IN THE SUPREME COURT OF FLORIDA

JAMES M. DAILEY,

Appellant,

v. **Case No. SC05-1512**
L.T. No. CR 85-07084-CFANO-D

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PRELIMINARY STATEMENT

This Defendant's Capital Crime:

During the late evening and early morning hours of May 5–6, 1985, the defendant, James Dailey, and another man, Jack Pearcy,[1] "took fourteen year-old Shelly Boggio to a deserted beach near St. Petersburg where Dailey tortured her with a knife, attempted to sexually assault her, and then stabbed, strangled and drowned her." Dailey v. State, 659 So. 2d 246, 247 (Fla. 1995).

References to the record:

References to the direct appeal record will be designated as (R Vol. #/page #). References to the instant post-conviction record will be designated as (PCR Vol. #/page #).

[1] Dailey and Pearcy were tried separately. The same trial judge in Dailey's case also presided over Pearcy's earlier jury trial. Dailey v. State, 594 So. 2d 254, 259 (Fla. 1991) [Dailey I]. On November 23, 1986, Pearcy was tried and found guilty of first degree murder. On November 25, 1986, the jury recommended life imprisonment for Pearcy; and, on January 9, 1987, Pearcy was sentenced to life imprisonment. See, Dailey I, 594 So. 2d at 256; (See also R V2/232). At Dailey's original sentencing hearing, the trial court noted that Dailey "was clearly the dominating force behind the murder" of Shelley Boggio. (R V2/239)

STATEMENT OF THE CASE

On January 22, 1986, James Dailey was charged by indictment filed in the Sixth Judicial Circuit, Pinellas County, Florida with the crime of murder in the first degree, for the stabbing/strangulation/drowning death of a 14—year-old victim, Shelley Boggio. On February 12, 1986, Dailey was extradited from California and arrested on return to Florida. Dailey's jury trial was held on June 23 - 27, 1987, before the Honorable Thomas F. Penick, Jr. On June 27, 1987, Dailey was found guilty of murder in the first degree. On August 7, 1987, Dailey was sentenced to death, as recommended by the jury 12—0 on June 30, 1987. (R V1/96—103, V2/228—231, V2/156). The trial court found five aggravating circumstances[2] and no mitigating circumstances.

On November 14, 1991, this Court affirmed Dailey's conviction, but remanded the case for re-sentencing. Dailey v. State, 594 So. 2d 254, 255 (Fla. 1991) [Dailey I]. This Court struck two of the aggravating circumstances (commission to avoid arrest and CCP) and, after concluding that the trial court had

[2] The trial court originally found the following five aggravating circumstances: Dailey had been previously convicted of a violent felony; the murder was committed during a sexual battery; the murder was committed to avoid arrest; the murder was especially heinous, atrocious, or cruel (HAC); and the murder was committed in a cold, calculated, and premeditated manner (CCP). Dailey I, 594 So. 2d at 256.

failed to weigh mitigating circumstances, remanded for resentencing. Dailey I, 594 So. 2d at 259.

Dailey's resentencing was held on January 21, 1994. On remand, the trial judge resentenced Dailey to death after finding three aggravating circumstances: (1) the defendant had been convicted of another violent felony, (2) the murder was committed during a sexual battery,[3] and (2) HAC. The trial court

[3] On direct appeal, Dailey argued that the trial court erred in finding as an aggravating circumstance that the murder was committed during a sexual battery or attempted sexual battery. In rejecting this claim in Dailey I, 594 So. 2d at 258, this Court expressly noted that, as the trial court found:

> The evidence presented during all phases of this trial establishes beyond a reasonable doubt that the motive for taking the victim, Shelly Boggio, to the area adjacent to the Route 688 bridge was sexual battery. The victim's body was found completely nude floating in the Intercoastal Waterway. Her underwear was found on shore near areas of fresh blood. Shelly Boggio's jeans had been removed and thrown in the waterway. Potential physical evidence of an actual sexual battery upon Shelly Boggio was lost because her body had been floating in the waterway for an extended period of time. All of the evidence and testimony presented establishes beyond a reasonable doubt that Shelly Boggio at the very least was a victim of an attempted sexual battery.
>
> We note the following additional evidence: Shelly had rebuffed Dailey's advances earlier that evening; Shelly had been stabbed both prior to and after removal of her shirt; her underwear was found 140 feet from her other clothing, with a trail of blood leading from the clothing to the underwear. We conclude that the record contains competent substantial evidence to support the trial court's finding of an attempted sexual battery. Dailey I, 594 So. 2d at 258

also found several nonstatutory mitigating circumstances.[4] On May 25, 1995, this Court affirmed Dailey's death sentence. Dailey II, 659 So. 2d at 248. On January 22, 1996, the United States Supreme Court denied Dailey's petition for writ of certiorari. Dailey v. Florida, 516 U.S. 1095 (1996).

On April 1, 1997, Dailey filed his initial Motion to Vacate Judgments of Conviction and Sentence With Special Request for Leave to Amend. On November 12, 1999, Dailey filed his Amended Motion to Vacate Judgments of Conviction and Sentence. On February l4, 2000, the Circuit Court filed an Order to Show Cause on Mr. Dailey's Amended Motion.

Following a Huff[5] hearing on November 19, 2001, before the Honorable Jack Espinosa, Jr., the Circuit Court ordered that Dailey was entitled to an evidentiary hearing on grounds I, II, III, IV, V, VI, VII, VIII, and XV of his Amended Motion and grounds IX, X, XI, XII, XIII, and XIV of his Amended Motion were denied. (See, Order Denying, In Part, and Granting Evidentiary

[4] The non-statutory mitigating factors were: (1) Dailey served in the Air Force and saw duty in Viet Nam on three occasions; (2) he was good to his family and helpful around the home; (3) he cared enough for his daughter to allow her to be adopted by his Air Force buddy; (4) he saved two young people from drowning when he was in high school; and (5) he and the victim had been partying and visited some bars together on the night of the murder. Dailey, 659 So. 2d at 247.

[5] Huff v. State, 622 So. 2d 982 (Fla. 1993).

Hearing on Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence With Special Leave to Amend)

The post-conviction evidentiary hearings were held on March 19, 2003, November 7, 2003, December 11, 2003, June 29, 2004, and November 5, 2004 on grounds I through VIII, and XV.

On July 20, 2005, the Circuit Court entered an 81-page written Order Denying Amended Motion to Vacate Judgments of Conviction and Sentence with Special Leave to Amend (PCR V2/136-217).

STATEMENT OF THE FACTS[6]

On direct appeal, this Court found "*substantial evidence of guilt*" and also set forth the following summary of facts:

> On May 5, 1985, fourteen year-old Shelly Boggio, her twin sister Stacey, and Stephanie Forsythe were hitchhiking near St. Petersburg when they were picked up by James Dailey, Jack Pearcy and Dwaine Shaw. The

[6] The State cannot accept Dailey's "Statement of the Facts," which is replete with impermissible argument, mischaracterizes the strength of the evidence presented at trial by unilaterally rejecting all of Dailey's incriminating admissions, and belatedly asserts a procedurally-barred "sufficiency-of-the-evidence-at-trial" claim under the guise of post-conviction relief. Sufficiency of the evidence is an issue for direct appeal and, therefore, is procedurally barred for post-conviction relief. See, Howell v. State, 877 So. 2d 697, 704, n.3 (Fla. 2004) (finding that to the extent that Howell questions the sufficiency of the evidence to establish either premeditation or felony-murder, . . . these issues are procedurally barred on collateral review); Thompson v. State, 796 So. 2d 511, 517 n.9 (Fla. 2001) (noting that sufficiency of the evidence is not the standard of review on a post-conviction claim of ineffective assistance of counsel).

> group went to a bar and then to Pearcy's house, where they met Gayle Bailey, Pearcy's girlfriend. Stacey and Stephanie returned home. *Shelly, Gayle and the men went to another bar and then returned to Pearcy's house about midnight. Shelly left in the car with Dailey and Pearcy, and when the two men returned without Shelly several hours later Dailey was wearing only a pair of wet pants and was carrying a bundle.* The next morning, Dailey and Pearcy visited a self-service laundry and then told Gayle to pack because they were leaving for Miami. Shelly's nude body was found that morning floating in the water near Indian Rocks Beach. She had been stabbed, strangled and drowned. Dailey and Pearcy were charged with her death.
>
> Pearcy was convicted of first-degree murder and sentenced to life imprisonment. *At Dailey's subsequent trial, three inmates from the county jail testified that Dailey had admitted the killing to them individually and had devised a plan whereby he would later confess when Pearcy's case came up for appeal if Pearcy in turn would promise not to testify against him at his own trial. Pearcy refused to testify at Dailey's trial.* Dailey presented no evidence during the guilt phase. The jury found him guilty of first-degree murder and unanimously recommended death. At sentencing, Dailey requested the death penalty and the court complied, finding five aggravating [n1] and no mitigating circumstances.

Dailey I, 594 So. 2d at 255-256 (e.s.)

