IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC04-520

ROBERT CONSALVO,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (Criminal Division)

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ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Robert Consalvo, was the defendant at trial and will be referred to as "Consalvo". Appellee, the State of Florida, the prosecution below will be referred to as the "State". References to the records will be "ROA" for the direct appeal, "PCR-R" for postconviction record, "PCR-T" for the postconviction transcripts, supplementals will be designated with an "S" preceding the record type, and "AIB" will denote Consalvo's amended initial brief. Where appropriate, volume and page number(s) will be given.

STATEMENT OF THE CASE AND FACTS

Although this Court struck Consalvo's initial brief for non compliance with Florida Rule of Appellate Procedure 9.210, Consalvo's amended brief continues to contain invectives, innuendo, and inappropriate argument. For these reasons, the State rejects Consalvo's statement of the facts.

On October 23, 1991, Consalvo was indicted for the first-degree murder[1] of Lorraine Pezza and armed burglary of her residence. (ROA.v22 3343). Trial commenced on January 20, 1993 and the jury returned its verdict on February 11, 1993, convicting Consalvo as charged. (ROA.v17 2719-21; ROA.v23 3646-

[1] This occurred between September 26 and October 3, 1991.

47). Following the penalty phase, on March 25, 1993, the jury recommended death by a vote of eleven to one. (ROA.v23 3708). On November 17, 1993, the court sentenced Consalvo to death for first-degree murder based upon the felony murder and avoid arrest aggravators outweighing two non-statutory mitigators. A consecutive life sentence for the armed burglary was imposed. (ROA.v20 3263-3308; ROA.v24 3751-68). This Court affirmed. Consalvo v. State, 697 So.2d 805, 809 (Fla. 1996). On May 4, 1998, certiorari review by the United States Supreme Court was denied. Consalvo v. Florida, 523 U.S. 1109 (1998).

On April 9, 1999, Consalvo filed a motion for postconviction relief and on July 12, 1999, filed an amended motion with appendix (PCR-R.1 71-72; 103-39; PCR-R.2-5 207-665). A second amended motion and appendix were filed March 7, 2001 (PCR-R.5 765-806). The State responded to the Second Amended Motion, and on December 10, 2001, a Huff v. State, 622 So. 2d 982 (Fla. 1983) hearing was held (PCR-R.6-9 817-1483, 1519-78). In the court's March 7, 2002 order, an evidentiary hearing was granted on Claims I - IV. Each claim was based upon aspects of the alleged attempted recantations of Mark DaCosta and William Palmer: Claims I and II were offered as newly discovered evidence; Claim III was a Brady v. Maryland, 373 U.S. 83 (1963) claim; and Claim IV was raised as a violation of Giglio v. United States, 405 U.S. 150 (1972). In the same order,

Consalvo's Claims V - XV were denied summarily. (PCR-R.9 1604-07). The evidentiary hearing was held May 22, May 23, and June 4, 2002. On February 25, 2004, the order was rendered denying postconviction relief on Claim I - IV based upon the court's factual findings that the recanting witnesses were unworthy of belief. (PCR-R.11 1991-2010).

The following facts were found on direct appeal:

> On September 21, 1991, at 8 p.m. the victim, Ms. Lorraine Pezza, who was accompanied by her neighbor Robert Consalvo, drove to an automatic teller machine and withdrew $200 from her bank account. She placed $140 of that money in the glove compartment of her vehicle and placed the remaining $60 in her purse. At approximately 1:30 a.m. Pezza and Consalvo returned to the former's apartment and, at around 2:30 a.m., Pezza realized that she had left the money in her car and looked for her car keys which she never found. She used a spare key to unlock her car and discovered the $140 missing from the glove box. At this point she called the police.
>
> At around 3 a.m. Officer William Hopper was dispatched to Pezza's apartment. Pezza, with Consalvo present, reported to Hopper that she had lost or somebody had stolen $140 and a set of keys. Hopper asked Consalvo about the missing money and keys and he denied any wrongdoing. As Hopper was writing his report in his patrol car, he was again dispatched to Pezza's apartment. With Consalvo no longer present, Pezza told the officer that she suspected Consalvo of taking her keys and money.
>
> Two days later, on September 24, 1991, Detective Douglas Doethlaff received a phone call from Pezza inquiring how to file

charges against Consalvo. Doethlaff advised Pezza that more identifying data was needed on Consalvo and indicated he would contact Consalvo. Doethlaff then contacted Consalvo and told him that Pezza wished to proceed with the case and that it was his word against hers. Consalvo continued to deny any wrongdoing.

On September 27, 1991, from 10 a.m. to 11 a.m., Pezza employed a locksmith to change the locks on her apartment door and her mailbox. The locksmith subsequently stated that he was also asked to change the locks on the victim's car, but was unable to do so. The locksmith was the last witness to see Pezza alive. At 4:08 p.m. on the same day, Consalvo was documented on videotape using Pezza's ATM card. Consalvo also used Pezza's ATM card on September 29 and 30, 1991. The manager of a motel testified that on September 30, 1991, he saw appellant driving a car "similar" to Pezza's.

On October 3, 1991, at approximately 12:40 a.m., Nancy Murray observed a man wearing a brown towel over his head cut a screen door and enter the residence of Myrna Walker, who lived downstairs from the victim. Murray called the police and Consalvo was apprehended while burglarizing the apartment. Fresh pry marks were found on a sliding glass door along with a cut porch screen. Assorted jewelry was found lying on the bedroom floor with a screwdriver and towel. When police searched Consalvo, they found checkbooks belonging to Pezza, as well as to Walker, and a small pocketknife. Consalvo was arrested and subsequent to his arrest, Consalvo repeatedly asked the police what his bond would be for this burglary offense and how quickly he could be released.

That same day, Detective Doethlaff went to Pezza's apartment to investigate why Consalvo was in possession of her checkbook.

Doethlaff observed fresh pry marks on Pezza's front door between the deadbolt and the doorknob. When no one answered the door, which was locked, Doethlaff left a business card at the door requesting Pezza to contact the police. That evening, after Pezza's family had tried unsuccessfully for several days to reach her, Eva Bell, a social worker for the Broward Mental Health Division, went to the victim's apartment to check on her[1]. While at the apartment, Bell encountered Pezza's next-door neighbor, Consalvo's mother, Jeanne Corropolli. Corropolli, who lived with Consalvo, related to Ms. Bell that her son had been arrested earlier that day (for the burglary of Mrs. Walker's apartment). After receiving no response at Pezza's apartment, Bell contacted the police. At 7:16 p.m. Officer Westberry responded to Bell's request to check on Pezza. He knocked on Pezza's apartment door without getting a response and noticed Doethlaff's business card was still in the door jamb. The officer went back to his patrol car to complete his report. Bell, who was still in Corropolli's apartment, testified that shortly after the officer left the apartment, Corropolli was on the phone. Corropolli hung up the phone and became hysterical. Corropolli told Bell that her son, Robert Consalvo, said that he was "involved in a murder."[2] Corropolli testified that when she told her son the police were next door, he replied, "Oh, shit." Bell immediately related this information to Officer Westberry, who then forced open Pezza's apartment door and discovered her decomposing body in the apartment. The porch screens of Pezza's apartment were cut.

At 10:10 p.m., Detective Gill of the Broward Sheriff's Office contacted Consalvo at the Pompano Jail Annex. After advising Consalvo of his rights, Gill notified Consalvo that they wanted to speak to him about Pezza's checks being found on his person at the time

of his arrest. Consalvo responded by stating: "[Y]ou are not going to pin the stabbing on me." At this time, Gill did not know that Pezza had been stabbed.

At 2:30 a.m. the next day, Detective Gill effectively arrested Consalvo by filing an add charge against him for the murder of Lorraine Pezza. Consalvo had not yet been released on bond for the burglary charge. When a search warrant was executed on Corropolli's apartment, the police found a bloody towel in a dresser in Consalvo's bedroom. Subsequent DNA testing matched the blood on the towel with the victim's blood. In a statement to the police, Consalvo's mother confirmed that her son had in fact called her from the county jail and had advised her that he might be implicated in a homicide. She further informed police that she had found a towel in her son's room with blood on it.

While incarcerated in the Broward County Jail, Consalvo made inculpatory statements to a fellow inmate named William Palmer. Consalvo told Palmer that he killed Pezza after she caught him burglarizing her apartment and said she would call the police. When she started to yell for help, Consalvo stabbed her. Lorraine Pezza was stabbed three times with five additional superficial puncture wounds. The fatal wound was to the left side of the chest. According to the testimony of Dr. Ronald Wright, the medical examiner, this could have occurred only if the victim was lying down at the time. The additional stab wounds were to the right upper chest and the right side of the back. The five superficial puncture wounds were to the back. Dr. Wright classified the manner of death as homicide and estimated that death occurred approximately three to seven days before the body was discovered.

> On February 11, 1993, appellant was convicted of armed burglary and the first-degree murder of Lorraine Pezza. The jury recommended the death sentence by a vote of eleven to one. The trial court found two aggravating factors: (1) the capital felony was committed while the defendant was engaged in the commission of a burglary, *see* § 921.141(5)(d), Fla. Stat. (1995); and (2) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest, *see id.* § 921.141(5)(e). The court found no statutory mitigating circumstances. As for nonstatutory mitigating circumstances it accorded the following "very little weight": (1) appellant's employment history; and (2) appellant's abusive childhood. Because the "mitigating factors have been given very little weight and they in no way offset the aggravating factors," the trial court found the death sentence "fully supported by the record."
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> [1]Pezza's medical and psychological records indicate a history of mental illness.
>
> [2]Telephone records indicated that at 7:32 p.m. on October 3, 1991 a collect call was made from the Pompano Jail Annex inmates' phone to Ms. Corropolli's apartment. Consalvo, at this time, was being held at the Pompano Jail Annex.

Consalvo, 697 So.2d at 809-11.

At the evidentiary hearing, Consalvo presented Mark DaCosta ("DaCosta"),[2] William Palmer ("Palmer"), and Assistant State

[2] **Mark DaCosta** was the name under which this witness was convicted, gave statements and grand jury testimony in Consalvo's case, and communicated with government officials. However, he used the name **Marco Lee Romalotti** when testifying in here. The State will refer to him as "DaCosta."

Attorney Ken Farnsworth. The State presented State Attorney Secretary Lisa Gardner, Assistant State Attorney Brian Cavanagh ("ASA Cavanagh"), Broward Sheriff's Office Detective Frank Ilarraza, and Florida Department of Law Enforcement Special Agent Audrey Jones ("FDLE Agent Jones"). In denying relief, the court rejected the recantation testimony of DaCosta and Palmer as not credible and untrustworthy, found ASA Cavanagh "unimpeachable", and concluded that evidence would not have produced a different result. Flowing from that, the court concluded there was neither a Brady nor Giglio violation. (PCR-R.11 2005-09)

It was DaCosta's evidentiary hearing testimony that he spoke to ASA Cavanagh about Consalvo's case a couple of days before he gave his October 10, 1991 taped statement to Detectives Gill and Ilarraza and two Cooper City detectives (PCR-T.1 37-40, 101-02). The meeting, according to DaCosta, took place in the State Attorney's conference room and lasted 30 minutes (PCR-T.1 41-44, 86-88). With DaCosta were ASA Cavanagh and a jail guard; Assistant State Attorney Jeff Marcus ("ASA Marcus"), the prosecutor assigned to the case, was not in the room and DaCosta did not know, nor had he ever met or spoken to ASA Marcus (PCR-T.1 44-45, 61, 96-97).

DaCosta claimed that all of the information he learned about Consalvo's case came from ASA Cavanagh, who had shown him

crime scene photographs, told him about the crime and what the police were looking for, named Consalvo as the suspect, and asked DaCosta to enlist another inmate to corroborate what would be given in testimony. DaCosta admitted that none of the information came from ASA Marcus or the police. According to DaCosta, in exchange for his testimony, he would receive a guidelines sentence (PCR-T.1 43-47, 57, 61, 96-97). It was DaCosta's testimony that he subsequently contacted a Cooper City detective he knew and was later interviewed by Broward Sheriff's Office ("BSO") Detectives Gill and Ilarraza, and two Cooper City detectives (PCR-T.1 49-51, 54-55).

In his **October, 1991** sworn police statement, DaCosta stated he had met Consalvo on either the fourth or fifth of October and knew of the charges from Consalvo and news reports (PCR-R.11 1861). During their conversations, Consalvo said his mother, brother, or someone was trying to get rid of a towel or sneakers with blood on them. The statement related that Consalvo had gained entry to the apartment of the victim, Lorraine Pezza ("Pezza"), with a set of keys he had taken from her earlier and was looking for prescription drugs Pezza had (PCR-R.11 1862). DaCosta reported Consalvo admitted Pezza lived near his mother's apartment and that he had been staying with his mother. Further, DaCosta told the police Consalvo confessed he knew Pezza and her boyfriend who had died three weeks before.

