by facts of case and diminishes when facts contradict same); Foster v. State, 679 So. 2d 747, 755 (Fla. 1996)(same); Wournous v. State, 644 So. 2d 1000, 1010 (Fla. 1994)(upholding rejection of uncontroverted expert

testimony when it cannot be reconciled with facts of crime);Miller v. State, 770 So. 2d 1144 (Fla. 2000)(upholding trial court's rejection of proposed mitigator of abusive childhood since there was no corroborative evidence for the allegation).

Moreover, counsel did present the testimony of a former medical examiner Dr. Ronald Wright in an attempt to counter the state's theory of the case. Indeed Wright testified that the victims may have been killed elsewhere; it is possible that more than one perpetrator committed these crimes; and Michael MacIvor may not have been paralyzed as a result of the injuries he received to the back of his head. (ROA 4506-4510, 4538). Consequently to a large extent, the postconviction testimony is cumulative to the evidence presented by the defense at trial. Counsel cannot be deemed ineffective when the new evidence presented is cumulative. Rutherford v. State, 727 So. 2d 216, 224 (Fla. 1999)(affirming summary denial of ineffective assistance of counsel where additional evidence of appellant's harsh childhood and Vietnam experience, although more detailed was cumulative); Provenzano, 561 So.2d at 546 (Fla. 1990) ("The additional testimony which Provenzano now suggests should have been given would have been largely cumulative.")

In conclusion, Overton has failed to establish that counsel, Smith and Garcia, provided him with constitutionally suspect representation at the guilt phase of his trial. This claim must be denied.

ISSUE IV

TRIAL COURT CORRECTLY DENIED APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE OF FAILING TO RAISE A CHALLENGE TO A BURGLARY COUNT ON WHICH THE STATUTE OF LIMITATIONS HAD ALREADY RUN

Appellant claims that trial counsel was ineffective for failing to file a motion to dismiss the burglary charge based on the statue of limitations had run on that count. The trial court summarily denied this claim in the following manner:

> A hearing was denied on this claim because, although the Defendant was correct in claiming that the statue of limitations had run on the offense, the Defendant could not show that he suffered any prejudice as a result of Counsel's failure to act. Had counsel raised the statute of limitations issue, the State would have been able to circumvent the problem by amending the information to allege an armed burglary. Under theses circumstances, by moving to dismiss the burglary charge on statute of limitation grounds, Counsel would have succeeded in only making matters worse for their client.

(PCR 2843).

Relief was denied properly as the record supports the trial court's conclusion. On appeal, appellant does not address the trial court's determination that Overton would have been subject to the more serious charge.

While the State charged Overton by Information with burglary under section 810.02(2), Florida Statutes (1991), a first-degree felony punishable by life imprisonment, there was

evidence that a gun was involved in the commission of the burglary. Overton, 801 So.2d at 886-87 (noting discovery of a shell casing and bullet hole in the MacIvors' curtain). The record establishes that a 22 caliber weapon and a second gun were involved in the murders and there was testimony that Overton carried a gun and knife in his "burglary" kit. (ROA 3189, 3777, 4153-54, 4167-68, 4173-74, 4505-19, 4740, 4789, 4811). Thus, had the defense objected, the State would have been able to amend the Information to allege Overton either was armed or armed himself during the course of the burglary to overcome any alleged statute of limitations problem. State v. Riveron, 723 So.2d 845, 847 (Fla. 3d DCA 1998) (opining "we know of no reason that precludes the State from bringing charges for life felonies and first-degree felonies within their statutory limitation periods even though the State is "upping" charges set out in an earlier information and even though the earlier charges are barred by the expiration of their statutory limitation period."); Akers v. State, 370 So.2d 81 (Fla. DCA 1979) (noting State could have amended information when crime charged was challenged by defense as beyond statute of limitations). An amendment would have increased the degree of the felony to a life felony under section 775.087(1)(a), Florida Statutes (1991), one without a statute of limitations.

Should this Court conclude the first-degree felony punishable by life burglary charge could not be amended to a life felony, the admission of evidence discussing the burglary does not establish prejudice under Strickland with regard to the remaining convictions or death sentences. "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). In the event the burglary conviction is vacated, the other convictions remain sound and the death sentences are proper.