When co-defendant Jack Pearcy was called to testify at Dailey's trial, outside the presence of the jury, Pearcy invoked the Fifth Amendment right to remain silent. (R V8/987)

At trial, Gayle Bailey testified that they [Pearcy, Dailey, Gayle, and Shelley] returned from the disco late, probably about midnight. (R V8/957—58, 975) When asked if it could have been 10:00 p.m., Gayle admitted that she really didn't know. (R

V8/975) Shaw was at the house when they returned from the disco; Gayle believed that Shaw "just got back from using the pay phone." (R V8/970; 953) Gayle went to the bathroom and when she came out, Pearcy, Dailey, and Shelley were gone. Gayle did not look in Dailey's bedroom to see if he was still there. (R V8/972) Gayle stayed up until Dailey and Pearcy returned at about 2:00 or 3:00 a.m. (R V8/976, 959) Pearcy was wearing the same clothes he wore when he left earlier. (R V8/959) Dailey wore only a pair of pants, which were wet. Dailey was carrying a bundle of something. (R V8/960) On cross-examination, defense counsel asked Gayle, "I know they came back one time. Did you hear when they came back one time prior to that?" Gayle replied, "Yes sir. I believe so." (R V8/977) Thereafter, Gayle stated that "Jack [Pearcy] and James [Dailey] came back once. They left together and then they came back again." (R V8/978) On redirect, the prosecutor asked Gayle, "Did you see James Dailey come back a time before he eventually show[ed] up?" Gayle answered, "He [Dailey] went back in the bedroom." (R V8/982) Gayle did not know the time, but "then they were gone and then they both came back together again." (R V8/983)

At the time of Dailey's trial, Oza Dwaine Shaw was incarcerated in the federal penitentiary in Oklahoma. (R V8/993) When the others [Pearcy, Dailey, Shelley, and Gayle] went out

that night, Shaw passed out on the couch. (R V8/997) When Shaw awoke, they'd returned home and Pearcy was leaving with Shelley. Pearcy and Shelley gave Shaw a ride to a phone booth about three or four blocks from the house. (R V8/997, 999; 1004) Dailey did not go with them. (R V8/999; 1007) Shaw did not know if Pearcy and Shelley returned to the house at that time. (R V8/999)

Shaw telephoned his ex-wife and girlfriend; Shaw was on the phone for "at least an hour," and when Shaw walked back to the house, he saw only Gayle, who was angry. (R V8/997-998; 1005) Shaw did not look in Dailey's bedroom. (R V8/1006) Shaw then fell asleep on the couch. (R V8/1006) Sometime later, which Shaw "guessed" was around "2, 2:30 in the morning, maybe later," Shaw woke up and saw both Dailey and Pearcy as they were coming in the house together. (R V8/1006; 998-999) Dailey seemed to walk a little bow-legged and the inside of his pants were wet. (R V8/998)

James Leitner relayed messages between Pearcy and Dailey during December of 1986. (R V9/1057–59, 1086) Leitner informed Dailey what happened at Pearcy's trial. (R V9/1060-61) Dailey asked Leitner to tell Pearcy that if Pearcy got a new trial on appeal, that Dailey would then testify and tell what really happened —— that he [Dailey] was the one that did it. (R V9/1066) Leitner told Dailey that it was important that he not

testify at his own trial because he would be charged with perjury if he testified differently at a retrial. (R V9/1069—70) Inmate Pablo DeJesus was in the library during one of the conversations. According to Leitner, when DeJesus asked Dailey why he had to kill the girl rather than just knock her out since she was only 14, Dailey responded, "Man, I just lost it." (R V9/1066-1067)

Inmate Pablo DeJesus met Dailey in December of 1986, when he gave Dailey a note from Jack Pearcy. (R V9/1085-87) Dailey asked DeJesus to tell Pearcy not to worry, that Dailey was the only one that knew what had happened and, as long as he didn't break down, Dailey could beat the case and then help Pearcy. (R V9/1092) Another time, Dailey said that he and Pearcy were "fall partners." (R V9/1093) DeJesus informed Pearcy that Dailey said not to worry, that he would not take the stand and could beat the case. (R V9/1095) Dailey asked DeJesus to reassure Pearcy that Dailey would beat the case and Dailey then would tell the truth —— that he killed the girl. (R V9/1095).

Paul Skalnik, a former police officer, was also an inmate at the Pinellas County Jail. Skalnik's pending charges were for parole violation and grand theft. (R V9/1107—09) Skalnik testified that no one offered him anything to testify in Dailey's trial. Skalnik had testified in other criminal cases

over the past five years, approximately six to eight times. (R V9/1108) Five or six of those were first—degree murder cases and all involved information Skalnik learned in jail. (R V9/1156) According to Skalnik, he had been responsible for helping to put 30 persons in prison, and he did this because he still had law enforcement in him. (R V9/1157)

In April or May of 1987, Dailey asked Skalnik if he knew whether notes between friends were admissible in court. (R V9/1112) Dailey told Skalnik that Pearcy had "done more than he had said, that he (Pearcy) had stabbed [the girl] too." (R V9/1114) Dailey also told Skalnik that Pearcy had actually held the girl "under." According to Skalnik, Dailey told him that the girl "kept staring at him (Dailey), screaming, and would not die. And he (Dailey) stabbed her and he threw the knife away." (R V9/1116-17) Detective Halliday testified that no one promised the inmates anything for their testimony. (R V9/1177-84) Halliday had worked with Paul Skalnik on prior cases. As a result of information from Skalnik, law enforcement recovered a ski mask worn by Richard Cooper, one of the perpetrators of the High Point murders. (R V9/1186-87) They also recovered a weapon in another case because of Skalnik's information. (R V9/1188)

Post-Conviction:

Several witnesses testified at the post-conviction hearings

in this case, including Beverly [Andrews] Andringa (the trial prosecutor), Detective John Halliday, Oza Shaw, James Dailey (the defendant), Henry Andringa and James Denhart (Dailey's trial attorneys), Paul Skalnik (one of the three inmates who testified at trial about Dailey's admissions), Mark Journey (a former reporter who interviewed Skalnik), and Jeff Hazen (Dailey's former CCRC attorney). Co-defendant Jack Pearcy was called by CCRC, but Pearcy asserted the Fifth Amendment and refused to testify. (PCR V4/537)

At the post-conviction hearing, Prosecutor Beverly Andringa confirmed that she did not put on testimony at trial that she didn't believe was true, she believed Skalnik's testimony to be true and put him on the stand, and she never offered Skalnik any undisclosed deals. (PCR V3/395) Mark Journey's telephone interview with Skalnik was initiated by attorney Evans and his 1988 article included that Skalnik said that he didn't intentionally lie in his testimony. (PCR V4/508; 512) Defense counsel, Henry Andringa, believed that when something is in the newspaper, the jury tends to lend credibility to it and, thus, he might not use it. (PCR V4/403) Andringa and Dailey discussed whether Dailey would testify and decided that he would not testify at trial. (PCR V3/408-9) The Frisbee story was not credible. Id. Co-counsel Denhart felt well-prepared for

Skalnik's cross-examination and reviewed all the depositions and outlined topics for trial. (PCR V4/529, 534) Denhart also knew that Skalnik had been a former police officer, which could "go either way." (PCR V4/533, 535)

Skalnik testified about his trial testimony and post-trial false claims, and the Circuit Court found,

> At the hearing, Mr. Skalnik testified that he was never promised anything by the State in exchange for his testimony against Mr. Dailey, and that no one from the State ever suggested facts to him, or otherwise told him how to testify. (See Evidentiary Hearing Transcript, dated November 7, 2003, pp. 47, 77-78, attached). He also testified that all of his testimony against Mr. Dailey was true to the best of his knowledge. (Evidentiary Hearing Transcript, dated November 7, 2003, p. 82, attached).
>
> In addition to Mr. Skalnik's testimony, the Court also heard the testimony of John Halliday, the lead detective in the case against Mr. Dailey, and Beverly Andringa (nee' Andrews), the prosecuting attorney. While Mr. Halliday was on the stand, Mr. Dailey's counsel failed to ask any questions about whether Mr. Halliday or any other representative of the State ever offered Mr. Skalnik anything in exchange for his testimony. (See Evidentiary Hearing Transcripts, dated March 19, 2003, pp. 70-90, November 7, 2003, pp. 100-104, attached). Mr. Halliday also testified that he found Mr. Skalnik to be credible at the time. (Evidentiary Hearing Transcripts, dated March 19, 2003, pp. 70-90, November 7, 2003, pp. 100-104, attached). Mr. Dailey's counsel at the hearing also asked Ms. Andringa about these matters, and she also testified that she found Mr. Skainik to be credible at the time, and that she did not offer him anything in exchange for his testimony. (Evidentiary Hearing Transcript, dated March 19, 2003, pp. 91-108, attached).
>
> (PCR V2/175-176) (e.s.)

For ease of reference in evaluating Dailey's post-conviction arguments on appeal, those additional facts from the post-conviction evidentiary hearing which relate specifically to the defendant's appellate issues will be set forth within the argument section of the instant brief.

SUMMARY OF THE ARGUMENT

Issue I: Although Dailey's IAC claims are cognizable in post-conviction, Dailey's additional claims of alleged prosecutorial misconduct are procedurally barred because they are based on the trial record and, thus, could have been raised on direct appeal. Dailey's IAC claims failed to establish any deficiency of counsel and resulting prejudice under Strickland.