DaCosta's statement revealed that after Consalvo had entered Pezza's apartment, she confronted him, threatened to call the police, and he became very violent (PCR-R.11 1862). Describing the crime DaCosta stated:

> A: Well, [Consalvo] .... never came right out and said well, I stabbed her or I killed her. He just said I did away with her. In a term like that, I did away with her. Um, he doesn't ... he doesn't talk about the stabbing, he doesn't talk about the weapon, he doesn't .. you know, he hasn't really told me about the weapon or where it is.

(PCR-R.11 1863). Also, DaCosta told the police Consalvo had Pezza's checkbook, a towel with blood on it, and sneakers from which he had tried to wash blood. Consalvo said his mother was angry and returning to New York, because she knew he had committed the murder. He confided to DaCosta that he was upset with his brother who was linking him to the murder (PCR-R.11 1863-65).

At the evidentiary hearing, DaCosta admitted he had not testified at trial, but had testified before the grand jury. DaCosta then attempted to recant his police statement and grand jury testimony. He avowed that all he had discussed with Consavo were Consalvo's girlfriend and "general things"; they never spoke about the evidence, facts of the homicide, or stabbing. (PCR-T.1 52-53, 58-59, 62-63, 66).

It was in August 2000, while speaking to Consalvo's private

investigator, that DaCosta tried to recant his prior testimony/statements (PCR-T.1 78-79; PCR-R.11 1868-77). When he did not hear from Consalvo's investigator, DaCosta sent letters to the Governor and Director of Investigations, Patrick Noble, before giving a statement to Correctional Office Inspector Tony Pesante (PCR-R.11 1879-96). In DaCosta's affidavit signed October 26, 2000 recounting his August 22, 2000 discussion with the defense investigator, he stated the police and/or Detective Gill had given him information and that along with facts gleaned from newspapers and television were passed onto Palmer. In his September 10, 2000 letter to the Governor, DaCosta claimed "sometime in 1992"[3] two state prosecutors gave him evidence about Consalvo. Less than a month later, in his October 2, 2000 letter to Director Nobles, DaCosta reported four prosecutors, judges, and attorneys were involved in giving him information about Consalvo (PCR-R.11 1868-96). A week later, October 10, 2000, DaCosta claimed it was ASA Cavanagh and Jeff DeMarcus,[4] who had met with him in the jail conference room in early 1992, and briefed him about the case (PCR-R.11 1889-90). In his January 31, 2001 taped statement to FDLE Agent Jones, DaCosta reported that four detectives from BSO and Cooper City fed him

[3] DaCosta gave his police statement on October 10, 1991 and his Grand Jury testimony on October 23, 1991.

[4] The State assumes DaCosta is referring to Jeff Marcus.

information, and that he met ASA Cavanagh after giving his October 10, 1991 police statement, but classified it as a "mistake" (PCR-T.1 168, 171-72).

In August, 2000, DaCosta told the defense investigator that he wanted to "make things right in his life." (PCR-R.11 1869). To the Director of Investigations, DaCosta wrote he feared for his safety and wished to be transferred out-of-state or to the federal system (PCR.11 1879-83). On May 22, 1991, DaCosta asked the court to put him in protective custody (see State's Evidentiary Hearing Exhibit 4). (PCR-T.1 187; PCR-T.5 13-16, 19-21). In that letter, he asked to be transferred to an Indiana facility nearer his wife and child, because he had been labeled a "snitch" due to Consalvo's case (PCR-R.11 1898-99).

DaCosta testified at the hearing that he discussed the charges he faced when speaking to ASA Cavanagh and in return for testifying against Consalvo and recruiting others to do so, he was guaranteed a guidelines sentence. Even though he allegedly was guaranteed a particular sentence, DaCosta went to trial. DaCosta's sentencing transcript, as well as evidentiary hearing testimony, established ASA Marcus, who had never met DaCosta before, advised the court that DaCosta had testified at Consalvo's grand jury (PCR-T.1 45-47, 61, 74-76, 87-89; PCR-R.11 1901-26). The court, in DaCosta's sentencing, was asked by DaCosta's friends and family to consider a lesser sentence. The

court determined DaCosta's recent actions did not overcome his prior criminal history, and sentenced DaCosta as an habitual offender with a 17 year sentence. In spite of the fact DaCosta defined "guideline sentence" as one that falls within "whatever I score out to", and that a habitual offender sentence is not a guidelines sentence, DaCosta maintained he received a guidelines sentence (PCR-T.1 61, 75-76, 89-91).

It was DaCosta's account that before he was moved to another area after his grand jury testimony, daily, he and Palmer discussed Consalvo's case. DaCosta noted he did not know what Consalvo told Palmer (PCR-T.1 62-66, 72-74).

Testifying at the evidentiary hearing, ASA Cavanagh avowed he did not give DaCosta any information about Consalvo's case. ASA Cavanagh did not prepare any of the witnesses for grand jury testimony because he was not assigned the Consalvo case, but merely was covering for a colleague. Further, he did not interview any inmates at the jail or in his office with respect to this case. In order to have an inmate brought from the jail, a court order is required; no court order was produced. The only time ASA Cavanagh met with DaCosta was in the busy court hallway moments before DaCosta was presented to the Grand Jury (PCR-T.2 243, 246-50). Typically, only the detectives know about the case and witnesses at the time of the grand jury presentation because there usually has been insufficient time

for completion of police reports and witness transcripts. (PCR-T.12 244-45, 249).

Likewise, ASA Cavanagh did not discuss DaCosta's case as he was not the assigned attorney. He could not, and did not, offer guarantees or promises to DaCosta. Also, ASA Cavanagh explained he does not promise a witness anything because he does not want the testimony influenced. The only thing ASA Cavanagh tells his witnesses is to tell the truth (PCR-T.2 247-50).

On October 8, 1991, Consalvo's case was assigned to ASA Marcus, but due to a scheduling conflict, ASA Cavanagh was asked on October 21 or 22, 1991 to take the case to the October 23, 1991 grand jury. ASA Cavanagh had no involvement in or knowledge of the case before then. Lisa Gardner, Broward State Attorney's Office secretary, confirmed the October 8, 1991 assignment to ASA Marcus. The subpoenas for the grand jury were not signed until October 22, 1991. ASA Cavanagh was not briefed by the detectives until just before the grand jury (PCR-T.2 228-32, 240-50).

In April, 2000, while incarcerated, Palmer was interviewed by defense investigator, Roy Carr, and later executed an affidavit stating his 1993 testimony was untruthful. He asserted Consalvo had not admitted to "sticking" or harming the victim and such was based upon facts given him by DaCosta (PCR-R.11 1928-31).

During the evidentiary hearing, Palmer maintained Consalvo had not used the word “stick” or “stuck”, nor had he admitted to stabbing Pezza (PCR-T.13 318-20). However, Palmer contradicted DaCosta, and testified that in his presence, Consalvo and DaCosta had many conversations about the case (PCR-T.3 320-22, 413). Palmer averred that DaCosta did not tell him everything about Consalvo’s case, but that Consalvo spoke about his case “a lot” in Palmer’s presence. In fact, Palmer reported that DaCosta got most of his information about Consalvo’s case by listening to Consalvo’s phone conversations (PCR-T.3 398, 404-05). DaCosta and Consalvo spoke a lot, and DaCosta would turn to Palmer and inquire whether Palmer had heard what Consalvo just said (PCR-T.3 412-13).

When questioned about his reason for offering his attempted recantation, Palmer noted he had been diagnosed with depression and paranoid schizophrenia, and admitted he was upset when he learned Consalvo was on death row, and he did not want anyone there because of his testimony (PCR-T.13 366-67, 374-75, 393). Palmer remembered all portions of his conversation with Consalvo that placed Consalvo at the murder scene, but could not recall those statements where Consalvo admitted to “stabbing” Pezza or his “purpose” for killing her. (PCR-T.3 294, 299, 318-22, 325-28, 354, 358, 362, 364-67, 379-81, 398-402, 404-07, 413, 418-19). Also, Palmer felt that if he did not tell the defense

investigator what he wanted to hear, the investigator could tell other inmates Palmer was a "snitch" who sent a man to death row. Palmer admitted he lies when it suits him, and would lie about something he heard many years ago to avoid being labeled a "snitch" (PCR-T.13 394-96, 428).

Palmer testified he did not know prosecutor, ASA Marcus, and averred he was offered nothing for testifying in Consalvo's case. In fact, Palmer believed he could have beaten his 1991 charges[5] without State assistance (PCR-T.3 333, 360-61, 370-72, 391-92, 409). Assistant State Attorney Ken Farnsworth, averred ASA Cavanagh had no influence on the charging and sentencing decisions in Palmer's case. The reduction of one charge and *nolle prosequi* of another was at the defense's request and made after discussions with the police deputy involved and an assessment of whether the case would survive suppression motion.[6] (PCR-T.4 447-49).

[5] Palmer did not believe he got a good deal on his 1991 remaining charges. He admitted the State did not assist him with the violation of probation sentencing, but testified against Consalvo, nonetheless. (PCR-T.3 388-92).

[6] Palmer testified in Consalvo's trial. There, Palmer admitted his prior convictions to the jury along with the charges he had been facing in October, 1991 when incarcerated with Consalvo. The jury was advised those charges were reduced or dismissed, and Palmer had been released on his own recognizance after he had testified at Consalvo's grand jury. Palmer averred he was promised nothing in exchange for his testimony (ROA.v15 2373, 2379-83, 2391-93, 2404-10).

Also revealed by Palmer was that paragraphs 13 and 15 of his affidavit to the defense investigator were untruthful and paragraph 14 was incomplete[7] (PCR-R.11 1930; PCR-T.3 398-400). According to Palmer, Consalvo confessed to having broken into Pezza's apartment and stealing her check book and prescription drugs. Consalvo admitted to Palmer that he had been caught committing another burglary and had the murder victim's checkbook on his person at that time. Palmer agreed that it was Consalvo who admitted to living with his mother in the same building as the victim and to consoling Pezza on the recent death of her boyfriend. According to Palmer, he would gather "bits and pieces" of Consalvo's conversation when they were on the telephones at the same time (PCR-T.13 318-19, 322, 399-402,

[7] Palmer's June 8, 2000 affidavit provided:

13. That on April 12, 2000, he did state to Mr. Carr that he testified untruthfully in February 1993 due to the fact that he was facing a lengthy prison term and wished to mitigate his sentence.

14. That testimony he gave in February 1993 was derived from information orally given him by another inmate, Mark DaCosta.

15. That when he gave testimony in February 1993 he was taking Thorazine prescribed to him in the Broward County Jail.

At the time of Consalvo's trial, Palmer's criminal case was completed and he could not be prosecuted further. It was not true that Palmer testified against Consalvo because he was facing a lengthy prison term, as Palmer had been given probation.

404-05). Palmer also admitted his memory was better in October 1991,[8] and it was possible Consalvo said he knew Pezza had passed out so he broke into her apartment, but she awakened and threatened to call the police. While Palmer claimed he did not think Consalvo said he stabbed Pezza when she awakened and began screaming, Palmer averred he had not improvise when he spoke to the police. In stead, he related what he had heard from DaCosta and Consalvo. Although Palmer did not recall reporting Consalvo's admission, he believed he testified Consalvo stated that "I didn't stab her 20 times. I only stuck her a couple of times." Whenever questioned about Consalvo stabbing Pezza, Palmer insisted Consalvo had used the word "stuck." (PCR-T.13 403, 406-08, 410-17).

Palmer characterized his change in testimony as:

> I wasn't lying intentionally. I was lying and saying that I heard it directly from him, but I might have heard it directly from him, but I didn't hear it because I wasn't listening. I am not sure what he talked about.
>
> ...
>
> I'm not sure what he talked to (sic) with DaCosta. I know that him and DaCosta talked a lot, and I was present during quite a few

[8] Palmer averred he has a bad memory which worsens with the more drugs he consumes. He confessed to smoking marijuana and drinking the evening before the evidentiary hearing and having two or three beers during the lunch recess. This also preceded his May 23, 2002 deposition. (PCR-T.3 372, 386-87, 394-95, 403).

> of the conversations. And DaCosta reviewed with me later just exactly what had been said.