The evidence proving the burglary was admissible for the murder convictions as it tended to establish that the killings were accomplished under a felony murder theory. The fact Overton cut the telephone lines prior to breaking into the MacIvors' home via a ladder to the second floor with the intent of raping Mrs. MacIvor would have been revealed to the jury whether or not the burglary charge was present. Such facts put the crimes of sexual battery, murder of the MacIvors' unborn child, and the first-degree murders of the MacIvors through strangulation in context. All that need be shown for felony murder is that the defendant intended to participate in the underlying felony and did some act to assist in the commission

of the underlying felony during which a murder occurred. See Lovette v. State, 636 So.2d 1304, 1306 (Fla. 1994). The State does not have to charge the underlying felony in a felony murder case nor does the court have to instruct on the underlying felony with the same specificity as it would had the felony been charged. See Kearse v. State, 662 So.2d 677, 682, (Fla. 1995); Brumbley v. State, 453 So.2d 381 (Fla. 1984); McCrae v. Wainwright, 422 So.2d 824 (Fla. 1982); Vasil v. State, 374 So.2d 465 (Fla. 1979); Robles v. State, 188 So.2d 789 (Fla. 1966). It only follows that the expiration of the statue of limitations for the underlying felony would not bar the jury from hearing such evidence. Jackson v. State, 513 So.2d 1093, 1095 (Fla. 1st DCA 1987) (finding “the running of the statute of limitations on the underlying felony is irrelevant to a prosecution for felony murder, a crime for which there is no statute of limitation” and “mere preclusion of the state's capacity to prosecute the subordinate crime because of a time limitation has no effect upon the question of whether such crime was committed”).

Similarly, the fact that the burglary conviction may fall does not alter the validity of the death sentences. Not only is the felony murder aggravator supported by the sexual battery conviction, but, "[t]he state need not charge and convict of felony murder or any felony in order for a court to find the

aggravating factor of murder committed during the course of a felony." Occhicone v. State, 570 So.2d 902, 906 (Fla. 1990). See Ruffin v. State, 397 So.2d 277 (Fla. 1981). Hence, the sentencing court could have found the felony murder aggravator proven with or without the burglary conviction. The trial court's finding of no prejudice was proper and must be upheld.

ISSUE V

THE TRIAL COURT DENIED CORRECTLY APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT PRE-INDICTMENT DELAY WAS A VIOLATION OF HIS RIGHT TO DUE PROCESS

Relying on Rogers v. State, 511 So.2d 526 (Fla. 1987) and Scott v. State, 581 So.2d 887 (Fla. 1991), Overton claimed he was entitled to a dismissal of the murder charges because he suffered prejudice due to the pre-indictment delay. Overton was granted a hearing on this claim. The trial court denied the claim based on the following:

> The fact is that the Defendant was a suspect from early on in the investigation but he was not the primary or strongest suspect until other suspects were eliminated. He more or less became a suspect by default. His primacy as a suspect only came about after he unintentionally supplied a sample of his DNA.
>
> The brain storming session repeatedly referred to by the Defendant took place on May 6, 1992. At that meeting, the Defendant was one of three suspects mentioned. George Reynolds and Joiy Holder were the other two. Later, a Mr. Golightly became a leading suspect. He was eliminated after he voluntarily gave a DNA sample. Likewise, Michael MacIvor's brother was a suspect for a time and likewise was eliminated after he voluntarily gave a DNA sample. Other theories of the crime were also run down. Thus it was that Detective Visco and FDLE Agent Larry Ruby traveled to Belize to check out the possibility that the crimes were somehow related to Michael MacIvor's purchase of an airplane there.
>
> So, as Agent Daniels said, although the Defendant was a suspect, he was not the strongest one. (citations omitted.) He became the primary and only

> suspect after his DNA was obtained and matched to the DNA left at the scene of the crime.
>
> The Defendant cannot point to any prejudice that resulted from the delay. The work records that he claims would have given him an alibi were destroyed in the year following the murders of which he was convicted. The co-worker who he claims was his relief the night after the murders saud that she would not have been able to remember more than one month later whether he had worked that night or not. Both Dr. Bever of Bode Technologies and Dr. Pollock of the FDLE lab testified that the DNA form the crime scene used to match the Defendant's was neither contaminated nor degraded by improper storage.

(PCR 2866-2867). The trial court's findings are supported by the record and must be affirmed.