Issue II: Dailey's Giglio and "newly discovered evidence" claims, based on inmate Paul Skalnik, are without merit. At the evidentiary hearing, Skalnik confirmed that his testimony at Mr. Dailey's trial was truthful and he repudiated the allegations made in 1988. Skalnik definitively retracted any post-trial recantation. Prosecutor Beverly Andringa also testified that she would not have called Skalnik at trial if she felt his testimony was not truthful and that she believed Skalnik's testimony was true when he was called to testify at Dailey's trial.

Issue III: Dailey's additional "newly discovered evidence

claims, based on Oza Shaw and Jack Pearcy, are without merit. Shaw's "new" testimony still places Pearcy and Dailey together for over an hour during the time frame of the victim's death. Pearcy refused to testify at trial and still refuses to testify.

Issue IV: Dailey's conclusory IAC allegations are insufficient to present any cognizable claim on appeal.

ARGUMENT

ISSUE I

THE IAC-PROSECUTORIAL MISCONDUCT CLAIM.

Appellant, James Dailey, admits that this hybrid issue - an IAC/prosecutorial misconduct claim - is predicated on two of the grounds alleged below: post-conviction claim #1(A) [IAC/failure to object to alleged prosecutorial misconduct] and post-conviction claim #6 [due process/alleged prosecutorial misconduct]. (See, Initial Brief at 49).

Dailey argues (1) that defense counsel was ineffective in failing to object to allegedly improper prosecutorial argument and (2) that the prosecutor allegedly improperly (a) commented on the elimination of the presumption of innocence, (b) vouched for the credibility of inmate witnesses, and (c) misstated when Oza Shaw went to use the pay phone.

Procedural Bar

Claims which could have been raised at trial and on direct

appeal are procedurally barred in post-conviction. Jones v. State, 2006 Fla. LEXIS 561 (Fla. April 13, 2006). Although Dailey's IAC claims are cognizable in post-conviction, Dailey's additional claims of alleged prosecutorial misconduct are procedurally barred because they are based on the trial record and, therefore, could have been raised on direct appeal. See Spencer v. State, 842 So. 2d 52, 60-61 (Fla. 2003) (rejecting claims of prosecutorial misconduct because the grounds for these claims were reflected in the trial record and, therefore, the claims should have been raised on direct appeal); Lamarca v. State, 2006 Fla. LEXIS 653 (Fla. May 4, 2006) (same).

IAC Claims & Standard of Review:

To obtain relief on a claim of ineffective assistance of counsel, Dailey must establish both deficient performance and prejudice, as set forth in Strickland v. Washington, 466 U.S. 668 (1984). See Rutherford v. State, 727 So. 2d 216, 218 (Fla. 1998).

> As to the first prong, deficient performance, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards. See Strickland, 466 U.S. at 688. Second, as to the prejudice prong, the deficient performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. See id. at 694; Rutherford, 727 So. 2d at 220.

Gore v. State, 846 So. 2d 461, 467 (Fla. 2003) (parallel citations omitted). "[W]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001). Thus, failing to establish either prong results in a denial of an IAC claim. See, Ferrell v. State, 918 So. 2d 163, 170 (Fla. 2005). Further, as the United States Supreme Court emphasized in Strickland,

> [j]udicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .

466 U.S. at 689.

In the instant case, the Circuit Court denied post-conviction relief after conducting several days of evidentiary hearings. "When reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance claim, this Court gives deference to the trial court's factual findings to the extent they are supported by competent, substantial evidence, but reviews *de novo* the trial court's determinations of deficiency and prejudice, which are mixed questions of fact

and law." Morris v. State, 2006 Fla. LEXIS 652 (Fla. 2006), citing Arbelaez v. State, 898 So. 2d 25, 32 (Fla. 2005); See also, [Derrick T.] Smith v. State, 2006 Fla. LEXIS 388 (Fla. 2006), Stephens v. State, 748 So. 2d 1028, 1031-32 (Fla. 1999).

Dailey claims that defense counsel was ineffective in failing to object to instances of alleged prosecutorial misconduct and that the prosecutor improperly (1) stated that the presumption of innocence had been removed, (2) vouched for the credibility of Paul Skalnik and other inmate witnesses, and (3) knowingly presented false argument regarding when Oza Shaw used the pay phone. (Initial Brief at 51, 54, 58). Additionally, Dailey asserts a "cumulative effect" argument, adding four procedurally-barred claims of alleged prosecutorial misconduct. (Initial Brief at 60-63). These four additional procedurally-barred claims involve matters previously addressed on direct appeal. On direct appeal, this Court held that the trial court erred in allowing evidence of Dailey's attempts to avoid extradition, but any error was harmless. Additionally, although the prosecutor's cited comments were deemed impermissible comments on Dailey's right to remain silent, in light of other substantial evidence of guilt, this Court found "beyond a reasonable doubt that the error did not affect the verdict." Dailey, 594 So. 2d at 256. Lastly, this Court also

found “as harmless error” the State's introduction into evidence of a knife sheath and the State's use of the hearsay statements of Detective Halliday concerning the inmates' reasons for coming forward. Dailey I, 594 So. 2d at 256, n. 2

In Issue I of his initial brief, Dailey quotes two excerpts from the Circuit Court’s 81-page written order denying post-conviction relief. (Initial Brief at 49-50, citing PC-ROA 143, and Initial Brief at 57, citing PC-ROA 147-48) These two excerpts relate only to Dailey’s IAC claim for failing to object to the prosecutor’s closing arguments (1) concerning the presumption-of-innocence and (2) allegedly vouching for the credibility of Skalnik and the other inmate witnesses. However, the Circuit Court’s written order also addressed the various sub-claims listed in Dailey’s “cumulative effect” argument. (See Initial Brief at 60-63). Therefore, the State respectfully directs this Court’s attention to the following additional relevant excerpts from the Circuit Court’s comprehensive order.

Circuit Court’s Order:

In denying post-conviction claim 1(A) – the IAC/prosecutorial misconduct claim - the Circuit Court’s order stated, in pertinent part:

> **A. Failure to Object to Prosecutorial Misconduct.**
>
> Mr. Dailey alleges that counsel was prejudicially

deficient in failing to object to numerous incidents of prosecutorial misconduct during the opening and closing statements of the guilt phase at trial. Mr. Dailey claims that counsel should have recognized these actions as improper and moved for mistrial. Additionally, Mr. Dailey claims that counsel's performance in this regard was a failure to adequately preserve the appellate record.

* * *

Next, Mr. Dailey contends that during the opening argument of the guilt phase of the trial, the prosecutor improper1y commented on Mr. Dailey exercising his constitutional rights when he fought extradition from Monterey, California when he stated the following:

> Mr. Heyman: Detective John Halliday and Stacey Boggio, the twin sister of the victim, went out to Monterey, California to identify the defendant as being the one who was with Shelley Boggio, the victim, the night of her death. *Detective Halliday will indicate to you he had to go out because Mr. Dailey was fighting extradition to come back to Florida.*

(See Jury Trial Transcript, Vol. 2, pp. 178-179, attached)(emphasis added). Mr. Dailey claims this argument to the jury was an improper comment on his valid exercise of his constitutional rights, and left the jury with the impression that his exercise of this right was a nefarious course of conduct. Mr. Dailey argues his counsel was ineffective for failing to object to these improper statements of the prosecutor.

Mr. Dailey raised this matter on direct appeal. Dailey v. State, 594 So. 2d 254, 256 (Fla. 1991). It is generally not proper to raise a different argument in order to re-litigate the same issue in a post-conviction relief setting. Quince v. State, 477 So. 2d 535, 536 (Fla. 1985). **As such, a defendant cannot use an ineffective assistance of counsel claim to get around the prohibition of post-conviction motions as second appeals**. Lopez v. Singletary, 634 So. 2d 1054, 1057 (Fla. 1993), Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). **Mr. Dailey's claim of ineffective assistance of counsel is therefore procedurally**

barred. However, even if this claim was not procedurally barred, it is without merit since the record clearly reflects that Mr. Dailey's trial counsel clearly objected to the prosecutor's statement. (See Jury Trial Transcript, Vol. 2, pp. 178-180, attached). Therefore, Mr. Dailey's claim is conclusively refuted by the record. As such, no relief is warranted on this ground.

Mr. Dailey next argues that his trial counsel was ineffective for failing to object to prosecutorial misconduct when the prosecutor again improperly commented on Mr. Dailey's valid exercise of his constitutional right to fight extradition during the prosecutor's closing argument when she stated the following:

> Ms. Andrews: You can consider those actions, as well as the others we have gone through, the washing of the car, the clothes, the going to Miami, staying there less than 24 hours, *having to be extradited from California. You can consider every single one of those as to his consciousness of guilt.*

(See Jury Trial Transcript, Vol. 6, p. 695, attached)(emphasis added). Mr. Dailey argues these statements by the prosecutor were an improper attempt to demonstrate to the jury Mr. Dailey's consciousness of guilt. Furthermore, Mr. Dailey argues his trial counsel was constitutionally ineffective for failing to object to these statements by the prosecutor, thereby denying Mr. Dailey of his right to effective assistance of counsel.