(PCR-T.13 413). Palmer said he was not lying during the evidentiary hearing because he could not recall who said certain things, but Consalvo could have discussed the stabbing (PCR-T.3 382-83). It was Palmer's admission that he, DaCosta, and Consalvo spoke, but DaCosta and Consalvo talked more than Palmer, who would catch only bits and pieces of the conversation. However, DaCosta tried to keep Palmer's attention during those conversations by turning to review what Consalvo had just related. Palmer did not recall exactly what was said (PCR-T.3 320-21, 364-65). While all three men talked about Consalvo's case, Palmer got "them mixed up as far as who said what" and that he only had caught "bits and pieces" of Consalvo's telephone conversation, a conversation he was not trying to overhear. (PCR-T.3 362, 366-67, 379, 404). Consalvo may have told Palmer things that he no longer remembers, but Palmer recalled "bits and pieces" of his testimonies (PCR-T.3 362, 379).[9] Palmer remembered Consalvo went to Pezza's apartment to steal her checks and prescription medication. Further, he

[9] Palmer's evidentiary hearing testimony confirmed he obtained his information about Consalvo through discussions **with** Consalvo or by **overhearing** telephone conversations Consalvo had with family members. Palmer admitted having conversations **with** Consalvo privately, **and** in DaCosta's presence (PCR-T.3 294-95, 299, 318-27, 354-57, 365, 379-81, 398-402, 404-07, 410, 413).

admitted Consalvo could have discussed the stabbing, knowing Pezza was passed out before breaking into the apartment, and being confronted by Pezza threatening to call the police (PCR-T.3 318-19, 322, 354, 362, 379, 382-83, 398-400, 404-07, 410).[10]

The evidentiary hearing records reveal Palmer refused to meet with, in fact avoided, FDLE Agent Jones, even though he knew she was investigating the case and claim of prosecutorial misconduct. Palmer was not anxious to assist Consalvo, and admitted fearing perjury charges. (PCR-T.3 419-21).

Based upon the testimony and record, the court rejected Dacosta's attempted recantation. Specifically, the court dismissed, as not believable, DaCosta's assertion that a meeting took place between himself and Cavanagh and that he was "fed" information. The court found Cavanagh's "credible and unimpeachable testimony" alone was sufficient to determine DaCosta's allegations were not credible. (PCR-R.11 2005).

The court likewise rejected Palmer's attempted recantation finding "Palmer admitted that Consalvo had talked about his case" and that through the passage of time, "Palmer is confused about what he heard directly from Consalvo and what he overheard

[10] At one point, Palmer admitted he was unsure whether Consalvo confessed he stabbed Pezza and then stabbed her again after she yelled. However, Palmer gave alternate excuses; either he lied or DaCosta made up the story (PCR-T.3 380-81, 407, 417).

Consalvo tell DaCosta." Further, the court based its decision in part on Palmer's testimony based upon his psychiatric history, years of prescription drug use, "bad memory", and fear of being labeled a "snitch", fear he was the cause of Consalvo's death sentence. The court deemed Palmer's testimony "bizarre and totally unworthy of belief" and his attempted recantation not credible (PCR-R.11 2007-09; PCR-T.3 370-83). Ultimately, the court concluded "Palmer's testimony at a new trial would not render probable a different verdict or different sentence." (PCR-R.11 2009). As a direct result of these findings, the Brady and Giglio claims were rejected. (PCR-R.11 2009). Postconviction relief was denied and this appeal followed.

SUMMARY OF THE ARGUMENT

Issues I and II - In rejecting the claim of newly discovered evidence arising from the attempted recantations of DaCosta and Palmer, the court made factual findings that these witnesses could not be believed. These findings are supported by substantial competent evidence contained in the record. The court resolved the inconsistencies in the testimony of all witnesses and considered Palmer's and Dacosta's motivations, prior mental health and prescription drug abuse, and admissions of lying when it benefits them. Also, the court found ASA Cavanagh unimpeachable in his account that he did not meet with or provide information about Consalvo's case to DaCosta prior to the grand jury testimony and that he had no influence over the charging/sentencing of Palmer or DaCosta. The court's factual findings must be given deference. Because the attempted recantations, notoriously unreliable, were not believable, the court followed its duty as discussed in Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994), and denied relief .

Issue III - Consalvo has failed to establish a Brady violation. He has not been able to prove that the State withheld exculpatory, material information. There is no reliable proof that the State gave information about Consalvo's case to DaCosta or Palmer, nor is there reliable evidence that undisclosed promises were made to these witnesses in exchange

for their testimony to the grand jury and/or at trial. Flowing from substantial, competent evidence that DaCosta and Palmer are untrustworthy, the court correctly determined that the Brady claim was not proven.

Issue IV - As with the newly discovered evidence and Brady claims, Consalvo based his assertion of a Giglio v. United States, 405 U.S. 150 (1972) violation of the accounts of DaCosta and Palmer. The court's factual findings rejecting DaCosta and Palmer as not credible are supported by substantial, competent evidence in the record. There was no proof that false testimony was presented knowingly to the jury by the State or that the statements were material. Consalvo has failed to show error.

Issues V and VI - In conclusory terms, Consalvo's asserts court error in summarily denying relief on **Postconviction Claims V - XV**. This is insufficiently pled to gain appellate review. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990). Furthermore, the summary denial was proper. The record reveals the court made findings regarding the legal sufficiency of the postconviction claims when such was at issue, discussed the application of procedural bars where appropriate, and identified those arguments which were without merit or refuted from the record. Such are supported by the record and case law. This Court should affirm.

ARGUMENT

ISSUES I AND II

RELIEF WAS DENIED PROPERLY ON CONSALVO'S CLAIMS OF NEWLY DISCOVERED EVIDENCE AFTER THE COURT ASSESSED AND REJECTED THE CREDIBILITY OF THE RECANTING WITNESSES (restated).

Consalvo asserts the court used the wrong legal standard in denying postconviction relief, and erred in rejecting the evidentiary hearing testimony of Palmer and DaCosta where they attempted to recant their prior testimony and statements.[11] (IB 53). The pith of Consalvo's argument is that the court should not have rejected the testimony of Palmer and DaCosta merely because they had credibility problems. Instead, Consalvo maintains that Palmer's attempted recantation automatically negates his trial testimony, thus, mandating a new trial. It is also argued by Consalvo that without Palmer's trial testimony, neither a conviction nor the avoid arrest aggravator would exist. (IB 55, 62-66). Consalvo seeks a new trial.

Contrary to Consalvo's position, the court followed the law by considering the new evidence, assessing the credibility of the witnesses, and resolving factual disputes. Further, the court cited and applied the appropriate law governing instances

[11] As the records reveal, DaCosta gave a police statement and testified before the grand jury, but did not testify at trial. Palmer testified at trial.

where witnesses attempt to recant their testimony, and determined that those witnesses could not be believed. In so doing, the court found that "Palmer's testimony at a new trial would not render probable a different verdict or different sentence." The court's findings are supported by substantial, competent evidence. Additionally, the determination that Palmer's testimony was untrustworthy of belief also negates Consalvo's challenge to the avoid arrest aggravator. Palmer's testimony stands, and as this Court found on direct appeal, supports the avoid arrest aggravator. This Court should affirm.

The standard of review for the denial of a new trial based upon newly discovered evidence is abuse of discretion. Mills v. State, 786 So.2d 547, 549 (Fla. 2001) (finding trial court did not abuse its discretion in denying postconviction relief based on newly discovered evidence); State v. Spaziano, 692 So.2d 174 (Fla. 1997). This Court has stated:

> In reviewing the trial court's application of the newly discovered evidence rule, this Court applies the following standard of review:
>
> > As long as the trial court's findings are supported by competent substantial evidence, "this Court will not substitute its own judgment for that of the trial court on question of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."

> *Melendez*, 718 So.2d at 747-48 (quoting *Blanco*, 702 So.2d at 1251).

Rogers v. State, 783 So.2d 980, 1003-04 (Fla. 2001). See Lightbourne v. State, 841 So.2d 431, 442 (Fla. 2003) (affirming denial of postconviction relief based on conclusion trial court's finding defendant had "not established a reasonable probability that a life sentence would have been imposed is supported by competent, substantial evidence.").

In order to prevail on a claim of newly discovered evidence two requirements must be met by the defendant:

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

Jones v. State, 709 So. 2d 512, 521-22 (Fla. 1998). "Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial" Marquard v. State, 850 So.2d 417, 424 (Fla. 2002) (citing Brown

v. State, 381 So.2d 690 (Fla. 1980); Bell v. State, 90 So.2d 704 (Fla. 1956)).

With respect to recantations, this Court has stated:

> Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. [c.o.] In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial. [c.o.] "**Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury**." [c.o.] Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted.

Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994) (emphasis supplied). See Stano, v. State, 708 So. 2d 271, 275 (Fla. 1998) (recognizing recanted testimony is “exceedingly unreliable"); Spaziano v. State, 660 So. 2d 1363, 1365 n. 1 (Fla. 1995) (same); Bell v. State, 90 So. 2d 704, 705 (Fla. 1956) (same). Only where it is determined that the recantation testimony is true must there be an assessment as to whether the new testimony would result in a different verdict on re-trial. See Johnson v. State, 769 So.2d 990, 998 (Fla. 2000) (announcing requirement of dual findings “First, the court must determine whether [the

witness's] recantation is true. If so, the court then must determine whether [the witness's] new testimony would probably result in a different verdict at a new trial). "Because [assessment of a witness's recantation] entails a determination as to the credibility of the witness, this Court 'will not substitute its judgment for that of the trial court on issues of credibility' so long as the decision is supported by competent, substantial evidence." Marquard, 850 So.2d at 424 (quoting Johnson v. State, 769 So.2d 990, 1000 (Fla. 2000)).

Following the evidentiary hearing, the trial court found that the testimony offered by Palmer and DaCosta were unbelieveable in their entirety. As such, under Marquard; Armstrong; and Johnson, it was the court's duty to deny the request for a new trial. The record in this case establishes that the court's factual findings and basis for the rejection of the testimony from Palmer and DaCosta are supported by substantial, competent evidence. Hence, this Court should affirm.

Initially it must be noted, Consalvo presents two misleading factual assertions. The first is that ASA Cavanagh promised Dacosta Consalvo would not receive the death penalty (IB 52). Consalvo does not give a record cite for this, and the State did not locate anything supporting this claim.

The second misleading factual assertion is that ASA Farnsworth reported that ASA Cavanagh went to the Broward County Jail to work with Palmer and DaCosta (IB 52). Again, Consalvo offers no record citations for this assertion. However, the record refutes Consalvo's factual assertion that ASA Cavanagh met Palmer and Dacosta in the jail. ASA Farnsworth testified that he authored a memorandum related to Palmer's reduced charges which stated in part: "Assistant Brian Cavanagh spoke to the Defendant Palmer and also another inmate at the Broward County Jail." (PCR-T.4 446). Explaining this statement, ASA Farnsworth averred that he did not know where ASA Cavanagh met with the inmates and that the statement merely was referencing where the inmates were being detained or housed, not where interviewed. (PCR-T.4 450). Moreover, ASA Cavanagh averred he did not meet the inmates at issue in the jail or in his office. (PCR-T.2 243, 246-50).

In announcing his factual findings, the trial judge stated that he had considered the reasonableness of the testimony in light of all the evidence as well as "the intelligence, frankness, credibility, plausibility, character and competence of the witnesses" and that he tried to ascertain the motives, biases and interest of the witnesses" (PCR-R .11 2004). The court rejected as not credible DaCosta's recantation of his police statements and grand jury testimony as well as his claim

that DaCosta and ASA Cavanagh met at the jail. It was the court's factual finding "that the State did not solicit DaCosta in order to obtain a conviction against Consalvo." Also, the court rejected "the allegation that DaCosta 'fed' information to William Palmer so that he could be the corroborating witness against Consalvo. (PCR-R.11 2005).

It was based upon ASA Cavanagh's "credible and unimpeachable testimony" that the court based its rejection of DaCosta's claim ASA Cavaugh solicited aid to convict Consalvo. This finding rested upon the fact Consalvo was arrested on October 3, 1991, DaCosta gave a police statement on October 10, 1991, but that ASA Cavanagh was not assigned Consalvo's case, but merely became involved in the case as a favor for the assigned prosecutor, Jeff Marcus, by signing grand jury subpoenas on October 22, 1991, the same day the lead detectives presented the case to the State, and took the matter before the grand jury. The evidentiary hearing testimony of Lisa Gardner and ASA Cavanagh support these findings. (PCR-T.2 228-32, 240-41, 243-50). It is well within the province of the fact finder to reject DaCosta's testimony, resolve credibility issues, and credit ASA Cavanagh's account as the accurate one. When it comes to facts, trial courts have an institutional advantage as they can observe witnesses, hear their testimony, and see and touch the physical evidence. Guzman v. State, 721 So.2d 1155,

1159 (Fla. 1998) (noting that trial judge has the superior vantage point to see and hear the witnesses and judge their credibility.) The court's factual findings here are supported by substantial competent evidence especially given his superior vantage point to assess credibility.