Overton presented the telephonic testimony of Overton's two former employers, manager David Smereck and assistant manager Sammy York. They managed the store and lived above it from 1986-1992. (PCR 227). Overton was a full-time employee, who always worked the graveyard shift, from 11:00P.M. to 7:00 A.M. the following morning. (PCR 213, 247, 228). Overton did not have a set schedule of days off, he worked when he was needed and would occasionally cover other shifts as well. (PCR 228, 247). No witness could recall if Overton was working on August 21, 1991. (PCR 233, 245). No person had access to the time cards. (PCR 234, 246). The police did not contact them after the murder. (PCR 245, 234). York stated that she was contact possibly in 1995 by an investigator regarding Overton's work schedule. (PCR 249).

Overton failed to establish actual prejudice. Simply because Smereck and York were in a position to know whether Overton worked the night of August 21, 1991 does not establish that he did work that evening. Overton did not prove that had York and Smereck remembered that evening, they would have said that Overton worked at the Amooco on the night of August 21, 1991. This critical omission is fatal to his claim.

For instance, in Scott, the defendant established critical evidence had been lost,

> The record of that hearing reflects that investigative reports and statements taken from witnesses during 1978 and 1979 were lost and were unavailable; reports of polygraph examinations of witnesses made at the time were no longer available; records reflecting the results of fingerprint analysis were no longer available; the report of the original detective assigned to the case and the report of the first officer on the scene were lost and were not available; the report of the evidence technician in this case, made in October of 1978 and identifying the evidence collected, was missing; numerous reports prepared by another police officer who participated in the investigation were not available; and a report concerning a potential suspect who had allegedly confessed was lost. In addition, evidence associated with other cases was intermingled with the Pikuritz evidence and some evidence known to have been in the Pikuritz evidence file was lost. The sheriff of Collier County in 1978 interviewed and hypnotized two witnesses and made a tape of those hypnosis sessions; that tape was lost and one of the witnesses had died.

Scott, 581 So.2d at 890. Also, the police had evidence of a viable alibi for Scott. It was undisputed that the state attorney would not go forward with the prosecution in 1979 due

to existence of an intact alibi. Id. Scott was also deprived of presenting evidence that another person, Phillip Drake was responsible for the murder and the state had in its possession hair samples of the victim which for some unexplained reason had not been tested for five years. Id. None of these factors are present in the instant case. Overton must be able to establish that at one time he in fact had a viable alibi. He cannot make that showing.

Nor can Overton establish that the pre-indictment delay was premised on some wrong doing by the state. The appellate record offers insight and a logical explanation for the five year delay in this case. A number of leads were explored throughout the first several years, including those associated with Michael MacIvor's business dealings. Law enforcement traveled as far away as Belize in an attempt to verify information. (ROA 3037, 4326, 4329-4332, 4353-63, 4405, 4408-4411). Other leads involving the purchase of MacIvor's plane were investigated. (ROA 4409-11). Other individual leads were followed including John Golightly, Larry Herlth, and Joiy Holder. (ROA 4404, 4408-14). At one point, the police even consulted a psychic. (ROA 3513-14). Overton was a suspect as early as 1992, however obtaining his blood sample was not accomplished until his

October 1996 arrest on another charge.[11] (ROA 516-3316, 505, 525, 560, 755). He was arrested for the murders in November of 1996 once the DNA results confirmed he was the perpetrator. (ROA 3863-4412, 1-2, 8-15). Relief was denied properly. Scott; Fleming v. State, 624 So.2d 797 (Fla. 1st DCA 1993)(rejecting claim of prejudicial pre-indictment delay as state cold not have avoided delay due to difficulty in solving crime); Evan v. State, 808 So.2d 92 (Fla. 2001)(rejecting claim six year delay in prosecution amounted to prejudicial pre-indictment delay because no evidentiary support for claim that key witnesses became unavailable and evidence became stale); State v. Ingram, 736 So. 2d 1215, 1217 (Fla. 5th DCA 1999)

Morever, even if Overton could establish that he was working the night shift on August 21, 1991, it does not establish an airtight alibi. The murders occurred anywhere after 9:00 p.m. on the night of August 21, 1991. And under his own theory, he would not have reported to work until 11:00 p.m. Consequently, he would have had sufficient opportunity to commit the murders and report to work on time without raising any suspicion. Consequently, even if this Court were to find that Overton did

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[11] Overton refused to provide voluntary blood samples while incarcerated for an unrelated burglary charge. While incarcerated, Overton cut himself while shaving and the police

work on August 21, 1991, he would not been entitled to relief. Rivera v. State, 717 So. 2d 407, (Fla. 1998)(rejecting claim that pre-indictment delay precluded the presentation of a viable alibi because there was sufficient time unaccounted for in which defendant could have murdered the victim). Relief was denied properly.