Mr. Dailey failed to present any evidence on this ground at the evidentiary hearings held in this matter. (See Evidentiary Hearing Transcripts, dated March 19, 2003, November 7, 2003, December 11, 2003, June 29, 2004, and November 5, 2004, attached). A defendant has the burden of proof on a motion for post conviction relief. Green v. State, 857 So. 2d 304, 305 (Fla. 2d DCA 2003). Furthermore, a court's order granting relief must be supported by competent substantial evidence. State v. Pawle, 884 So. 2d 1137, 1138 (Fla. 2d DCA 2004)(citing Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997)). The Florida Supreme Court previously ruled that statements by the prosecutors regarding Mr. Dailey's contesting

extradition were not prejudicial. Dailey v. State, 594 So. 2d 254, 256 (Fla. 1991). Regardless, this statement was a short, isolated statement, made in passing that did not appear to improperly influence the jury. Therefore, Mr. Dailey has not proven that the prosecutor's statement during the closing arguments of the guilt phase prejudiced him. As such, no relief is warranted on this ground.

Next, Mr. Dailey alleges that his counsel was ineffective for failing to object to the prosecutor's closing argument wherein the prosecutor intentionally commented on and misstated the presumption of innocence afforded to him by the U.S. Constitution when she stated:

> Ms. Andrews: Remember, as Mr. Denhardt asked you to remember, the presumption of innocence. The presumption of innocence that all citizens are afforded under the Constitution of the United States. All criminals are afforded, all murderers are afforded. It's gone right now. It's gone. *It no longer applies. The shield has to be removed.*

(See Jury Trial Transcript, Vol. 6, p. 686, attached) (emphasis added). Mr. Dailey contends this comment made by the prosecutor was a patently improper comment on the constitutional presumption of innocence by implying to the jury they must presume Mr. Dailey to be guilty merely because the State had charged him with murder. Since his trial counsel failed to object to this statement, Mr. Dailey argues, his counsel was constitutionally ineffective and Mr. Dailey was deprived of his constitutional right to effective assistance of counsel and a fair trial.

Mr. Dailey failed to present any evidence on this ground at the evidentiary hearings held in this matter. (See Evidentiary Hearing Transcripts, dated March 19, 2003, November 7, 2003, December 11, 2003, June 29, 2004, and November 5, 2004, attached). **The question of when to object is a strategic decision that is within the discretion of the attorney, and should not normally be questioned by a court if the attorney's actions could be considered reasonably competent counsel. Peterka v. State, 890 So. 2d 219, 233 (Fla. 1999). Furthermore, Mr. Dailey has mischaracterized the prosecutor's statements as an**

improper comment on his constitutional right to the presumption of innocence. In fact, these comments appear to be nothing more than an attempt to argue the State had met its evidentiary burden. Ruiz v. State, 743 So.2d 1, 4 (Fla. 1999) (The assistance permitted includes counsel's right to state his contention as to the conclusions that the jury should draw from the evidence, quoting United States v. Morris, 568 F. 2d 396, 401 (5th Cir. 1978)). Therefore, the prosecutor's statements were not prejudicial, and Mr. Dailey has not established ineffective assistance of counsel. As such, no relief is warranted on this ground.

* * *

Mr. Dailey next alleges his counsel was ineffective for failing to object to a statement made by the prosecutor during closing arguments of the guilt phase of the trial. During the State's closing argument, the prosecutor made the following statement:

> Ms. Andrews: Now, there are only three people who know exactly what happened on that loop area north of Indian Rocks Beach on the night of May 5th, early morning hours of May 6th, 1985. Shelley Boggio, and she is dead. Jack Pearcy and he is not available to testify; and the defendant. So, when the defense stands up here, and they have already and I imagine Mr. Andringa will when he gets up to rebut, and says where's the evidence, where's the eyewitnesses, use your common sense.

(See Jury Trial Transcript, Vol. 6, pp. 684-685, attached). Later in the State's closing argument, the prosecutor made another statement Mr. Dailey contends is improper when she stated:

> Ms. Andrews: Now let's talk about motive. *As I said before, there is [sic] only three people who know what really happened out there that night and why they killed her.* That is not something the Judge is going to tell you the State of Florida has to prove to you. We can't.

(See Jury Trial Transcript, Vol. 6, p. 688, attached) (emphasis added). In addition, Mr. Dailey claims the

State made another objectionable statement during the closing arguments about Mr. Dailey's constitutional right not to testify when she stated:

> Ms. Andrews: Fingernails. You didn't hear about the length of Mr. Dailey's fingernails. No, because he left Pinellas County, went to Miami, where he stayed less than 24 hours and we arrest him months later in the State of California. That's right. *Only he knows the length of his fingernails.*

(See Jury Trial Transcript, Vol. 6, p. 694, attached) (emphasis added). **Mr. Dailey claims that these comments made on the part of the prosecutor impermissibly referred to the exercise of his Fifth Amendment right not to testify, and were designed to highlight for the jury the fact that he failed to testify.**

The right not to testify against one's self is protected by the Florida State Constitution and the United States Constitution, and commenting on a defendant's exercise of this right is a serious defect in a defendant's trial. State v. Kinchen, 490 So. 2d 21, 22 (Fla. 1985). The test for whether a comment is an impermissible statement about a defendant's exercise of the right not to testify is whether the comment is fairly susceptible of being interpreted by the jury as a comment on the defendant's failure to testify. Rimmer v. State, 825 So. 2d 304, 322 (Fla. 2002). **On direct appeal in this case, the Florida Supreme Court found the first and the third statements of the prosecutor cited by Mr. Dailey in this ground to be improper comments on his right not to testify**. Dailey v. State, 594 So. 2d 254, 258 (Fla. 1991). **However, the Court also found these errors to be harmless. Id. It is clear these statements were in fact harmless. Therefore, Mr. Dailey is unable to establish prejudice resulted from the failure of his trial counsel to object to the first and third statements in this ground. As such, only the second statement remains for consideration**.

Mr. Dailey failed to present any evidence or testimony that the prosecutor's second statement could be fairly susceptible to the interpretation that she was commenting on Mr. Dailey's failure to testify. (See Evidentiary Hearing Transcripts, dated March 19, 2003, November 7, 2003, December 11, 2003, June 29,

2004, and November 5, 2004, attached). **The second statement cited by Mr. Dailey is far more reserved and less direct than the other two statements that have already been ruled upon by the Florida Supreme Court. This statement may also be fairly susceptible to the interpretation that it is a comment on Mr. Dailey's failure to testify, but it is a close question. Regardless of whether this statement is technically permissible or not, it was certainly not prejudicial to Mr. Dailey. Therefore, Mr. Dailey's trial counsel did not provide ineffective assistance of counsel by failing to object the prosecutor's statement. As such, no relief is warranted on this ground**.

Next, Mr. Dailey alleges counsel was ineffective for failing to object to the prosecutor's guilt phase closing argument wherein the prosecutor engaged in improper bolstering of the testimony of the witnesses Messrs. Skalnik, Leitner, and DeJesus when she stated:

> Ms. Andrews: Skalnik is a thief. We admitted that as I have already said. But what I want you to remember what Detective Halliday said about the other information that he had gotten from this man. It was proven to be reliable. He has told him where critical evidence in another murder was, evidence that they didn't know existed because the Defendant had told them that they had thrown away the ski mask until Skalnik told them exactly where it was based on a conversation he had. A weapon that was thrown away in another murder case. *And that Detective Halliday, after having conversations with Skalnik and knowing him for years, considers him to be reliable enough to bring him to the State Attorney's Office with the information he has provided.*
>
> *You heard Detective Halliday's experience and what unit he is with and the types of crimes that he investigates. If these men are cons, they would not con Detective Halliday.*

(See Jury Trial Transcript, Vol. 6, p. 707, attached) (emphasis added).

Mr. Dailey contends that this argument by the prosecutor was an improper attempt to bolster the testimony of Paul Skalnik, James Leitner, and Pablo

DeJesus, which the prosecutor knew to be not credible. Mr. Dailey argues that in making such an argument, the prosecutor was attempting to insulate this suspect testimony by cloaking it with Det. Halliday's seal of approval. Since his trial counsel failed to object to this argument, Mr. Dailey argues, he was deprived of his right to effective assistance of counsel and his right to a fair trial.

The prosecutor plays a special role in our criminal justice system, and as a result, any statements of personal belief by the prosecutor as to the reliability of any particular witnesses or evidence could unfairly prejudice the defendant. Myers v. State, 788 So. 2d 1112, 1114 (Fla. 2d DCA 2001). Improper bolstering of witness testimony occurs when the prosecutor attempts to improve the witness' credibility by putting the weight of government behind the witness' testimony. Hutchinson v. State, 882 So. 2d 943, 953 (Fla. 2004). It is therefore impermissible for a prosecutor to argue that a police officer should be believed simply because he is a police officer. Garrette v. State, 501 So. 2d 1376, 1379 (Fla. lst DCA 1987).

In the instant case, it does not appear the prosecuting attorneys engaged in any improper bolstering of witness testimony. Instead, it appears the prosecutor simply outlined evidence introduced during the trial which demonstrated the witness' reliability. There does not appear to be any instance where the prosecutors attempted to endorse or stand behind any of the witnesses. Furthermore, Mr. Dailey failed to introduce any evidence at the hearings on this issue. (See Evidentiary Hearing Transcripts, dated March 19, 2003, November 7, 2003, December 11, 2003, June 29, 2004, and November 5, 2004, attached). Therefore, Mr. Dailey has failed to demonstrate that his counsel's conduct was deficient and that prejudice resulted. As such, no relief is warranted on this ground.