Even though ASA Cavanagh's testimony is sufficient to support rejection of DaCosta's account, the court also pointed out the many inconsistencies evident in the various statements DaCosta gave to various parties. One of the inconsistencies identified involved DaCosta's mis-characterization of his sentencing as a guidelines sentence offered by the state. The record showed it was the defense who asked for a guidelines sentence, but at the State's request a habitual sentence of 17 years was imposed (PCR-R.11 2006). Further, DaCosta was not credible in alleging a plea deal with ASA Cavanagh because the record showed DaCosta did not take a plea, but went to trial and upon conviction was declared a habitual offender. (PCR-R.11 2006). The court noted DaCosta's consistency in trying to get out of prison both in 1991, at the time of Consalvo's 1993 trial, and through the 2002 evidentiary hearing where DaCosta continued to write letters in an attempt to move to the federal system and closer to his wife in Indiana. Most telling for the trial court was DaCosta's admission that he gave "numerous inconsistent statements and has not had a problem telling 'lies'

when it suits him." (PCR-R.11 2007) (footnote omitted). These findings are supported by the record, including the fact that Palmer contradicts DaCosta on a key point, namely, that Consalvo discussed the case facts in the presence of Palmer and DaCosta. (PCR-T.1 45-47, 61-66, 72-76, 78-79, 87-91, 168-72, 187; PCR-T.2 228-32, 240-50, 2947-95, 299, 318-28, 354-58, 362-67, 379-81, 398-407, 410-13, 418-19; PCR-R.11 1868-96, 1901-26, 2004-07).

Additionally, the court's rejection of Palmer's evidentiary hearing attempted recantation is supported by the record facts. One of the more telling statements by Palmer regarding what he heard from Conslavo was: "I wasn't lying intentionally. I was lying and saying that I heard it directly from him, but I might have heard it directly from him, but I didn't hear it because I wasn't listening. I am not sure what he talked about." (PCR-T.13 413). Later, Palmer admitted that DaCosta and Consalvo spoke quite a lot, and "quite a few of the conversations" were in Palmer's presence. (PCR-T.13 413).

It was the court's conclusion that the allegation Consalvo never made admissions to Palmer and/or that DaCosta fed the information to Palmer was refuted by Palmer's own testimony. (PCR.R.11 2007). These factual findings were based on Palmer's admission Consalvo discussed his case, but that Palmer was confused as to what Palmer knew from talking to Consalvo directly and what he overheard Consalvo discuss with DaCosta.

As found by the court, Palmer's statements and trial testimony were consistent, but not always consistent with DaCosta's October 10, 1991 police statement. The court recognized that Palmer's poor memory was due to years of prescription drug use, psychiatric history, fear of being labeled a "snitch", and belief that his testimony was the cause for Consalvo's death sentence. (PCR-R.11 2007-08). As Palmer testified, he was a prescription drug user, who suffered from psychiatric problems, feared being labeled a "snitch" if he did not recant to the defense investigator, and was upset that his testimony may have led to the capital sentence. Palmer was most concerned about the sentence and stated: "I don't think [Consalvo] should be on death row, though, and if any statement that he told me he stabbed her put him there, then I'm wrong. I don't think he ever told me he stabbed her." (PCR-T.3 294, 299, 218-28, 354, 358, 362-67, 374-75, 379-81, 393-407, 412-13, 418-19, 428).

Consalvo alleges that Palmer testified against him in order to receive a lesser sentence on the charges Palmer faced. Palmer denied this. Given this, the record supports the court's finding that Palmer was not so motivated. (PCR-T.3 333, 360-61, 370-72, 391-92, 409; PCR-T.4 447-49; PCR-R.11 2008).

Further, the bizarre and untrustworthy nature of Palmer's testimony, as found by the court, is evidenced in the State's cross-examination of the witness. Such establishes that Palmer

recalled certain aspects of his conversation with Consalvo during which Consalvo admitted to breaking into the victim's home and taking her keys and checkbook. Palmer admitted to having been in a prison mental health facility when the defense investigator located him. It was Palmer's testimony the drugs he had been prescribed over the years harmed his memory. Additionally, Palmer hears whispering voices at night as he lies awake; he calls the voices "ghosts", but he did not hear "ghosts" during the week before the evidentiary hearing. These voices denigrate Palmer who believes people talk about him. He has been diagnosed as depressed and paranoid schizophrenic. Although he has been prescribed medication, Palmer does not take it. However, when incarcerated with Consalvo, Palmer was taking medicine which helped him. (PCR-T.3 369-83).

Also, Palmer alternately asserted he did not think Consalvo had admitted to stabbing the victim, then he stated DaCosta told him about Consalvo, and finally that he did not recall Consalvo admitting to stabbing the victim, but that Consalvo could have stated that. During the examination, Palmer admitted he tells lies, but not as many as he used to tell. (PCR-T.3 369-83). Given the internal inconsistences in Palmer's account and his admission that he did not want his testimony to be the basis for the death sentence, nor did he want to be labeled a snitch, the court was well within its province to find the testimony

unbelievable and to deny a new guilt phase trial.[12] See Sochor v. State, 883 So.2d 766, 786 (Fla. 2004) (affirming denial of postconviction relief as trial court's rejection of notoriously unreliable recantation testimony was supported by record and affirming rejection of Brady and Giglio claims on same grounds); Robinson v. State, 865 So.2d 1259, 1262 (Fla. 2004) (opining "Robinson has failed to demonstrate error by the trial court on the critical credibility issue that arises with Fields's recantation testimony. The trial court has made a fact-based determination that the recantation is not credible, and noting prior assessment "that recantation testimony 'may be unreliable and trial judges must 'examine all of the circumstances in the case.'"); Lightbourne v. State, 841 So.2d 431, 441 (Fla. 2003) (affirming denial of relief where court found recanting witnesses "inconsistent, contradictory, and just not worthy of much belief"); Armstrong, 642 So.2d at 735 (rejecting relief while noting "recanting testimony is exceedingly unreliable, and

[12] Further, the fact that Palmer corrected errors in questions posed by the police and counsel refutes any recent allegation that the police told him what not to say. In fact, Palmer admitted that in 1992, even if a false answer were suggested, he would not give the false answer. From a comparison of the accounts given by Palmer and DaCosta in 1991, it is clear they did not coordinate their stories. This gives further support for the rejection of the attempted recantations (PCR-T.3 409-11, 414-17).

it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true").

This Court should affirm the denial of relief as the court made a factual determination that Palmer and DaCosta were not trustworthy. Johnson, 769 So.2d at 998. A new trial is not warranted, in fact it was the court's duty to deny relief, as the attempted recantations were not believable. Armstrong, 642 So.2d at 735

Turning to **Issue II**, Consalvo maintains that the trial court failed to consider Palmer's evidentiary hearing testimony as "newly discovered evidence." Contrary to Consalvo's position, the trial judge cited the correct law regarding newly discovered evidence involving recanted testimony, considered the veracity of Palmer's evidentiary hearing testimony where he attempted to recant his trial testimony, assessed such in relationship to the facts, and rejected Palmer's most recent account. The factual findings are supported by the evidence as noted above and reincorporated here. The complete rejection of Palmer's attempted recantation leaves intact the trial testimony and the evidence supporting the avoid arrest aggravator. The trial court correctly cited Armstrong, 642 So.2d at 735, as that opinion outlines the appropriate standard for newly discovered evidence associated with recantations. As discussed above, the appropriate law was applied in determining that Palmer's

evidentiary hearing testimony would not change the outcome of the trial. Postconviction relief was denied properly.

Consalvo presents numerous direct appeal cases[13] where the avoid arrest aggravator was rejected,[14] these do not undermine

[13] Consalvo cites to Menendez v. State, 368 So.2d 1278 (Fla. 1979); Bolander v. State, 422 So.2d 833 (Fla. 1982); Martin v. State, 420 So.2d 583 (Fla. 1982); Griffin v. State, 414 So.2d 1025 (Fla. 1982); Adams v. State, 412 So.2d 850 (Fla. 1982); Doyle v. State, 460 So.2d 353 (Fla. 1984);Bates v. State, 465 So.2d 490 (Fla. 1985); Riley v. State, 366 So.2d 19 (Fla. 1978); Bruno v. State, 574 So.2d 76 (Fla. 1991); and Davis v. State, 604 So.2d 794 (Fla. 1992). All predate Consalvo v. State, 697 So.2d 805 (Fla. 1997), wherein this Court found that in the avoid arrest aggravator applied because it was clear that Consalvo's main reason for killing the victim was to eliminate a witness. Not only was Palmer's testimony regarding Consalvo's stabbing of the victim at the time she threatened to call the police cited, but this Court also credited the evidence that Consalvo and the victim knew each other and that Consalvo knew the victim was pressing charges for an earlier theft. Id. at 819. Consalvo's recitation of the development of the law in this area does not answer the question before this court, namely, whether the trial judge's rejection of the testimony from Palmer and DaCosta was supported by the evidence. Because the testimony from Palmer and DaCosta was not believable, it would have no impact on a re-trial. A new trial was denied correctly and none of the cases cited by Consalvo call into question the denial of a new trial or this Court's 1997 conclusion that the avoid arrest aggravator was proven beyond a reasonable doubt and found by the sentencing court properly.

[14] To the extent that Consalvo argues that absent the avoid arrest aggravator, his death sentence cannot stand, he is incorrect. This Court has affirmed single aggravator cases and has stated: "[w]hen one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided...." State v. Dixon, 283 So.2d 1, 8-9 (Fla. 1973), superseded by statute as stated in State v. Dene, 533 So.2d 265 (Fla. 1988). Based upon this interpretation, a single aggravator sentence was affirmed in LeDuc v. State, 365 So.2d 149, 152 (Fla. 1978). Since then, this Court has affirmed

the trial court's conclusion that Palmer's testimony in the postconviction litigation was not believable. The test is not whether the aggravator should have been found, but whether Palmer's attempted recantation would change his trial testimony to such an extent that a different verdict would be rendered. Because, as this Court has recognized "recanting testimony is exceedingly unreliable," and the trial court determined that the attempted recantation could not be believed, it was the court's duty to deny a new trial. Sochor, 883 So.2d at 786; Robinson, 865 So.2d at 1262; Lightbourne, 841 So.2d at 441-42; Marquard, 850 So.2d at 424; Armstrong, 642 So.2d at 735. The fact the attempted recantation was not believable supports the conclusion that the trial testimony would not change to such an extent as to render a different result probable. A new trial was denied properly.

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several single aggravator cases where there was little mitigation. In sentencing Consalvo, the court found no statutory mitigation and very little weight was assigned the two non-statutory mitigators of "employment history" and "abusive childhood." Consalvo v. State, 697 So.2d 805, 811 (Fla. 1996). Hence, even absent the avoid arrest aggravator, Consalvo's death sentence remains proper as his mitigation is minimal. See Butler v. State, 842 So.2d 817, 832-34 (Fla. 2003); Blackwood v. State, 777 So.2d 399 (Fla. 2000); Cardona v. State, 641 So.2d 361 (Fla. 1994), denial of postconviction relief reversed, 826 So.2d 968 (Fla. 2002).

ISSUE III

POSTCONVICTION RELIEF WAS DENIED PROPERLY ON CONSALVO'S ALLEGATION OF A BRADY VIOLATION AS THERE WAS NO CREDIBLE EVIDENCE THE STATE BRIEFED EITHER DACOSTA OR PALMER ABOUT THE MURDER INVESTIGATION, THUS, THERE WAS NO EXCULPATORY EVIDENCE TO DISCLOSE (restated)

Here, Consalvo maintains his allegations that ASA Cavanagh visited Palmer and another inmate in the jail to discuss the case and housing of the inmates, in addition to the State's refusal to turn over grand jury testimony of DaCosta and Palmer is newly discovered evidence. This evidence, he claims, constitutes exculpatory material requiring disclosure under Brady v. Maryland, 373 U.S. 83 (1963). Consalvo suggests that the court erred in rejecting this claim.

Contrary to Consalvo's position, the court heard the testimony of ASA Cavanagh, ASA Farnsworth, Palmer, DaCosta, and other witnesses at the evidentiary hearing, and made credibility assessments and factual findings that ASA Cavanagh did not meet any inmates at the jail to discuss the case. In fact, the court rejected completely the attempted recantations of Palmer and DaCosta as analyzed in Issues I and II and reincorporated here. There was no exculpatory evidence to be turned over to the defense and the Brady claim was rejected properly. This Court must affirm.

"The Brady rule requires that the prosecution not suppress

evidence favorable to an accused where that 'evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' Brady, 373 U.S. at 87." Boyd v. State, 2005 WL 318568, at 5 (Fla. Feb. 10, 2005). Recently, this Court discussed the standard of review applied to Brady claims.