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confiscated the towels used to stop the bleeding. (ROA 505, 512, 535-537).

ISSUE VI

THE TRIAL COURT PROPERLY FOUND THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO DECLARE A CONFLICT OF INTEREST

Appellant claims that one of his defense counsel improperly disclosed to the state, the theory of defense. This alleged breach of confidentiality was accomplished either by giving to the prosecutor a copy of the novel *Presumed Innocent*, which describes a similar defense to the chosen defense in this case, or by simply disclosing the details of the defense. Appellant was granted a hearing on this claim. The trial court rejected the claim finding:

> The Defendant apparently confuses assertions with facts. He offered absolutely no evidence of his claim that Counsel informed the State of the theory of his defense.

(PCR 2867). The record supports the court's findings.

Jason Smith and Manual Garcia, both stated that the nonoxynol defense was the creation of their forensic expert Dr. Wright. (PCR 754-755, 782). Neither gave a copy of the book *Presumed Innocent* to John Ellsworth, the assistant state attorney. (PCR 782-783, 756). In fact as the nonoxynol defense developed, Ellsworth asked defense counsel if they had read the book because there was a similar defense in the novel. (PCR 756, 820-821). The state asserts that relief was denied

properly as the record below is void of any evidence to support these claims. Breedlove v. State, 595 So. 2d 8, 10 (Fla. 1992)(affirming denial of claim of ineffective assistance of counsel for failing to pursue voluntary intoxication defense as record demonstrates a total lack of available facts to establish defense).

ISSUE VII

THE TRIAL COURT DENIED PROPERLY APPELLANT'S CLAIM THAT TE STATE WITHHELD EXCULPATORY EVIDENCE IN VIOLATION OF BRADY V. MARYLAND

Appellant claims that the trial court erred in summarily denying allegations that the state withheld exculpatory evidence in violation of Brady v, Maryland, 373 U.S> 83 (1963). The withheld items are; "police brain storming session notes" which related to Overton's status as a suspect; and 2) impeachment information regarding Dr. Pope's "sloppy evidence collection." The state asserts that summary denial was proper.

With regards to the assumed existence of notes from a meeting of law enforcement, appellant claimed that the state did not turn over all the "notes, drawings, photographs or receipts." **Initial brief at 93.** He further assumes, "The state never disclosed any subsequent brainstorming sessions on Mr. Overton. When Mr. Overton was not arrested, the logical rationale was that he had been eliminated as a suspect." **Initial brief at 94-95.** The trial court summarily denied the claim finding that defense counsel was aware of the brain storming session. (PCR 2841). Relief was denied properly.

Appellant was well aware of the fact that the state had conducted a brainstorming session in May of 1992 as it was the

topic of lengthy discussions pre-trial. (ROA 880-887, 4385). In fact, trial counsel deposed law enforcement personnel who were in attendance. Overton, 801 So.2d at 884. Overton's claim is frivolous. Rivera v. State, 717 So.2d 477, 483 (Fla. 1998)(rejecting Brady claim based in part on fact alleged Brady information was known to defense); Hunter v. State, 660 So.2d 244, 250 (Fla. 1995)(same).

Irrespective of his knowledge of the 1992 meeting, Overton insists that because the goal of that 1992 meeting was to "eliminate" certain individuals, including Overton, and Overton was not arrested until 1996, he assumes that exculpatory evidence, i.e., evidence of his alibi, was uncovered in 1992 and withheld. Overton's assumption is speculative and illogical. See White v. State, 729 So.2d 909, 913 (Fla. 1999) (rejecting claim of materiality under Brady as evidence victim stated she was afraid of motorcycle gang members that did not included White did not mean he was not perpetrator); Mills v. Singletary, 63 F.3d 999, 1015 (11th Cir. 1995) (finding evidence another suspect was violent was not directly exculpatory); Mills v. State, 507 So.2d 602 (Fla. 1987). Overton did not present any evidence to support his alibi. Nor did he present any evidence to support his claim that other brain storming sessions were held. He simply asserts that they were. Summary denial

was proper. He simply asserts that it must exist.[12] Moreover, any alleged notes, impressions, or progress notes of any meetings among investigators are not Brady material and subject to disclosure. See Spaziano v. State, 570 So.2d 289, 291 (Fla. 1990)(ruling investigative notes detailing inferences from investigation is not admissible evidence and thus not Brady material); Williamson v. Moore, 221 F.3d 1177, 1182 (11th Cir. 2000)(finding mental impressions of prosecutor's case is opinion work product and not Brady material in the instant case).