> Excerpt, Order Denying Amended Motion to Vacate Judgments of Conviction and Sentence with Special Leave to Amend, July 20, 2005 (PCR V2/139; 151) (e.s.)

In denying post-conviction claim #6 – the substantive due process/prosecutorial misconduct claim - the Circuit Court ruled, *inter alia*, that (1) Dailey's underlying prosecutorial claims were procedurally barred, (2) no proof was offered at the evidentiary hearing to support these claims, and (3) these claims also were without merit. The Circuit Court's written order denying post-conviction claim 6 states, in pertinent part:

> In Ground VI of the Motion, Mr. Dailey contends the prosecutors engaged in misconduct, to the extent that it permeated the trial and denied him his fundamental right to a fair trial. Mr. Dailey alleges the prosecutors presented false and misleading testimony to the jury, and made improper inflammatory arguments. These improper actions occurred throughout the opening and closing arguments, as well as during the direct and cross-examinations of witnesses during both the guilt and penalty phases of the trial. As such, Mr. Dailey contends, his trial was unfair, and he is entitled to relief. Mr. Dailey sets out the specific allegations upon which his grounds are based in grounds A, C, and D below. [FN2]
>
> [FN2 There was no ground VIB listed in Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence With Special Leave to Amend.]
>
> **A. Opening and Closing Arguments.**
>
> * * *
>
> **Next, Mr. Dailey contends that during the following part of the opening argument at the guilt phase of the trial, the prosecutor improperly commented on Mr. Dailey's exercise of his constitutional right when he fought extradition from Monterey, California when he stated**:
>
> Mr. Heyman: Detective John Halliday and Stacey Boggio, the twin sister of the victim, went out to Monterey, California to

> identify the defendant as being the one who was with Shelley Boggio, the victim, the night of her death. *Detective Halliday will indicate to you he had to go out because Mr. Dailey was fighting extradition to come back to Florida.*

(See Jury Trial Transcripts, Vol. 2., p. 178-179, attached)(emphasis added). Mr. Dailey claims this argument to the jury was an improper comment on Mr. Dailey's valid exercise of a constitutional right, and left the jury with the impression that Mr. Dailey's exercise of this right was a nefarious course of conduct.

Mr. Dailey raised the failure of his trial counsel to object to this statement in ground IA, as grounds for a claim of ineffective assistance of counsel. Mr. Dailey also raised this statement as one of the grounds for his direct appeal. See Dailey v. State, 594 So. 2d 254, 256 (Fla. 1991). **Claims which were raised or could have been raised on direct appeal are procedurally barred from being raised in a motion for postconviction relief**. Reaves v. State, 826 So. 2d 932, 936 n.3 (Fla. 2002), See also Roberts v. State, 568 So. 2d 1255, 1257-58 (Fla. 1990), Johnson v. State, 593 So. 2d 206, 208 (Fla. 1992). Such claims are barred from being raised in a **motion for postconviction relief because these motions are not intended to be used as second appeals**. **Lopez v. Singletary, 634 So. 2d 1054, 1056 (Fla. 1993). Since this statement was in fact raised on direct appeal, Mr. Dailey is procedurally barred from raising it collaterally. As such, no relief is warranted on this ground.**

Mr. Dailey next contends that the prosecutor again improperly commented on Mr. Dailey's valid exercise of his constitutional right to fight extradition during the closing argument at the guilt phase of the trial when she stated:

> Ms. Andrews: You can consider those actions, as well as the others we have gone through, the washing of the car, the clothes, the going to Miami, staying there less than 24 hours, *having to be extradited from California. You can consider every single one of those as to his consciousness of guilt.*

(See Jury Trial Transcript, Vol. 6., p. 695, attached) (emphasis added). [FN3] Mr. Dailey claims this was an additional attempt by the prosecutor to convince the jury that he was trying to avoid being brought to trial. Mr. Dailey also claims this was an improper suggestion of consciousness of guilt, based upon the valid exercise of a constitutional right. Such an argument, Mr. Dailey claims, prejudiced him to the jury and as a result he was denied the fundamental right to a fair trial. Mr. Dailey also argues his trial counsel further prejudiced him by failing to object to this statement.

> FN3 The Florida Supreme Court stated in its opinion the prosecution made no further mention of extradition after questioning Detective Halliday on direct examination. See Id. However, the trial transcripts show the prosecutor made the above statement on closing.

Mr. Dailey raised the failure of his trial counsel to object to this statement in ground IA, as grounds for a claim of ineffective assistance of counsel. As discussed in ground IA, Mr. Dailey failed to present any evidence on this ground at the evidentiary hearings held in this matter. (See Evidentiary Hearing Transcripts, dated March 19, 2003, November 7, 2003, December 11, 2003, June 29, 2004, and November 5, 2004, attached). A defendant has the burden of proof on a motion for post conviction relief. Green v. State, 857 So. 2d 304, 305 (Fla. 2d DCA 2003). Furthermore, a court's order granting relief must be supported by competent substantial evidence. State v. Pawle, 884 So. 2d 1137, 1138 (Fla. 2d DCA 2004)(citing Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997)). **The Florida Supreme Court also previously ruled Mr. Dailey was not prejudiced by the prosecution's comments on his extradition from California. State v. Dailey, 594 So. 2d 254, 256 (Fla. 1991). Therefore, Mr. Dailey has not established that the prosecutor's remarks were prejudicial. As such, no relief is warranted on these grounds.**

Next, Mr. Dailey claims the prosecutor intentionally commented on and misstated the presumption of innocence afforded to Mr. Dailey by the

Constitution when she stated:

> Ms. Andrews: Remember, as Mr. Denhardt asked you to remember, the presumption of innocence. The presumption of innocence that all citizens are afforded under the Constitution of the United States. All criminals are afforded, all murders are afforded. *It's gone right now. It's gone. It no longer applies. The shield has to be removed.*

(See Jury Trial Transcript, Vol. 6, p. 686, attached) (emphasis added). Mr. Dailey contends this comment by the prosecutor was a patently improper comment on the constitutional presumption of innocence given to Mr. Dailey. Mr. Dailey contends the prosecutor's statement implied to the jury that they must presume him guilty simply because the State had charged him with the crime, and that it served to misinform the jury about their obligation as well as denied Mr. Dailey the fundamental right to a fair trial. Finally, Mr. Dailey also contends his counsel was prejudicially deficient by failing to object to these improper statements.

Mr. Dailey raised the failure of his trial counsel to object to this statement in ground IA, as grounds for a claim of ineffective assistance of counsel. As stated in ground IA, Mr. Dailey failed to present any evidence or make any argument on this issue at the evidentiary hearings held in this matter. (See Evidentiary Hearing Transcripts, dated March 19, 2003, November 7, 2003, December 11, 2003, June 29, 2004, and November 5, 2004, attached). **The question of when to object is a strategic decision that is within the discretion of the attorney, and should not normally be questioned by a court if the attorney's actions could be considered reasonably competent counsel**. Peterka v. State, 890 So. 2d 219, 233 (Fla. 1999). **Mr. Dailey has mischaracterized the prosecutor's statements as an improper comment on his constitutional right to the presumption of innocence. However, these comments appear to be nothing more than an attempt by the State to argue that its evidentiary burden was met**. See Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999), quoting United States v. Morris, 568 F. 2d 396, 401 (5th Cir. 1978) ("The assistance permitted includes counsel's right to state his contention as to

the conclusions the jury should draw from the evidence.") **Therefore, the prosecutor's statements were not improper, and Mr. Dailey suffered no prejudice as a result. As such, no relief is warranted on this ground.**

* * *

Next, Mr. Dailey argues the prosecutor made improper references to and comments upon Mr. Dailey's exercise of his Fifth Amendment right to refrain from testifying when she stated:

> Ms. Andrews: Now, there are only three people who know exactly what happened on that loop area north of Indian Rocks Beach the night of May 5th, early morning hours of May 6th, 1985. Shelley Boggio and she is dead; Jack Pearcy and he is not available to testify; and the defendant. So, when the defense stands up here, as they have already and I imagine Mr. Andringa will when he gets up to rebut, and says where's the evidence, where's the eyewitnesses, use your common sense.

(See Jury Trial Transcript, Vol. 6., pp. 684-685, attached). Mr. Dailey also claims that later in her closing argument, the prosecutor made a similar improper comment when she stated:

> Ms. Andrews: Now let's talk about motive. *As I said before, there is only three people who know what really happened out there that night and why they killed her.* That is not something the Judge is going to tell you the State of Florida has to prove to you. We can't.