> To establish a *Brady* violation, the defendant must show the following: (1) that the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the suppression resulted in prejudice. *Rogers v. State*, 782 So.2d 373, 378 (Fla.2001) (citing *Strickler v. Greene*, 527 U.S. 263, 280-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)).
>
> *Brady* claims are mixed questions of law and fact. *Rogers*, 782 So.2d at 376-77. When reviewing *Brady* claims, this Court applies a mixed standard of review, "defer[ring] to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but review[ing] *de novo* the application of those facts to the law." *Lightbourne v. State*, 841 So.2d 431, 437-38 (Fla.2003) (citing *Stephens v. State*, 748 So.2d 1028, 1031-32 (Fla.1999)).

Johnson v. State, 30 Fla. L. Weekly S215 (Fla. Mar. 31, 2005). See Lightbourne v. State, 841 So.2d 431, 437-38 (Fla. 2003); Stephens v. State, 748 So.2d 1028, 1031-32 (Fla. 1999); Rogers v. State, 782 So.2d 373 (Fla. 2001); Way v. State, 760 So.2d 903 (Fla. 2000); Jones v. State, 709 So.2d 512, 519 (Fla. 1998);

Hegwood v. State, 575 So.2d 170, 172 (Fla. 1991); Strickler v. Greene, 527 U.S. 263, 280-82 (1999);[15] High v. Head, 209 F.3d 1257, 1265 (11th Cir. 2000); U.S. v. Starrett, 55 F.3d 1525, 1555 (11th Cir. 1995).

In order to satisfy prejudice under Brady, a defendant must show the evidence was exculpatory and material. Way v. State, 630 So.2d 177, 178 (Fla. 1993). 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." United States v. Bagley, 473 U.S. 667, 682 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id. Prejudice is measured by determining whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v.

[15] In Hegwood v. State, 575 So.2d 170, 172 (Fla. 1991) and Jones v. State, 709 So.2d 512, 519 (Fla. 1998), this Court included a “due diligence” standard as part of the standard. While Strickler v. Green, 527 U.S. 263 (1999) does not contain that requirement as a separate prong, this Court has noted that “due diligence” remains a part of the standard. In Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000), it was reasoned: “[a]lthough the ‘due diligence" requirement is absent from the Supreme Court's most recent formulation of the Brady test, it continues to follow that a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.” See Way v. State, 760 So. 2d 903 (Fla. 2000); High v. Head, 209 F.3d 1257 (11th Cir. 2000) (finding Strickler did not abandoned due diligence requirement of Brady).

Whitley, 514 U.S. 419, 435 (1995). "As noted by the United States Supreme Court, '[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.'" Gorham v. State, 521So.2d 1067, 1069 (Fla. 1988) (quoting U.S. v. Agurs, 427 U.S. 97, 109-10 (1976)).

The court determined Consalvo's allegations of a secret meeting involving ASA Cavanagh, DaCosta and Palmer never occurred. Hence, there was no exculpatory evidence to be disclosed. This conclusion was based not only upon ASA Cavanagh's account, but on all evidence adduced below.

In rejecting the suggestion Cavanagh solicited DaCosta's aid to convict Consalvo, the court found ASA Cavanagh's testimony refuting this claim was "credible and unimpeachable". The evidence supporting this is that Consalvo was arrested on October 3, 1991; DaCosta gave a police statement on October 10, 1991, ASA Cavanagh was not assigned Consalvo's case, but merely became involved in the case on October 22, 1991, as a favor to ASA Marcus. October 22, 1991 was the same day the lead detectives presented the case to the State, just the day before the matter was taken to the grand jury. ASA Cavanagh had no involvement in or knowledge of the case before that time. (PCR-T.2 228-32, 240-50). Also, ASA Cavanagh avowed he did not give

DaCosta any information about Consalvo's case. ASA Cavanagh did not prepare any of the witnesses for grand jury testimony because he was not assigned the Consalvo case, but merely was covering for a colleague. Further, he did not interview any inmates at the jail or in his office with respect to this case. The only time ASA Cavanagh met with DaCosta was in the busy court hallway moments before DaCosta was presented to the grand jury (PCR-T.2 243-50). Lisa Gardner, a Broward State Attorney's Office secretary, confirmed the October 8, 1991 assignment. ASA Cavanagh was not briefed by the detectives until just before the grand jury (PCR-T.2 228-32, 240-50).

Assistant State Attorney Ken Farnsworth, averred ASA Cavanagh had no influence on the charging and sentencing decisions in Palmer's case. The reduction of one charge and *nolle prosequi* of another was at the request of the defense, and the decision to reduce the charges was made after discussions with the police deputy involved, and an assessment of whether the case would survive a suppression motion. Such was confirmed by Palmer at trial. (PCR-T.4 447-49; ROA.v15 2373, 2379-83, 2391-93, 2404-10).

Further, ASA Farnsworth, testified he authored a memorandum expounding upon the reduction/dismissal of Palmer's charges. Such stated in part: "Assistant Brian Cavanagh spoke to the Defendant Palmer and also another inmate at the Broward County

Jail." Explaining this, ASA Farnsworth averred that the statement merely was referencing to where the inmates were being detained/housed, not where ASA Cavanagh interviewed them. (PCR-T.4 446, 450).

With respect to the non-disclosure of the grand jury testimony, Consalvo offers no case law to support his assertion that the grand jury transcripts "must be presumed to be so damning to the State's position that they could not be revealed" or his suggestion that such would contain exculpatory material. (IB 72). In fact, the court heard argument and reviewed pleadings from counsel on the existence of the court reporter's notes. (IB 72; PCR-R.10 1619-21, 1668-97, 1701-02, 1706-08, 1713-19, 1724-25; PCR-T.1 19-20; PCR-T.5 631-48). At the time of Consalvo's March 27, 2002 request, (PCR-R.10 1619-21, 1668-73, 1675-78) the State had no objection to the court granting the motion, provided that there would be no delay in the scheduled evidentiary hearing. Consalvo was unable to obtain grand jury transcripts, because the court reporter's notes could not be located, even though several attempts were made, and the State assisted Consalvo's counsel in this endeavor. During the May, 2002 hearing, it was the trial court's conclusion that there was no basis for continuing the evidentiary hearing, and the court did not believe the grand jury material was so critical. Rather, the testimony was likely to have been

inculpatory, not exculpatory, and Consalvo was able to present his case for postconviction relief, given the fact DaCosta, Palmer, and ASA Cavanagh were scheduled to testify. (PCR-T.5 631-48). The inability of the parties to secure the grand jury testimony does not establish a Brady violation after the court had granted Consalvo leave to obtain the requested testimony. As the record reflects, the court reporter for the grand jury has passed away, and even after an exhaustive search, her notes could not be located. (PCR-R.10 1725; PCR-T.1 19-20).

Pursuant to section 905.27, Florida Statutes, grand jury testimony is not disclosable except under limited circumstances. Given these limiting circumstances, the State would not have been required to have a transcript prepared at the time of the indictment. It was not until the postconviction litigation that Consalvo sought the grand jury testimony, at which time he was informed the deceased reporter's notes could not be located. Consalvo has not pled, nor shown any bad faith on the State's part, nor has he shown exculpatory evidence was suppressed. Cf. Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (finding relief unwarranted where loss of evidence was not done through malice). As explained in Guzman v. State, 868 So.2d 498, 509 (Fla. 2003), "loss or destruction of evidence that is potentially useful to the defense violates due process only if the defendant can show bad faith on the part of the police or prosecution." Consalvo

cannot make, and has not made, this showing.

DaCosta testified that his grand jury testimony was consistent with his October 10, 1991 police statement. A review of that statement shows that it is inculpatory, not exculpatory with respect to Consalvo. (PCR-T.1 62, 98, 100-13). Likewise, Palmer's evidentiary hearing testimony shows he gave consistent statements to the grand jury and at trial showing Consalvo committed the murder. (PCR-T.3 294-95, 299, 318-27, 354-57, 365, 379-81, 398-402, 404-07, 410, 413). As such, there is no evidence the misplacement and/or destruction of the grand jury notes was willful or that the testimony would be exculpatory. Consalvo's claim must fail. He is not entitled to relief under these circumstances. Consavlo failed to show exculpatory evidence was withheld. The denial of the Brady claim was proper, and this Court must affirm.

ISSUE IV

THE COURT PROPERLY REJECTED CONSALVO'S ASSERTION OF A GIGLIO VIOLATION BASED UPON THE ALLEGED RECANTATION EVIDENCE (restated)

Consalvo asserts there was a violation under Giglio v. United States, 405 U.S. 150 (1972). To support this, he points to the missing grand jury testimony, reasserts that ASA Cavanagh met with DaCosta to discuss the case, and claims Palmer and DaCosta corroborate each other. As he has in other parts of the brief, Consalvo makes unsupported, derogatory allegations of

"clandestine activities and tactics" by the State. Consalvo has failed to allege where the trial court erred in rejecting this claim. The court heard from the witnesses and resolved the factual disputes against Consalvo. It was the court's conclusion that neither DaCosta nor Palmer were credible. Rather, ASA Cavanagh, who unequivocally denied any contact with DaCosta or Palmer before the grand jury testimony, and repudiated the allegation that he fed information to DaCosta, was found to be "unimpeachable." These factual findings are supported by the record. Consalvo's Giglio claim failed because he brought forth no credible testimony that the State knowingly presented false or misleading testimony to the jury. This Court must affirm.

The appropriate standard of appellate review of Giglio claims is that the appellate 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. Lightbourne v. State, 841 So. 2d 431 (Fla. 2003).

Recently, this Court discussed Giglio stating:

> A ***Giglio*** claim is based on the prosecutor's knowing presentation at trial of false testimony against the defendant. ***See Giglio***, 405 U.S. at 154-55, 92 S.Ct. 763; ***Guzman***, 868 So.2d at 506. To establish a ***Giglio*** violation, it must be shown that (1) the testimony given was false; (2) the

prosecutor knew the testimony was false; and (3) the statement was material. *See Guzman*, 868 So.2d at 505; *Ventura v. State*, 794 So.2d 553, 562 (Fla.2001); *Rose v. State*, 774 So.2d 629, 635 (Fla. 2000).

Initially, we note that the "materiality" prongs of the *Brady* and *Giglio* tests are often confused as one and the same. They are not. This Court recently clarified the two standards and the important distinction between them. *See Guzman*, 868 So.2d at 506. The *Brady* standard of materiality is less defense-friendly:

> The *Brady* standard of materiality applies where the prosecutor fails to disclose favorable evidence to the defense. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)....
>
> By contrast to an allegation of suppression of evidence under *Brady*, a *Giglio* claim is based on the prosecutor's knowing presentation at trial of false testimony against the defendant. See *Giglio*, 405 U.S. at 154-55, 92 S.Ct. 763. Under *Giglio*, where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).... The State, as the beneficiary of the *Giglio* violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable

> doubt. *Id.* at 680 n. 9, 105 S.Ct. 3375 (stating that "this Court's precedents indicate that the standard of review applicable to the knowing use of perjured testimony is equivalent to the *Chapman [v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)] harmless-error standard").
>
> [*Guzman v. State*, 868 So.2d 498, 506-07 (Fla. 2003)] (footnote omitted).

Mordenti v. State, 894 So.2d 161, 175 (Fla. 2004).

With respect to the missing grand jury testimony, the State reincorporates its discussion outlined in **Issue III** and reiterates that the court reporter is deceased, and her notes can not be located. The State would also point out that DaCosta did not testify at trial, but admitted during the evidentiary hearing that his grand jury testimony was consistent with his October 10, 1991 sworn police statement and that he did not testify at trial. (PCR-R.10 1619-21, 1668-97, 1701-02, 1706-08, 1713-19, 1724-25; PCT-T.1 19-20, 62, 98, 100-13; PCR-T.5 631-48) As such, the trial jury was not, and could not have been misled by anything DaCosta reported, as he was not before them and the grand jury testimony was irrelevant.

Unlike DaCosta, Palmer did testify at trial and was cross-examined on his police statement, his criminal history, recent charges, and veracity. Thus again, the grand jury testimony was irrelevant. Moreover, both witnesses attempted to recant their

prior testimony, which the trial court was able to assess through their evidentiary hearing testimony. As a result of such testimony, along with evidence from other witnesses, the court found Palmer and DaCosta to be untrustworthy of belief. (PCR-R.10 1619-21, 1668-97, 1701-02, 1706-08, 1713-19, 1724-25; PCR-R.11 1991-2010; PCT-T.1 19-20, 62, 98, 100-13; PCR-T.3 294-95, 299, 318-27, 354-57, 365, 379-81, 398-402, 404-07, 410, 413; PCR-T.5 631-48; ROA.v15 2373, 2375-76, 2378-81, 2383, 2391-92-93, 2404, 2407-10) The mere fact that the grand jury testimony was not available, neither detracts from the court's factual and legal conclusions, nor does it establish some nefarious intent by the State. Clearly, a Giglio violation cannot be presumed from the lack of a grand jury transcript.