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[12] Overton testified that he now remembers that Detective Visco came into the Amoco a few days after the murders to "verify his employment." (PCR 595-596, 613-614). He further claims that he should his August time card to Visco, but at the time he did not make the connection that Visco was really investigating the MacIvor murders. (638, 642,643). That connection was not made until five to six years later. (Id). However, this self serving statement about his meeting with Visco is in complete contradiction with his previous statements to the trial court back in 1999. It is also in contradiction to the testimony of Smith and Garcia. (PCR 159-160, 186, 787). Prior to trial, Overton filed a motion to discharge the services of Smith and Garcia, because of their failure to follow-up on various defenses. One such defense was based on this issue of pre-indictment delay. Overton lamented that further investigation into the "brain storming sessions" was needed to find out which law enforcement personnel was assigned to check out his alibi. Overton expressed frustration to the Court that defense attorney either had been unwilling or unable to ascertain that information. (ROA 880-886). In these proceedings ten years after the fact, Overton now remembers that it was Detective Visco who came to the station and asked to see Overton's timecard. Overton has offered no explanation regarding the obvious and blatant discrepancies between his two statements.

The second alleged Brady violation, according to Overton, occurred as follows, "[i]n another capital case from Monroe County, the case of State v. Lloyd Allen, the FDLE Crime Lab had refused to accept evidence submitted by Doc Pope because the sample was sloppily collected, and possibly contaminated." Overton argued this information is material because Doc Pope stored evidentiary samples in his home prior to sending them to FDLE for testing. (**Initial brief at 95-96).** The state argued that the claim should be summarily denied as it was insufficiently pled and Overton could not establish prejudice. The trial court found the claim to be insufficient as pled. (PCR 1301). That ruling was correct as any further impeachment evidence would have been cumulative.

The record demonstrates that Pope's collection of evidence in this case was severely challenged. For instance, the jury knew Pope was not an expert in DNA analysis or luma lighting techniques. (ROA 3337, 3438, 3567, 3576). The jury heard it was improper for Pope to take pieces of evidence home with him. (ROA 3393, 3480-81, 4032). The jury learned Pope had entered the wrong date regarding the collection of the bed sheets and had forgotten to make a property receipt for the swabs collected from the sexual assault kit. (ROA 3451-52, 3526). The jury heard it was improper for Pope to store those swabs in the

sexual assault kit and trace evidence from Mrs. MacIvor's body should have been collected at the scene rather than at the morgue. (ROA 4038, 4502-04). And the jury heard that a packaged condom found at the scene should have been taken into evidence during the initial investigation. (ROA 3526, 4500).

In light of the extensive impeachment regarding Doc Pope's evidence collection performance, any further criticism of his work in an unrelated case would have offered very little by way of valuable impeachment. Summary denial was proper. See Routly v. State, 590 So.2d 397, 399 (Fla. 1991) (finding new documents offered only cumulative impeachment, thus not material under Brady); Groover v. State, 498 So.2d 15, 17 (Fla. 1986); Spaziano v. Singletary, 36 F.3d 1028, 1039 (11th Cir. 1994) (rejecting claim of ineffectiveness for failure to pursue further impeachment given abundant impeachment presented); Routly v. Singletary, 33 F.3d 1279, 1288 (11th Cir. 1994); Scott v. Dugger, 891 F.2d 800, 804 (1989).

Appellant also alleged that the state withheld evidence concerning three other suspects.[13] Overton was granted a hearing

[13] In his postconviction motion, Overton presented this claim as one of ineffective assistance of counsel. He was granted a hearing on that claim. (PCR 2862). The state asserts that this claim is not preserved for review as the legal basis raised on appeal is not the claim that was raised below. Occhichone v. State, 570 So. 2d 902, 906 (Fla. 1990).

on a claim that counsel was ineffective for failing to follow up with this lead. (PCR 1294-1295, 2862). The trial court denied relief finding:

> The alternate theory of the crime favored by the Defendant was that his DNA was planted. Although the Defendant asserts, inaccurately, that at least three other individuals confessed to the crime, unless the theory that the Defendant's DNA was planted at the scene of the crime has some traction, confessions form individuals on the periphery or even further removed form the crime, can be discounted.