(See Jury Trial Transcript, Vol. 6, p. 688, attached) (emphasis added). Mr. Dailey also claims that the prosecutor made yet a third improper comment upon Mr. Dailey's constitutional right not to testify when she stated:

> Ms. Andrews: Fingernails. You didn't hear about the length of Mr. Dailey's fingernails. No, because he left Pinellas County, went to Miami, where he stayed less than 24 hours and we arrested him months later in the State of California. That's

> right. *Only he knows the length of his fingernails.*

(See Jury Trial Transcript, Vol. 6, p. 694, attached) (emphasis added). Mr. Dailey argues these comments constituted impermissible comments on Mr. Dailey's exercise of his Fifth Amendment right and were designed to highlight the fact that Mr. Dailey did not testify during the trial.

Mr. Dailey raised each of these statements in ground IA, as grounds for claims of ineffective assistance of counsel. As noted in ground IA, Mr. Dailey failed to introduce any evidence or make any argument as to any of these statements. (See Evidentiary Hearing Transcripts, dated March 19, 2003, November 7, 2003, December 11, 2003, June 29, 2004, and November 5, 2004, attached). **Furthermore, with regards to the first and the last statements cited in this section, Mr. Dailey raised both of these statements as grounds for his direct appeal**. Dailey v. State, 594 So. 2d 254, 257, 258 (Fla. 1991). **As such, Mr. Dailey's plea for relief based on these two statements are procedurally barred on his motion for post conviction relief**. Reaves v. State, 826 So. 2d 932, 936 n.3 (Fla. 2002), See also Roberts v. State, 568 So. 2d 1255, 1257-58 (Fla. 1990), Johnson v. State, 593 So. 2d 206, 208 (Fla. 1992). **With respect to the second statement, the question is whether it could be fairly interpreted to be a comment on Mr. Dailey's right not to testify**. Rimmer v. State, 825 So. 2d 304, 322 (Fla. 2002). **This Court finds that this statement cannot reasonably be taken as a comment on the fact that Mr. Dailey was not testifying. As such, no relief is warranted on these grounds**.

Mr. Dailey's next allegation of misconduct by the State is that the prosecutor improperly bolstered witness testimony when she stated:

> Ms. Andrews: Skalnik is a thief. We admitted that as I have already said. But I want you to remember what Detective Halliday said about the other information that he has gotten from this man. It has proven to be reliable. He has told him where critical evidence in another murder case was evidence that they didn't know existed because the Defendants had told them they had thrown away the ski mask until Skalnik told them

> exactly where it was based on a conversation he had. A weapon that was thrown away in another murder case. *And that Detective Halliday, after having conversations with Skalnik and knowing him for years, considers him to be reliable enough to bring him to the State Attorneys' Office with the information he has provided.*
>
> *You heard Detective Halliday's experience and what unit he is with and the types of crimes that he investigates. If these men are cons, they would not con Detective Halliday.*

(See Jury Trial Transcript, Vol. 6, p. 707, attached) (emphasis added). Mr. Dailey argues that the prosecutor was attempting to bolster the unreliable testimony of witnesses Paul Skalnik, Pablo DeJesus, and James Leitner by cloaking it with Detective Halliday's approval. Mr. Dailey contends this argument is prejudicial, and denied him the fundamental right to a fair trial. Furthermore, Mr. Dailey argues that his trial counsel was prejudicially deficient in not objecting to these arguments.

Mr. Dailey previously argued the failure of his trial counsel to object to this statement as the basis for a claim of ineffective assistance of counsel in ground IA. As previously noted in ground IA, Mr. Dailey failed to introduce any evidence, or present any argument on this ground at the evidentiary hearings held in this matter. (See Evidentiary Hearing Transcripts, dated March 19, 2003, November 7, 2003, December 11, 2003, June 29, 2004, and November 5, 2004, attached). It is improper for a prosecutor to attempt to improve a witness' testimony by putting the government behind the testimony. Hutchinson v. State, 882 So. 2d 943, 953 (Fla. 2004) (Finding, "In this case, the prosecution did not place the prestige of the government behind the witnesses' testimony, nor did the State rely on anything outside the record to support the witnesses' statements.") It is also improper for a prosecutor to argue that a police officer should be believed simply because he is a police officer. Garrette v. State, 501 So. 2d 1376, 1379 (Fla. 1st DCA 1987). **However, in the instant case, the prosecutor neither vouched for Detective Halliday, nor did she argue he should be believed**

because he was a police officer. The prosecutor merely referred to matters in the record which provided an adequate basis for finding Detective Halliday to be credible. Therefore, the prosecutor's argument was completely proper. As such, no relief is warranted on this ground.

*** * ***

C. Paul Skalnik.

Mr. Dailey alleges that the State utilized the testimony of Paul Skalnik during the guilt phase of the trial, and the State's reliance on this testimony amounted to prosecutorial misconduct. Mr. Dailey alleges that Mr. Skalnik testified that he was incarcerated in the Pinellas County Jail with Mr. Dailey, and that Mr. Dailey made statements implicating himself in the murder of Shelley Boggio. (See Jury Trial Transcript, Vol. 5, p. 540, attached). In addition, Mr. Skalnik also testified he had reached no agreement for leniency with the State in exchange for his testimony. (See Jury Trial Transcript, Vol. 5, p. 582-583, attached). However, Mr. Dailey argues that in a sworn Motion to Dismiss for Prosecutorial Misconduct, dated August 7, 1988, and a statement to the Court dated August 8, 1988, Mr. Skalnik stated that the Office of the State Attorney for the Sixth Judicial Circuit, including Beverly Andrews, were aware of the "potential questionability" of confessions Mr. Skalnik had testified about. (See Motion to Dismiss For Prosecutorial Misconduct, Affidavit of Paul Skalnik, Statement dated 08-08-88, Letter to Mr. Bob Heyman, attached). Mr. Dailey argues that Mr. Skalnik specifically indicated that he testified falsely in Mr. Dailey's case, and that the State was aware of this fact. Mr. Dailey also argues that Mr. Skalnik stated that the prosecutors in Mr. Dailey's case were aware of an agreement for leniency in exchange for testimony against Mr. Dailey, and they allowed him to testify otherwise. Therefore, Mr. Dailey argues the prosecutors in this case engaged in misconduct, and as a result he is entitled to relief.

Mr. Dailey essentially makes two claims of prosecutorial misconduct. First, Mr. Dailey claims the prosecutors in this case presented false testimony

to the Court and the jury. Next, Mr. Dailey claims the prosecutors in this case failed to disclose evidence favorable to the defense. These claims amount to allegations that the prosecution violated Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), as well as Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In a case somewhat similar to the instant case, the Florida Supreme Court clarified what is necessary to establish violations of Giglio and Brady. See Guzman v. State, 868 So. 2d 498, 505, 508 (Fla. 2003). Under Guzman, in order to establish a Giglio violation the defendant must show: (1) the testimony was false; (2) the prosecutor knew it was false; and (3) the testimony was material. Id. at 505. (citing Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001)). In order to establish a Brady violation, it must be shown that: (1) exculpatory or impeaching evidence; (2) was suppressed willfully or inadvertently by the State; (3) prejudice resulted. Id. at 508 (citing Jennings v. State, 782 So. 2d 853, 856 (Fla. 2001)).

Mr. Dailey has not established that either a Giglio or a Brady violation occurred in this case. With respect to Mr. Dailey's claim that a Giglio violation occurred when the prosecutors in this case allowed Mr. Skalnik to testify falsely about Mr. Dailey's incriminating statements, Mr. Dailey failed to establish that the testimony was false and that the prosecutors were aware of this fact. At the evidentiary hearing Mr. Skalnik testified that his testimony at Mr. Dailey's trial was truthful, and he provided an explanation for several statements that he made to the contrary after Mr. Dailey's trial. (See Evidentiary Hearing Transcript, dated November 7, 2003, pp. 23-87, attached). **In addition, the prosecutor in question, Beverly Andringa testified that she would not have called Mr. Skalnik to the stand if she felt his testimony was not truthful.** (See Evidentiary Hearing Transcript, dated March 19, 2003, p. 99, attached). **She also testified that she believed Mr. Skalnik's testimony was true at the time he was called to testify against Mr. Dailey**. (See Evidentiary Hearing Transcript, dated March 19, 2003, p. 105, attached). **Therefore, Mr. Dailey has failed to establish that Mr. Skalnik's testimony was false, and that the prosecutor was aware of this falsity at**

the time. As such, no relief is warranted on this ground.

With regard to Mr. Dailey's allegation that a Brady violation occurred when the prosecutors failed to disclose to Mr. Dailey that the State offered him leniency in exchange for his testimony. Mr. Skalnik testified at the evidentiary hearing that the State never offered him anything of value in exchange for his testimony. (See Evidentiary Hearing Transcripts, dated November 7, 2003, pp. 23-29, 32, 36, 39, 47-49, 53-54, 57-58, 71, 80-81, attached). **The prosecutor also testified that she did not offer anything of value to Mr. Skalnik in exchange for his testimony**. (See Evidentiary Hearing Transcript, dated March 19, 2003, p. 105, attached). **Furthermore, the facts surrounding Mr. Skalnik's testimony and subsequent events are not consistent with the existence of an agreement between Mr. Ska1nik and the State. As a result, Mr. Dailey cannot demonstrate to this Court that either of the prosecutors knowingly presented false evidence, or that they suppressed evidence favorable to the Defense. As such, Mr. Dailey cannot demonstrate prosecutorial misconduct, and no relief is warranted on this ground.**

D. Other misconduct.

In his Motion, Mr. Dailey makes several additional allegations of prosecutorial misconduct. Mr. Dailey alleges that during the direct examination of Detective John Halliday, the prosecutor improperly elicited testimony regarding Mr. Dailey's exercise of his right to fight extradition when he engaged in the following:

> Mr. Heyman: As you previously testified before this jury, you were the investigating detective in this case of State of Florida versus James Dailey?
> Det. Halliday: Yes, I was.
> Mr. Heyman: Now, I believe, when we left off last time during your testimony, you had investigated the scene and developed certain leads which culminated in finding James Dailey to be a suspect in this case?
> Det. Halliday: Yes, it did.
> Mr. Heyman: Was an arrest warrant for murder

in the first degree subsequently gathered by you?