The synopsis of Consalvo's allegations is that ASA Cavanagh met with DaCosta, revealed facts about the case, and asked DaCosta to recruit other inmates to report these facts. All information was alleged to have originated with ASA Cavangh and DaCosta was alleged to have recruited Palmer. The trial court rejected Consalvo's allegations based upon the lack of credibility of Palmer and DaCosta. Furthermore, ASA Cavanagh's testimony established that the State did not give information about Consalvo's case to either DaCosta or Palmer. Also, ASA Cavanagh explained that he did not meet the witnesses until just before the grand jury testimony commenced, and then, such

meeting was in the busy court hallway, not where DaCosta alleged in either the jail or State Attorney's offices. ASA Farnsworth refuted Consalvo's interpretation of the influence ASA Cavanagh had with respect to Palmer's case, and where ASA Cavanagh met with Palmer and another inmate. It was ASA Farnsworth's testimony that ASA Cavanagh had no input on the charging decisions related to Palmer Further, ASA Farnsworth explained that his memorandum merely was noting where the inmates were housed, not where they met with ASA Cavanagh.

From this testimony, the court concluded: "4. Having rejected the "recantation" of both DaCosta and Palmer, the Court finds that there was no deliberate use of misleading testimony." (PCR-R.11 2009). The rejection of the "recantation" testimony of Palmer and DaCosta is supported by competent, substantial evidence as analyzed in Issues I and II and incorporated here. Part of the evidence supporting the rejection of Palmer and DaCosta is that these witnesses contradicted each other, had motivations to attempt to recant.[16] ASA Cavanagh denied giving the inmates information or having contact with them before the day they met in the hallway just before the grand jury

[16] DaCosta was seeking to move to the federal prison system so he could be housed in Indiana and closer to his wife. Palmer feared his testimony was relied upon to sentence Consalvo to death and was concerned that if he did not recant, he would be labeled a "snitch."

testimony, and the independent records which showed that ASA Cavanagh was not assigned Consalvo's case, but merely was covering the proceedings for a colleague. These facts support the conclusion there was no impropriety on the part of the State, and that Palmer and DaCosta were unworthy of belief.

Having found DaCosta and Palmer not credible, the court properly determined that no false or misleading information was placed knowingly before the jury. Consalvo failed to prove that the court erred in rejecting the attempted recantations or in determining there was "no 'deliberate use of misleading testimony.'" There is no proof the testimony offered by Palmer at trial was false and that the "prosecutor knew the testimony was false." Having failed to establish that false or misleading testimony was even offered, the issue of materiality does not come into play. As such, a Giglio violation did not occur and the claim was rejected properly. See Sochor, 883 So.2d at 786 (affirming denial of relief as court's rejection of notoriously unreliable recantation testimony was supported by record and affirming rejection of Brady and Giglio claims on same grounds).

ISSUES V AND VI

SUMMARY DENIAL OF POSTCONVICTION CLAIMS V - XV WAS PROPER AS THEY WERE LEGALLY INSUFFICIENT, PROCEDURALLY BARRED, REFUTED FROM THE RECORD, OR MERITLESS (restated)

In **Issue V**, Consalvo asserts it was error to deny summarily

his postconviction Claims V through XV because the court failed to: (1) consider whether the claims were legally or factually sufficient; (2) demonstrate from the files and records why the claims were summarily denied; (3) attach portions of the record to its order to allow for appellate review; and (4) enter findings on the timeliness of Consalvo's motion[17] (IB 77, 79-81). Consalvo admits in **Issue VI** that the trial court addressed each of his postconviction claims separately, but failed to give regard to the interrelationship of all his claims, those denied after a hearing, as well as those summarily denied. (IB 81-87).

The record reveals that the court made findings regarding the legal sufficiency of the postconviction claims when such was at issue, discussed the application of procedural bars where appropriate, and identified those arguments which were without merit or refuted from the record. Consalvo has failed to identify where the trial court erred in its ruling on the individual claims. Moreover, he did not raise a cumulative error argument below, thus, the issue raised in the instant

[17] The motion for postconviction relief was not denied as untimely. Instead, a hearing was granted on four claims, and the balance of the claims were denied summarily upon the court's review of the record. Implicit in the resolution of the matter, is that the motion was filed timely. As such, there did not have to be an announcement that the motion was timely. Consalvo's complaint is irrelevant to this litigation.

Issue VI is unpreserved.[18] The record supports the court's rulings on each claim, and therefore, there is no cumulative error. Relief was denied properly and this Court should affirm.

On appellate review, a trial court's summary denial of postconviction relief will be affirmed where the law and competent substantial evidence supports its findings. Diaz v. Dugger, 719 So. 2d 865, 868 (Fla. 1998). In Lucas v. State, 841 So. 2d 380, 388 (Fla. 2003), this Court stated that: "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." See State v. Coney, 845 So.2d 120, 134-35 (Fla. 2003); Peede v. State, 748 So.2d 253, 257 (Fla. 1999)

[18] In **Issue VI**, it is Consalvo's position his claims involving the alleged recantations of Mark DaCosta and William Palmer should have been viewed in light of his claim: (1) that the trial court erred in not ensuring he wished to waive his right to testify (**Postconviction Claims VI - VIII**); (2) that the State failed to turn over evidence to the defense for testing or to disclose Consalvo's personal information which could be mitigating **(Postconviction Claim V**); (3) that the trial court failed to require empirical data on proportionality (**Postconviction Claim IX**); (4) denial of the right to testify precluded him from presening certain mitigation (**Postconviction Claim X**); trial court error in addressing the actions of the victim's brother (**Postconviction Claim XI**); and vindictive sentencing by the trial court (**Postconviction Claim XII**) (IB 85-87)

(citation omitted). Further, "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." McLin v. State, 827 So.2d 948, 954 (Fla. 2002) (quoting Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993)).

With respect to **Issue V**, Consalvo asserts the court did not consider whether the issues were legally and factual sufficient, failed to demonstrate why summary denial was proper, and neglected to attach records supporting the summary denial. (IB 77, 80-81). In **Postconviction Claim V**, the court rejected Consalvo's claim that there was a "presumption" that his "declared 'evidence' would exonerate the Defendant." In denying relief, the court stated in part: "Mere conclusory allegations are insufficient to meet Defendant's burden of establishing a prima facie case upon a legally valid claim." (PCR-R.11 1605). Ruling on **Postconviction Claims VI through VIII**, the court concluded the claims were in part legally insufficient and procedurally barred. (PCR-R.11 1606). The same ruling was made for **Postconviction Claim IX** with the additional finding that proportionality review had been conducted by this Court on direct appeal. (PCR-R.11 1606-07). Addressing **Postconviction Claims X through XV**, the trial judge stated: "[t]he claims are without merit and procedurally barred. (PCR-R.11 1607). For

each claim or grouping of claims, the trial judge incorporated, referenced, and/or adopted specific pages of State's response to the postconviction motion. Such refutes Consalvo's allegation that the court failed to address the legal sufficiency of the individual claims or to demonstrate why summary denial was appropriate.

Consalvo's assertion that it was error not to have attached portions of the trial record to the order summarily denying these claims is meritless. This Court has held repeatedly that attachment of the record is unnecessary where specific references are made to the record relied upon by the court. See Spencer v. State, 842 So.2d 52, 69 (Fla. 2003) (reaffirming that "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion"); Diaz, 719 So.2d at 866; Asay v. State, 769 So. 2d 974, 989 (Fla. 2000); Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993); Provenzano v. Dugger, 561 So.2d 541, 543 (Fla. 1990). All that is required of the court is to state its rationale for denying relief. Diaz, 719 So. 2d at 867. Here, in assessing each claim, the court announced its findings and conclusions. Standing alone, the court's order sufficiently advises the parties of its rationale and allows for appellate review. However, the court also relied upon the State's

response which gave specific record citations. Through these references, further support was provided for the conclusions of legal insufficiency, procedural bars, meritless arguments, and claims refuted from the record. Relief must be denied.

To the extent Consalvo's appeal can be interpreted as challenging the denial of the individual claims, he has failed to present argument that the claims were not legally insufficient, procedurally barred, refuted from the record, or without merit. An appellant may not simply allege error without offering supporting argument. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived). Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990). Given Consalvo's dearth of legal argument, this Court should find that the issue has been waived. Should this Court find otherwise, the following is offered as assistance in the review.

Postconviction Claim V - In his motion, Consalvo asserted the State withheld material and exculpatory evidence in the form of: (1) fiber evidence, (2) cigarette butts, (3) fingerprint evidence, and (4) a piece of a knife blade. These items were not offered at trial, but Consalvo claims that "should now be made available to the defense for testing as the **presumption** is

that said evidence would exonerate this defendant." (emphasis supplied) (PCR-R.5 785-86). Consalvo added that the police did not check for fingerprints at all possible points of entry to the victim's apartment or such items as the refrigerator or toilet. This too, he asserted "gives rise to the presumption" the evidence would exonerate him. (PCR-R.5 786). With respect to the penalty phase, Consalvo claimed the State had withheld "other factors in the defendant's background that would militate against imposition of the death penalty." Not only did Consalvo fail to plead that he did not know about this evidence,[19] but he has failed to explain how such would exonerate him, except to say that there is a "presumption" of exoneration. Clearly, the claim was pled in conclusory terms, and thus, was legally insufficient. Reaves v. State, 826 So.2d 932, 942 (Fla. 2002) (finding Brady claim legally insufficient and denied properly where defendant failed to allege how items of evidence were exculpatory or impeaching.); Asay v. State, 769 So.2d 974, 982 (Fla.2000) (holding court does not err in summarily denying Brady claims which were insufficiently pled).

Moreover, raised on direct appeal were the issues of the disclosure of the letter requesting the cigarette butts be

[19] This is especially true of "factors in the defendant's background." Such information is known to the defendant as it is in his background. As such, it cannot be deemed suppressed.

tested and the disclosure of matches made for some of the forty unidentified fingerprints. Consalvo, 697 So.2d at 812-13. There, this Court rejected the claim of a discovery violation arising from the State's failure to disclose the letter requesting the lab analysis of the cigarette butts. Id. at 812. With respect to the fingerprints, this Court noted:

> Months before trial the State disclosed the fingerprint expert's name (Tom Messick) and his thirteen-page latent fingerprint report to the appellant. There were some forty unidentified latent fingerprints in the victim's apartment. ...
>
> ...
>
> Even if there was a discovery violation, however, we find no error by the trial court in concluding that appellant's defense was not prejudiced and that any violation was not willful. In fact, **because there still remained a substantial number of unidentified prints, even after Messick's further analysis, the defense's third party theory could still be asserted. Also, Messick's ultimate conclusion was that none of the latent fingerprints recovered from the victim's apartment matched appellant's fingerprints, a fact helpful to the defense**.

Consalvo, 697 So.2d 812-13 (emphasis supplied). Because the issues were raised and rejected on appeal, the matter is procedurally barred. "Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." Muhammad v. State, 603 So.2d 488, 489 (Fla. 1992). Cf. Rivera v. State, 717 So.2d 477,

480 n.2 (Fla. 1998) (finding it impermissible to recast claim which could have or was raised on appeal as one of ineffectiveness in order to overcome a procedural bar or re-litigate an issue considered on direct appeal).

The record also refutes the claim that evidence was not disclosed. In the defense opening statement, he asserted the police work was poor and that they failed to do a thorough investigation, instead settling for "an easy resolution" by charging Consalvo (ROA.v7 1075-81, 1086, 1092, 1094-95). Defense counsel challenged the State to call **Tom Messick, the fingerprint expert**, to testify about a print lifted that did not match the victim or Consalvo (ROA.v7 1083). Counsel also **spoke about the knife blade** which was found in the victim's apartment and how the State did not send it to the medical examiner or for DNA testing (ROA.v7 1083-86, 1092-95). Further, the State's discovery submissions and depositions filed in the trial court case file, along with examination of witnesses, establish that the fiber, fingerprint, cigarette, and knife blade evidence were disclosed to the defense. (PCR.8 1339-57, 1382, 1388-89, 1400-19; PCR.9 1420-31, 1433-83; ROA.v11 1821; ROA.v12 1961-62, 1987-88, 2015-16; ROA.v14 2297-98, 2329, 2334-35, 2345-51). Clearly, the defense had received notice of the existence of this evidence, thus, Consalvo is unable to prove he did not have the evidence in question or could not have found it with due

diligence. Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000) (reasoning that "[a]lthough the "due diligence" requirement is absent from the Supreme Court's most recent formulation of the Brady test, it continues to follow that a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant."). Evidence has not been suppressed, and thus, there is no Brady violation where the information is accessible equally to the defense and state, or where the defense either had it or could have obtained it through use of due diligence. Freemanv. State, 761 So.2d 1055, 1061-62 (Fla. 2000); Provenzano v, State,616 So.2d 428, 430 (Fla. 1993).