(PCR 2862).

In other words, appellant's claim that a defense that three other people committed the murder, could not be presented at the same trial where he is claiming that he his DNA was planted. Overton does not address the inherent contradictory nature of this alternate theories. Rivera v. State, 717 So. 2d 477, 486 (Fla. 1998)(upholding counsel's decision jot to pursue voluntary intoxication defense given that it was in complete contradiction to the defendant's assertion that he was innocent).

In any event, the evidence adduced at the hearing below unequivocally establishes that Jason Smith and Manny Garcia were all aware that an individual named Lee McCune, came forward with hearsay information regarding another suspect named Hernandez. McCune alleged that Hernandez admitted to him that he [Hernandez] was at the MacIvor's home the night of the murders.

Hernandez allegedly stated that he was downstairs while Overton was upstairs committing the crimes.

Law enforcement personnel, Larry O,Neil took the statement of Lee McCune wherein he made the allegation regarding Hernandez's confession. That information was then passed on to the prosecutor Ellsworth. Ellsworth testified that he gave the information to Smith and Garcia. (PCR 822-823, 834, 835). Once Hernandez was located six months later, Phillip Harrold of the Monroe Sheriff's department followed up on the statement. (PCR 700-702). Hernandez denied to Harrold that he ever made such a statement to McCune. Neither McCune nor Hernandez were called to testify at these proceedings. (Id.)

Both Smith and Garcia testified that they were aware of the statement but decided not to pursue this potential avenue because it would not be helpful to them. Both attorneys explained that because Hernandez allegedly claimed that he was at the crime scene, while Overton was committing the murders, that statement would be devastating to the theory that the DNA evidence had been planted. (PCR 756-757, 793-794). Given the very inculpatory nature of the statement, counsel cannot be considered constitutionally deficient in failing to pursue this "alternate theory" any further. Cf. Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997)(finding counsel's decision to

forego mental health testimony based on limited value weighed against other damaging evidence likely to be revealed); Van Poyck v. State, 694 So. 2d 686 (Fla. 1997)(same).

ISSUE VIII

[14]THE TRIAL COURT'S SUMMARY DENIAL OF THE REMAINING CLAIMS WAS PROPER

Appellant claims is very cursory fashion that the trial court denied improperly his request for an evidentiary hearing on several claims. Appellant is incorrect.

Appellant requested and was denied a claim that FDLE and the Monroe County Sheriff's Office failed to provide "investigative records on other suspects which were the subject of brainstorming sessions." **Initial brief at 97.** The trial court denied relief finding:

> **Claim I**- the Defendant should have continued access to relevant agency records, known and unknown.
> The claim was denied without prejudice to the Defendant seeking additional records from specific agencies as the need becomes known.

(PCR 2839).

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[14] For this Court's edification , however, the state would point out that the trial court did conduct a hearing on many of these claims albeit under related claims. For instance appellant was granted a hearing regarding his alleged alibi defense. See Issues III and V in this brief. Appellant was also granted a hearing on the claim that counsel was ineffective for failing to sufficiently challenge the state's medical examiner. See Issue III. Appellant was also granted a hearing on his claim that the murders were committed in a different manner that presented at trial, see Issue III.

In a footnote the court noted that it had ordered the Sheriff's office to disclose records, and the agency complied. (PCR 2839). Summary denial was proper.

The remainder of appellant's claim contains cursory statements that the trial court improperly denied an evidentiary hearing on other claims. Appellant does not include record cites, case law or legal analysis. These issues should be deemed waive. Duest v. State, 555 So. 2d 849,852 (Fla. 1990)("refusing to address merits of claim because appellant "[m}erely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court AFFIRM the trial court's denial of appellant's motion for post conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Terri Backus and Christina Spudeas, Capital Collateral Representative, 101 N.E. 3rd Ave., Suite 400, Fort Lauderdale, Florida, 33301, this ___ day of August 2006

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

_____

CELIA A. TERENZIO
Assistant Attorney General