Det. Halliday: Yes, it was.

Mr. Heyman: When was Mr. Dailey arrested on that arrest warrant?

Det. Halliday: Mr. Dailey was arrested on that, I believe, it was November of '85.

Mr. Heyman: As a result, did you take further part in returning him to the State of Florida?

Det. Halliday: Yes, in the extradition procedures, yes.

Mr. Heyman: Could you explain to the jury what extradition procedures are?

(See Jury Trial Transcript, Vol. 5, p. 590, attached). Mr. Dailey argues this was an intentional effort by the prosecutor to elicit testimony that Mr. Dailey fought extradition to Florida. This was improper, Mr. Dailey contends, because fighting extradition is an exercise of a constitutional right and the prosecutor was attempting to cast this exercise of a constitutional right as something nefarious. Therefore, Mr. Dailey argues that he was prejudiced and denied his right to a fair trial.

Mr. Dailey is not entitled to relief on these grounds. Claims which were raised or could have been raised on direct appeal are procedurally barred from being raised on a motion for postconviction relief. Reaves v. State, 826 So. 2d 932, 936 n.3 (Fla. 2002), See also Roberts v. State, 568 So. 2d 1255, 1257-58 (Fla. 1990), Johnson v. State, 593 So. 2d 206, 208 (Fla. 1992). **Such claims are barred from being raised in a motion for post conviction relief because these motions are not intended to be used as second appeals**. Lopez v. Singletary, 634 So. 2d 1054, 1056 (Fla. 1993). **It is clear that this statement was raised on direct appeal. See Dailey v. State, 594 So. 2d 254, 256 (Fla. 1991). As such, no relief is warranted on this ground.**

Next, Mr. Dailey alleges that during the direct examination of Gayle Bailey, the prosecutor was presenting testimony he knew to be false, and that he was supplying answers for his questions to the witness. Mr. Dailey alleges this occurred during the following exchange between Ms. Bailey and Mr. Dailey's trial counsel:

Mr. Andringa: What time did they come home?
Ms. Bailey: I don't know. In the morning. Bob said - two or three.
Mr. Andringa: Who said that?
Ms. Bailey: Is that what you said?
Mr. Andringa: Are you talking to Mr. Heyman?
Ms. Bailey: Yes.
Mr. Andringa: You don't know?
Ms. Bailey: Right. I don't know.

(See Jury Trial Transcript, Vol. 4, pp. 402-403, attached). Mr. Dailey argues that it is clear from this testimony that the witness, Ms. Bailey, was relying on facts she did not independently know. Instead, Mr. Dailey argues this testimony shows the prosecutor was supplying facts to the witness. Mr. Dailey argues that the prosecutor was putting on false testimony, and as such, denied Mr. Dailey the right to a fair trial.

Mr. Dailey failed to present any arguments or introduce any evidence at the evidentiary hearings held in this matter. (See Evidentiary Hearing Transcripts, dated March 19, 2003, November 7, 2003, December 11, 2003, June 29, 2004, and November 5, 2004, attached). **The statement that Mr. Dailey cites is an isolated incident, and hardly establishes under any standard that the State provided the testimony to Ms. Bailey. Furthermore, there is no question about whether Ms. Bailey was in a position to know the facts which she testified to, and a review of both the direct and cross examinations reveal that Ms. Bailey's testimony on this point was that she did not know when Mr. Dailey returned to the Seminole residence**. (See Jury Trial Transcript, Vol. 4, pp. 374-409, attached). Therefore, Mr. Dailey is unable to establish that the prosecutor committed misconduct. As such, no relief is warranted on this ground.

> Excerpt, Order Denying Amended Motion to Vacate Judgments of Conviction and Sentence with Special Leave to Amend, July 20, 2005 (PCR Vol. 2/183; 207) (e.s.)

Analysis:

After conducting several days of evidentiary hearings, the

Circuit Court entered a comprehensive written order which correctly applied the controlling legal precedent to the facts of this case. This Court does not substitute its judgment for that of the trial court on issues of fact when competent, substantial evidence supports the circuit court's factual findings or on issues of witness credibility. See, Windom v. State, 886 So. 2d 915, 921 (Fla. 2004). In the instant case, the Circuit Court's cogent written order is supported by competent, substantial evidence and should be affirmed for the following reasons.

The IAC/Prosecutor Comment Claims (presumption-of-innocence and alleged improper vouching for inmate witnesses)

First, Dailey's underlying claims of alleged prosecutorial misconduct are procedurally barred. See, Lamarca, *supra*. In fact, Dailey concedes that his underlying claims of alleged prosecutorial misconduct are "contained squarely within the record." (Initial Brief at 50, 58). Accordingly, any substantive prosecutorial misconduct claims, based on the face of the trial record, are procedurally barred in post-conviction. Moreover, issues of alleged prosecutorial misconduct which were or could have been raised on the direct appeal are improperly rephrased as issues of ineffective assistance of counsel. See, Medina v. State, 573 So. 2d 293 (Fla. 1990).

Second, as the Circuit Court noted, “Mr. Dailey failed to present any evidence or make any argument on this [IAC/prosecutor comment] issue at the evidentiary hearings held in this matter.” (PCR V2/143) Although several days of evidentiary hearings were held below, Dailey concludes that it was simply unnecessary for him to present any evidence on his IAC/prosecutor comment claims at the post-conviction hearings because they are “contained squarely within the [direct appeal] record” and “no reasonably competent counsel would fail to object.” (See, Initial Brief at 50, 58). In arriving at this self-serving conclusion, Dailey has conspicuously ignored Strickland’s well-settled presumption, *i.e.*, that a reviewing court “must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689, 104 S. Ct. at 2065 (internal quotation marks and citation omitted). Furthermore, Dailey has unilaterally abolished his burden of proof under Strickland, which clearly places the burden on the criminal defendant to demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the defense. Id. at 687. Finally, this Court has

already rejected Dailey's rationale by consistently recognizing that "a decision not to object to an otherwise objectionable comment may be made for strategic reasons." Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003), quoting Chandler v. State, 848 So. 2d 1031, 1045 (Fla. 2003).

Third, this Court has long recognized that a trial counsel's decision not to object is a tactical one, Ferguson v. State, 593 So. 2d 508, 511 (Fla. 1992), and in denying Dailey's IAC/prosecutor's comment on the presumption-of-innocence claim below, the Circuit Court ruled, in pertinent part:

> The question of when to object is a strategic decision that is within the discretion of the attorney, and should not normally be questioned by a court if the attorney's actions could be considered reasonably competent counsel. Peterka v. State, 890 So. 2d 219, 233 (Fla. 1999). Mr. Dailey has mischaracterized the prosecutor's statements as an improper comment on his constitutional right to the presumption of innocence. However, these comments appear to be nothing more than an attempt by the State to argue that its evidentiary burden was met. See Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999), quoting United States v. Morris, 568 F. 2d 396, 401 (5th Cir. 1978) ("The assistance permitted includes counsel's right to state his contention as to the conclusions the jury should draw from the evidence.") Therefore, the prosecutor's statements were not improper, and Mr. Dailey suffered no prejudice as a result. As such, no relief is warranted on this ground.
>
> (PCR V2/188; see also PCR V2/143) (e.s.)

Fourth, as noted above, the Circuit Court specifically found that the prosecutor's comments "appear to be nothing more

than an attempt by the State to argue that its evidentiary burden was met." (PCR V2/188; See also, PCR V2/143). In this case, the prosecutor's presumption-of-innocence comment was squarely invited by defense counsel's preceding comments. The prosecutor's comment was essentially the same as defense counsel's comment in the initial closing argument that the presumption of innocence stays with the defendant "unless each and everyone of you . . . hear evidence that should convince you beyond a reasonable doubt that Mr. Dailey is not entitled to that presumption." (R V10/1229) Defense counsel argued that Dailey was presumed innocent, at the start of trial and was still innocent "at this point, ... because the State has not proven the case to you by credible evidence beyond and to the exclusion of a reasonable doubt." (R V10/1251) The allegation that the prosecutor misstated the presumption of innocence during closing argument of the guilt phase was not raised at trial and on direct appeal undoubtedly because, in context, it is apparent that the prosecutor's argument was based on the State's theory that the evidence indeed had shown the elements of the charged offense and that the Defendant's right to the presumption of innocence terminated at the close of all the evidence. (R V10/1262) The prosecutor's comment in the responsive closing argument was invited by the initial closing

of the defense. See, Caballero v. State, 851 So. 2d 655, 660 (Fla. 2003), Goodwin v. State, 751 So. 2d 537, 544, n.8 (Fla. 1999).