Further, the evidence produced against Consalvo was overwhelming[20], thus, even if evidence exists which shows that another individual had been in the victim's apartment, such would not produce a different result at trial. The homicide scene was a residence, and likely to contain fiber, fingerprint,

[20] Because of the claims presented by Consalvo that Palmer and DaCosta recanted their statements, the State does not rely upon Palmer's testimony at this juncture to establish that the result of the trial would not have been altered by any evidence the defense may have wished to test independently. However, the State maintains that Palmer's recent recantation is not credible, and thus, may be used to support the denial of postconviction relief. Without question, there was no Brady violation.

and cigarette evidence from other individuals unconnected to the crime. Such does not establish prejudice under Brady. A showing of prejudice requires that there be a suppression of exculpatory, material evidence, where "there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." Strickler, 527 U.S. at 289.

It is not the fact that others may have been in Ms. Pezza's apartment **before** her death, but that Consalvo had been there **at the time of** her death. The evidence established Consalvo was there at the time of the murder. What is telling about this case, and refutes any claim of prejudice, is that Consalvo had a connection with the victim, had a reason to kill her, was found in possession of her property, had a towel in his bedroom with Ms. Pezza's blood on it, and took money from her checking account after Ms. Pezza was last seen alive. See, Consalvo, 697 So.2d at 809-10. (ROA.v7 1121-27, 1165-66, 1172-73, 1178-78, 1191, 1217-20; ROA.v8 1282-84, 1288-92; ROA.v9 1423-36, 1456; ROA.v10 1617-19, 1621-22, 1641; ROA.v11 1696-98, 1708-14, 1717-19, 1721-24, 1746; ROA.v12 1885, 1788, 1815-20, 1823, 1830-31, 1849-54, 1868-69, 1902-03, 1909; ROA.v14 2262, 2266; ROA.v15 2433-34). Given this evidence, there is no reasonable probability that the outcome of the proceedings would have been different had the fiber, fingerprint, cigarette butts, and knife

blade been tested by the defense. Because the record establishes that the defense had knowledge of the challenged evidence and that additional testing would not have altered the outcome of the trial in Consalvo's favor, the trial court properly denied postconviction relief. This Court must affirm.

Turning to Consalvo's penalty phase claim, it is clear that the matter is legally insufficient and cannot establish a Brady violation. Consalvo asserted the State possessed and suppressed "[t]he existence of other factors in the defendant's background that would militate against the imposition of the death penalty and give rise to the defense better presenting non-statutory mitigating factors." (PCR-R.5 787). Such claim did not identify the evidence the State possessed which the defense did not have or could not have obtained by using due diligence as such evidence would have been personal to Consalvo and known to him. The challenged sub-claim, in the most conclusory terms, asserted the State possessed evidence of factors in Consalvo's background. Conclusory claims are legally insufficient and subject to summary denial. See LeCroy v. State, 727 So. 2d 236, 239 (Fla. 1998) (upholding summary denial where there is no factual support for conclusory claim); Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998) (reaffirming conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record"). Summary denial was proper.

Moreover, given the nature of the evidence claimed to have been suppressed, namely, "factors" in Consalvo's background, a Brady violation cannot be established. Such "factors" are personal to Consalvo and he would know of their existence and benefit to his case. The State may not be charged with a Brady violation where the allegedly non-disclosed information was known to the defendant. As noted above, evidence has not been suppressed, and thus, there is no Brady violation where the information is accessible equally to the defense and state, or where the defense either had it or could have obtained it through use of due diligence. Freeman, 761 So.2d at 1061-62; Provenzano,616 So.2d at 430. See Occhicone, 768 So.2d at 1042 (reasoning "Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant."); Carter v. Bell, 218 F.3d 581, 601 (6th Cir. 2000) (rejecting Brady claim in relationship to state's failure to disclose recommendation defendant be transferred to mental health facility where it was defendant's self-referring which prompted recommendation; there is no error in prosecution's failure to disclose defendant's own knowing actions); Oats v. Singletary, 141 F.3d 1018, 1032 (11th Cir. 1998) (declining to address whether clemency board was required to disclose "investigation file" under Brady because defendant

had not made a showing that any of the information in his file was exculpatory or unavailable to him).

Postconviction Claims VI - VIII were found to be legally insufficient, procedurally barred, without merit, and refuted from the record. (PRC-R.9 1606). The trial court reasoned:

> As pointed out by the State by referencing the trial transcript, the colloquy between the Court and the Defendant clearly indicates that Consalvo knew he could testify and call witnesses at the trial but that he chose to waive those rights. The Defendant's conclusory allegation that he was denied his rights at the penalty phase similarly fail to state a claim which is legally sufficient. Furthermore, although Defendant has a fundamental right to testify, that does not require an on-the-record waiver of the right. Torres-Arbloedo v. State, 524 So.2d 403 (Fla. 1988). The Court agrees with the State's Response as to these Claims. See State's Response, pp. 40-44.

(PRC-R.6 856-860; PCR-R.9 1606). These findings and rationale are supported by the record and law.

In Consalvo's motion for postconviction relief, he claimed the trial court: (1) failed to inquire sufficiently to obtain an on-the-record waiver that Consalvo knowingly, intelligently, and voluntarily waived his right to testify in the guilt and penalty phases of his trial. (PCR-R.5 788-89, 791); (2) "deprived the defendant of his fundamental rights under the Florida and United Sates Constitutions" by failing to make a record of its inquiry (PCR-R.5 789); and (3) denied Consalvo of the opportunity to

clarify or refute certain testimony and Palmer's testimony would not have be uncontroverted (PCR-R.5 789-94). Conspicuously absent from the claims were the allegations that Consalvo did not know that he could testify or that he was precluded from testifying. Such deficiencies in the pleading makes the claims legally insufficient because Consalvo failed to identify a deprivation of a constitutional right. LeCroy v. State, 727 So.2d 236, 239 (Fla. 1998) (upholding summary denial of motion where there was no factual support offered for conclusory claim). The crux of Consalvo's claims presented in his postconviction motion was that the **trial court** did not conduct an adequate inquiry to determine whether Consalvo was making a knowing and voluntary waiver of the right to testify. A trial court error is a matter which could have and should have been presented on direct appeal, and as such, Consalvo is procedurally barred from raising the claim here. Muhammad v. State, 603 So. 2d 488, 489 (Fla. 1992). Such supports the summary denial.

Additional support for the denial of relief is based upon the following analysis. A defendant possesses the ultimate authority to decide to exercise his constitutional right to testify Jones v. Barnes, 463 U.S. 745, 751 (1983) (opining "[i]t is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the

case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal...."). The guilt phase record contains Consalvo's statements in response to the questions of the trial court **and** prosecutor which establish that Consalvo was advised and confirmed, in the guilt phase, that he had "the absolute right to testify", the "absolute right" to put on any evidence he wished, that he had discussed this issue with counsel, and personally, without any threat or coercion, decided he did not wish to testify or present evidence (ROA..v15 2463-65). The full colloquy into Consalvo's decision to waive testifying and presenting evidence refutes the instant claims. Summary denial was proper.

Moreover, while it may assist reviewing courts in determining whether there was a knowing waiver of a constitutional right, a trial court is not required to conduct an on-the-record inquiry with the defendant to determine whether he is knowingly, intelligently, and voluntarily waiving his right to testify. Torres-Arboledo v. State, 524 So.2d 403, 410-11 (Fla. 1988) (finding constitutional right to testify is not in category of fundamental rights which requires colloquy and on-the-record waiver); Remeta v. State, 522 So.2d 825, 827 (Fla. 1988) (same). As a matter of law, Consalvo is not entitled to relief with regard to either his guilt or penalty phase claims.

In **Postconviction Claim IX**, Consalvo asserted due process

and equal protection violations occurred when the **trial court** did not require the state present empirical and statistical data regarding capital sentencing to assist with a proportionality analysis. Further, Consalvo charged that on direct appeal, this Court "did not make any kind of in depth study of other cases ... but simply looked at the aggravators versus mitigators...." (PCR-R.5 794-96). The trial court determined:

> A "proportionality" review is one conducted by the Supreme Court and not the trial judge. The Defendant's sentence was, in fact, reviewed by the Florida Supreme Court for proportionality and upheld. *Consalvo v. State*, 697 So. 2d 805, 820 (Fla. 1996). Defendant's claim is legally insufficient and procedurally barred. See State's Response, pp. 45-53, which the Court adopts and incorporates by reference herein.

(PCR-R.9 1606-07). Summary denial was appropriate.

Consalvo did not present a valid claim because proportionality review is for this Court, not the trial judge, and there is no basis for forcing the State to present statistical or empirical data so that the trial court could conduct a proportionality review.[21] Proportionality review is

[21] To the extent Consalvo appeared to claim there is a data base which outlines all of Florida's capital cases which should have been presented at sentencing, the claim is meritless. This Court has access to all Florida cases, and is the appropriate body for conducting a proportionality review. There is neither a need nor a basis for submitting "empirical data" readily accessible and redundant to case law before the courts. Also, requiring the State to offer "statistical proof" is not a proper claim for postconviction relief. The State's responsibility is

the unique function of this Court and the review is made based upon the aggravation and mitigation presented at trial compared to other death penalty cases. See Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991) (recognizing proportionality review is "a unique and highly serious function of [the Florida Supreme] Court, the purpose of which is to foster uniformity in death-penalty law."). See Bates v. State, 750 So. 2d 6, 12 (Fla. 1999); Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998); Terry v. State, 668 So. 2d 954 (Fla. 1996). Also, Consalvo's assertions that the "'Capital Case Data Base' shows conclusively that the death penalty in this case in not proportional" and that the court should have forced the State to present

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to present aggravating factors related to the homicide and the defendant before the court for sentencing. It is the defense's right to bring forward factors it believes mitigates the sentence. To have the State present unidentified "statistical evidence" is irrelevant to the matter before the sentencing court, namely, the appropriate sentence given the crime and the defendant's character. Capital sentencing requires that the defendant obtain an individualized sentence. Lockett v. Ohio, 438 U.S. 586, 604 (1975); Hitchcock v. Dugger, 481 U.S. 393 (1978); Johnson v. State, 660 So.2d 637, 646 (Fla. 1995). However, there is "[n]othing in [Lockett which] limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Lockett, 438 U.S. at 604, n.12. "Statistical proof" is irrelevant evidence which does not satisfy the constitutional requirement for individualized sentencing. See, Scott v. Dugger, 891 F.2d 800, 805 (11th Cir. 1989) (rejecting claim that journalist, opposed to the death penalty and who had written about it extensively, should have testified); Martin v. Wainwright, 770 F.2d 918, 935-37 (11th Cir. 1985) (affirming exclusion of testimony about deterrent effect of death penalty). Consalvo's claim is meritless.

unspecified evidence so that the proportionality review would not have been based upon conjecture were pled in wholly conclusory terms, and therefore, legally insufficient. Conclusory allegations are legally insufficient on their face and may be denied without a hearing. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989).

The challenge to the trial court's sentencing is procedurally barred as the propriety and proportionality of the sentence were addressed on direct appeal; Consalvo, 697 So. 2d at 816-20. See Muhammad, 603 So. 2d at 489 (concluding "[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack."). Likewise, the claim that the trial court should conduct a new proportionality review was denied properly as it was pled in conclusory terms and the trial court could not review the decision of this Court. As a last point, Consalvo failed to cite any case which raises proportionality to a federal constitutional claim. In fact, proportionality review is a state mandate, not one of federal constitutional dimension. Pulley v. Harris, 465 U.S. 37, 44-51 (1984) (reasoning Eighth Amendment to United States Constitution does not require proportionality review); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981) (finding Florida's proportionality review is a matter of state law). Consalvo's claim is legally insufficient

and denied properly.

Postconviction Claim X was found by the court to be procedurally barred and without merit. (PCR-R.9 1607). Below, Consalvo asserted he was not given a forum to prove he is a caring parent or that he has repented his sins, and has religious devotion. He also claimed in his postconviction motion that the denial of his right to testify[22] deprived him of his ability to show remorse, good death row behavior, and a lack of an intent to kill. (PCR-R.5 797). To the extent Consalvo asserted he was denied a proper forum, such is a claim which could have been raised on direct appeal and having failed to do so, Consalvo is now procedurally barred from litigating it. "Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." Muhammad, 603 So.2d at 489; Spencer v. State, 842 So. 2d 52, 60-61 (Fla. 2003). Moreover, those factors which came into existence after sentencing are not properly raised as newly discovered evidence, [23] as such do not meet the definition of

[22] Consalvo has not established he was precluded from testifying. Likewise, he has not pled that he did not know he felt remorse or that could have challenged the proof of his intent to kill.

[23] In order to establish a claim of newly discovered evidence, two requirements must be met. First, the trial court, defendant, and defense counsel must not have known of the asserted facts and could not have known them by the use of diligence. Second, "the newly discovered evidence must be of

"newly discovered" either because the evidence did not exist at the time of trial (eg. good death row behavior) or because it was not unknown to Consalvo (eg. remorse).

The thrust of Consalvo's claim is that he was denied the occasion to show remorse, good death row behavior, and his lack of intent to kill because the trial court did not give him an opportunity to testify. Consalvo's waiver of his right to testify does not establish a means for creating a claim of newly discovered evidence, especially where such evidence is personal to Consalvo, such as remorse, or came into existence after the penalty phase, such as "good death row behavior." A defendant may not use a different argument to re-litigate the same issue. Rivera v. State, 717 So. 2d 477, 480 n.2 (Fla. 1998); Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995); Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). All Consalvo is doing is recasting his claim of preclusion from testifying at the guilt and/or penalty phases into a claim of "newly discovered evidence" of what he asserts he would have stated at trial. Clearly, this

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such nature that it would probably produce an acquittal on retrial." Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992) (quoting Jones v. State, 591 So. 2d 911, 915 (Fla. 1991)). With the exception of a life sentence imposed upon a co-defendant, the evidence must have been in existence at the time of trial; that evidence which comes into existence after sentencing may not be considered as aggravation or mitigation. Porter v. State, 653 So. 2d 374, 379-80 (Fla. 1995) (holding that "newly discovered evidence, by its very nature, is evidence which existed but was unknown at the time of sentencing").

evidence is not newly discovered, and Consalvo is procedurally barred from asserting he was denied the right to testify.

Additionally, Consalvo's attempt to establish a mitigator by proving lingering doubt through a "lack of intent to kill" is improper. Lingering or residual doubt is not a proper subject of capital sentencing, nor is there a federal constitutional right to present such testimony. Way v. State, 760 So. 2d 903, 916-17 (Fla. 2000); Bates v. State, 750 So. 2d 6, 9, n.2 (Fla. 1999); Sims v. State, 681 So. 2d 1112, 1117 (Fla. 1996); Franklin v. Lynaugh, 487 U.S. 164 (1988). Obviously, if lingering doubt is not permitted as a basis for mitigation, then Consalvo's assertion he was precluded from showing a "lack of intent to kill" cannot form a basis for granting a new sentencing. Summary denial was proper.

In **Postconviction Claim XI**, Consalvo maintained the court erred in not controlling the alleged "antics" of the victim's surviving brother.[24] (PCR-R.5 798). As the court found, the claim is procedurally barred and meritless. (PCR-R.9 1607).

[24] Without referencing where in the record the actions of the victim's brother were improper, Consalvo asked the trial court to find behavior inappropriate and prejudicial. Such a claim is legally insufficient. "The defendant in a postconviction proceeding bears the burden, however, of establishing a *prima facie* case based upon a legally valid claim." Patton v. State, 784 So. 2d 380, 386 (Fla. 2000). Conclusory allegations are legally insufficient on their face and may be denied summarily. LeCroy v. Dugger, 727 So. 2d 236, 239 (Fla. 1998).

Claims of trial court error, especially where an objection was raised,[25] are not cognizable in postconviction litigation as they are issues which should have or could have been raised on direct appeal. See Spencer v. State, 842 So. 2d 52, 60-61 (Fla. 2003); Vining v. State, 827 So. 2d 201, 218 (Fla. 2002); Smith v. State, 445 So. 2d 323, 325 (Fla. 1983).

With respect to **Postconviction Claim XII**, Consalvo asserted below that the State sought and the trial court imposed the death penalty through vindictiveness. This wholly conclusory claim was denied summarily as procedurally barred and meritless. (PCR-R.5 799; PCR-R.9 1607). Such was proper because this is a direct appeal claim, and the matter is refuted from the record.

Other than claiming there was vindictiveness in the sentencing because the State allegedly had offered to forego

[25] According to Consalvo, the issue of the actions of the victim's brother was brought to the trial court's attention, but the court either minimized the occurrence or refused to "deal with the disruptive behavior." (PCR-R.5 798-99; ROA.v14 2168-2218). Because Consalvo admits the matter was raised at trial and rejected, it could have been addressed on appeal. The matter is procedurally barred and not cognizable in this postconviction litigation. Spencer v. State, 842 So. 2d 52, 60-61 (Fla. 2003); Muhammad v. State, 603 So. 2d 488, 489 (Fla. 1992). Further, it is also inappropriate to use a different argument to re-litigate the same issue. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). On direct appeal, Consalvo challenged the victim impact testimony offered by the victim's brother during the penalty phase of trial. Consalvo, 697 So. 2d at 816. As such, any attempt at re-litigating the use of such testimony and suggestion of prejudice arising from that testimony is procedurally barred.

seeking the death penalty if Consalvo would plead guilty to first-degree murder (ROA.v3 269), Consalvo pointed to nothing in support of vindictive sentencing.[26] He merely alleged there is no "reasoned explanation" why the State sought the death penalty after it had been willing to accept a life sentence before trial. This assertion does not meet the pleading requirements for postconviction relief; LeCroy, 727 So.2d at 239; and is procedurally barred because such was an issue for direct appeal, not postconviction litigation. Spencer, 842 So.2d at 60-61.

Similarly, Consalvo is procedurally barred from recasting the direct appeal claim of the propriety of the death sentence, Consalvo, 697 So. 2d at 816-20, to one of vindictiveness. It is inappropriate to use a different argument on postconviction to re-litigate a direct appeal matter. Rivera, 717 So.2d 477, 480; Medina, 573 So.2d at 295.

Even if the procedural bar fails, the summary denial should be affirmed. The trial judge was not involved with the negotiations, such as they were, and there was no showing of vindictiveness on the part of either the State[27] or court

[26] There was no firm plea offer, only the prosecutors willingness to consider a plea: "I won't consider a two. If they want to plead to first degree, and waive the death penalty, we'll consider that." (ROA.v2 269).

[27] The parties had proceeded to trial under the assumption the State would seek the death. See Consalvo's motions challenging case and death penalty (ROA.v23 3510-13, 3529-30,

especially in light of the jury's eleven to one recommendation.[28] See Groover v. State, 489 So.2d 15, 16-17 (Fla. 1986) (finding barred and meritless claim of vindictiveness arising from state proceeding to trial and seeking death penalty once defendant withdrew his plea agreement). Cf. McDonald v. State, 751 So.2d 56 (Fla. 2d DCA 1999) (finding imposition of longer sentence than contemplated in failed plea negotiation does not establish vindictiveness where judge was not involved in negotiations). It is well settled, a disparity between the sentence received following trial and an earlier plea offer will not, standing alone, support a finding of vindictiveness. Santana v. State, 677 So.2d 1339 (Fla. 3d DCA 1996).

Consalvo's **Postconviction Claims XII - XV** were addressed to the constitutionality of portions of section 921.141, Florida Statutes (PCR-R.5 800-03). At trial and/or on appeal, Consalvo

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3533-68, 3574-76, 3592-3593, 3613-3617). During the January 15, 1993 status conference, the State noted that it would give thought to any offer Consalvo may make. The prosecutor stated: "I won't consider a two. **If they want to plead** to first degree, and waive the death penalty, **we'll consider that**." (ROA.2 269) (emphasis supplied). At no time did the State indicate it was making a firm plea offer or that a death sentence would not be appropriate.

[28] Following conviction, the jury was presented evidence and argument related to the penalty. It was the jury's reasoned judgment Consalvo should be sentenced to death. This alone establishes no vindictiveness on the part of the State or trial court. Under Tedder v. State, 322 So. 2d 908 (Fla. 1975), the jury's recommendation should be given great weight.

claimed the statute was unconstitutional: (1) under the Eighth Amendment to the United States Constitution because it allowed for arbitrary and unreliable imposition of the death penalty (ROA.23 3533-36), (2) the felony murder aggravator is an "automatic aggravating circumstance" (ROA.23 3538-39; ROA.24 3709-13), and (3) the use of victim impact evidence is improper. (PCR-R.6 988-1000). As such, the court properly found these claims procedurally barred and meritless (PCR-R.9 1607).

The claim the statute violated the Eighth Amendment by failing to narrow the class of persons eligible for the death penalty could have been raised on direct appeal. The claims the felony murder aggravator was an unconstitutional, automatic aggravating factor and that it was unconstitutional to admit victim impact evidence were raised and rejected on direct appeal. See Consalvo, 697 So.2d at 816, 820 (rejecting claim victim impact evidence was unconstitutional and opining "one who commits a capital crime in the course of a burglary will not automatically begin with two aggravating circumstances"). Because these claims either were or could have been raised on direct appeal, they are procedurally barred here. Muhammad, 603 So. 2d at 489. See Parker v. State, 611 So.2d 1224 (Fla. 1992) (finding claim "felony murder" aggravator failed to narrow class of persons eligible for death penalty procedurally barred on rule 3.850 motion). Further, this Court has rejected repeatedly

the instant constitutional challenges. See Pooler v. State, 704 So. 2d 1375, 1380-81 (Fla. 1997) Jackson v. State, 704 So.2d 500, 507 (Fla. 1997); Hunter v. State, 660 So. 2d 244, 252-53 (Fla. 1995), cert. denied, 516 U.S. 1128 (1996); Windom v. State, 656 So. 2d 432, 438 (Fla 1995); Fotopoulos v. State, 608 So. 2d 784, 794 n. 7 (Fla. 1992). See also Proffitt v. Florida, 428 U.S. 242 (1976) (finding Florida's capital sentencing scheme constitutional); Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989) (upholding Florida's felony murder aggravator against constitutional challenge); Johnson v. Dugger, 932 F.2d 1360 (11th Cir. 1991); Blanco v. State, 706 So. 2d 7, 11 (Fla 1997). Given the fact that Florida's death penalty statute has withstood constitutional challenges, the summary denial should be affirmed.

With respect to assertions raised in **Appellate Issue VI** that the postconviction allegations related to the attempted recantation of Palmer and DaCosta should have been viewed as a cumulative error analysis with **Postconviction Claims V and VIII - XII**, the State would again note that this argument was not presented below. As such it is not preserved for appeal. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Moreover, in **Issues I - IV**, the State analyzed and gave record support for the rejection of the testimony from Palmer and DaCosta. The State reincorporates that discussion here. The attempted

recantations of Palmer and DaCosta have no impact on the analysis here because Consalvo knew he had the right to testify and offer mitigation evidence. Also, the record refutes any claim of a Brady violation, court error in addressing the actions of the victim's brother, or vindictive sentencing. The State would incorporate its analysis to **Postconviction Claims V, and VIII - XII** Further, the testimony from Palmer and DaCosta was so untrustworthy, it has no impact on the propriety of the summary denial of relief. See Sweet v. State, 810 So.2d 854, 867 (Fla. 2002) (rejecting claim of cumulative error based in part on the trial court's rejection of the untrustworthy recantation testimony).

Also, the State maintains the individual underlying claims **Postconviction Claims V and VIII - XII**, are procedurally barred, legally insufficient, or meritless, *a fortiori,* Consalvo has suffered no cumulative effect which invalidates his conviction or sentence. Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984) (opining "[i]n spite of Zeigler's novel, though not convincing, argument that all nineteen points should be viewed as a pattern which could not have been seen until after the trial, we hold that all but two of the points raised either were or could have been, presented at trial or on direct appeal. Therefore, they are not cognizable under rule 3.850."), sentence vacated on other grounds, 524 So.2d 419 (Fla. 1988); Wike v. State, 813

So.2d 12, 22 (Fla 2002); Rose v. State, 774 So.2d 629, 635 n. 10 (Fla. 2000); Downs v. State, 740 So.2d 506, 509 (Fla. 1999) (finding where allegations of individual error are found to be without merit, a cumulative error argument based on the asserted errors must likewise fall); Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998) (reasoning where each claim is either meritless or procedurally barred, there cannot be cumulative error to consider); Chandler v. Dugger, 634 So.2d 1066, 1068 (Fla. 1994); Rivera v. State, 717 So.2d 477, 480 n.1 (Fla. 1998). Relief must be denied.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Ira W. Still, III, Esq., 148 S.W. 97th Terrace, Coral Springs, FL 33071 on this _____ day of June, 2005.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on this _____ day of June, 2005.

_____
LESLIE T. CAMPBELL