Fifth, the trial court's instruction to the jury thereafter included that the presumption of innocence stayed with the Defendant "through each stage of the trial until it's been overcome by the evidence to the exclusion of and beyond a reasonable doubt". (R V10/1306—1307) Accordingly, any alleged error would be harmless and clearly was cured by the trial court's instructions to the jury. See, Wuornos v. State, 644 So. 2d 1000, 1010 (Fla. 1994); See also, McCrae v. State, 510 So. 2d 874, 878 (Fla. 1987) (stating that "no ineffectiveness is shown because the general standard instructions on the presumption of innocence and the state's burden of proof were sufficient to apprise the jury of the applicable principles")

Sixth, Dailey's reliance on the pre-AEDPA federal habeas case of Mahorney v. Wallman, 917 F.2d 469 (10th Cir. 1990) is misplaced. (Initial Brief at 51-53). In Mahorney, the state prosecutor made specific statements negating the presumption of innocence during both voir dire and closing argument. Mahorney was convicted of first degree rape in state court, and, on federal habeas review, the federal appellate court concluded that a new trial was warranted because (1) defense counsel

vigorously objected to the prosecutor's remarks and moved for a mistrial, but his motion was denied and his objections were categorically overruled in the presence of the jury; (2) the trial court did not cure or minimize the problem through any admonishment or special instruction and the judge's refusal twice to correct the prosecutor's misstatements when publicly requested to do so gave such statements some appearance of judicial approval; (3) the trial court's overall charge on the presumption of innocence and burden of proof was not sufficiently specific to preserve that presumption in light of the prosecutor's specific statement that it had been extinguished; (4) the state did not point to any misstatements by defense counsel that might implicate the "invited response" doctrine, and (5) the error was not harmless because Mahorney never denied the act of sexual intercourse, but consistently defended on the basis of consent and the jury was presented with two relatively credible, competing stories by the complaining witness and the accused, neither of which was conclusively confirmed or disproportionately discredited.

The IAC/improper vouching claim

Dailey also raises the failure of counsel to object to the prosecutor's closing argument as allegedly improperly vouching for the credibility of Paul Skalnik. In his post-conviction

claim below, Dailey asserted that the prosecutor's comment allegedly bolstered the testimony of the three jailhouse witnesses, Skalnik, Leitner and DeJesus, by reminding the jury of Detective Halliday's experience and stating, "[I]f these men are cons, they would not con Detective Halliday." (R V10/1283)

Detective Halliday's statements about these witnesses was the subject of direct appeal and found to be harmless error. Dailey I, 594 So. 2d at 256 n. 2. In this case, as this Court held in Chandler v. State, 848 So. 2d 1031, 1046 (Fla. 2003), because the defendant "could not show the comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the Strickland test."

Furthermore, the prosecutor's comment at trial was in the context of rebutting the defense closing argument attacking the motives of the three witnesses, but not what they had said. (R V10/1276-1283) Defense argued in the initial closing that the State bought their testimony. (R V10/1246-1247, 1249) Therefore, the prosecutor responded to the claim that "Mr. Denhardt accused the State of buying their testimony." (R V10/1280) Although argued as affecting the cumulative effect (Initial Brief at 62), no testimony was presented at the

evidentiary hearing concerning Leitner or DeJesus, and although testimony was presented concerning Paul Skalnik, Dailey's trial attorneys, Mr. Andringa and Mr. Denhardt, were not asked at the post-conviction evidentiary hearing about the failure to object to this comment at trial. Ultimately, Dailey's IAC claim is meritless because trial counsel were not required to make a futile objection to the legally permitted rehabilitation of the witnesses. See Caballero v. State, 851 So. 2d 655, 660 (Fla. 2003) (addressing invited response doctrine). Dailey has not shown any deficiency of counsel and resulting prejudice under Strickland. Furthermore, all but one of the defendant's "long line" of "improper vouching" cases, cited at pages 54-55 of Dailey's initial brief, are direct appeal cases, and they actually reinforce the principle that Dailey's claims of alleged improper prosecutorial comment are procedurally barred.

The single post-conviction IAC/"improper vouching" case cited by Dailey, Rhue v. State, 693 So. 2d 567 (Fla. 2d DCA 1997), is readily distinguishable. In Rhue, a capital sexual battery case involving a child victim, defense counsel failed to object to repeated testimony that vouched for the credibility of the child. This testimony was presented from the child victim's

mother, his grandmother, his great-grandmother[7] and from Dr. Crum, a psychologist who examined the child. Dr. Crum testified that he had previously assessed children whom he found to be not credible. In those cases, Dr. Crum advised the State Attorney's Office that the child was not credible, but not in this case. Trial counsel did not object to this testimony. Furthermore, during closing arguments, the prosecutor emphasized Dr. Crum's expert opinion that "he believed the child was telling the truth. That's what his job is. He went to all those schools. He has all that experience with working with children; that's his job." Rhue, 693 So. 2d at 568. In Rhue, trial counsel testified at the post-conviction hearing that there was no tactical reason to refrain from objecting to the trial testimony regarding the child victim's credibility. In addition, the appellate court's review of the record revealed nothing that would support such a tactical decision. Consequently, Rhue "overcame the presumption that trial counsel's failure to object

[7] "The child's mother testified that, after the child related the incident to her, she asked him if it really happened and she looked him right in the face "because when you look him in the face you can tell." She also testified that the child does not make up stories and then stick with them. The child's grandmother testified that the child may tell lies about small things, such as whether he has eaten all his food, "but never would he lie. We try to stress to him to tell the truth." And the child's great-grandmother, when asked if the child had been injured in the incident, stated, '[The child] injured? Why, he wouldn't lie.'" Rhue, 693 So. 2d at 569.

may have been sound trial strategy." Id. at 568, citing Strickland, 466 U.S. at 689. Because the child victim's credibility was the pivotal issue in Rhue, trial counsel's performance was deemed deficient in failing to object to repeated testimony and multiple comments vouching for the child's credibility; and the Second District also concluded that there was "a reasonable probability that, but for trial counsel's omissions, the outcome of the proceeding would have been different." Rhue, 693 So. 2d at 570.

Dailey also relies, in part, on Ruiz v. State, 743 So. 2d 1, 10 (Fla. 1999), a case which recently was distinguished in another capital post-conviction case, Miller v. State, 926 So. 2d 1243 (Fla. 2006). In denying the IAC/prosecutor comment claim in Miller, this Court explained:

> Miller relies on Ruiz v. State, 743 So. 2d 1, 10 (Fla. 1999), wherein this Court reversed the defendant's convictions and remanded for a new trial based on multiple instances of prosecutorial misconduct. For example, one instance of misconduct occurred in Ruiz when the prosecutor "invoked the immense power, prestige, and resources of the State" by arguing, "What interest do we [prosecutors] as representatives of the citizens of this county have in convicting somebody other than the person--." Id. at 9. This Court found that by making this argument, the prosecutor was improperly implying, "If the defendant wasn't guilty, he wouldn't be here." Id. at 5. We conclude, however, that the prosecutor's statements in this case are not as egregious as what occurred in Ruiz, which included numerous instances of prosecutorial misconduct.

* * *

> We find the claim here clearly distinguishable from Ruiz. Moreover, trial counsel did object to the State's attempt to imply that Miller would have committed a second homicide. [n4] Trial counsel also testified at the evidentiary hearing that the facts before the jury somewhat supported the State's statements and he preferred not to make more of the issue once his objections were overruled. Because of this evidence before the trial judge, we find no error by the trial judge in rejecting this claim.

Miller, 926 So. 2d at 1243

IAC/prosecutor's closing regarding the time of Shaw's phone call

Dailey now claims that the prosecutor misstated the evidence during closing argument (R V10/1272-1273), as to when Oza Shaw used the phone to call his ex-wife and girlfriend in Kansas. (Initial Brief at 58). This claim is procedurally barred. Dailey current objection to the prosecutor's closing argument was not raised at trial, was not raised on direct appeal, was not raised as an IAC/prosecutor comment claim in Dailey's post-conviction motion or amended motions to vacate and was not an IAC/prosecutor comment claim for which an evidentiary hearing was granted by the Circuit Court. Since Dailey's current IAC/prosecutor comment claim was not raised in the defendant's motion or amended motion to vacate, it is procedurally barred. See, Gordon v. State, 863 So. 2d 1215, 1219 (Fla. 2003), citing Steinhorst v. State, 412 So. 2d 332,

338 (Fla. 1982).

Moreover, Dailey has not demonstrated any deficiency of counsel and resulting prejudice under Strickland. In the same paragraph of the State's closing argument now cited by Dailey, the prosecutor continued,

> . . . That leaves the four of them, Bailey, the Defendant, Pearcy and Shelly Boggio, going out to the bar. The come home from the bar and remember, they're only gone at that bar about an hour. Oza Shaw is on the phone about an hour. The only conflict at all in their testimony is whether or not Oza Shaw was home first or Gayle was home first. I don't think it's a conflict. (R 1273) (e.s.)

Thus, the direct appeal record reflects that the prosecutor was arguing that there was either no conflict, as raised by defense counsel in the initial closing argument, or that it was not important. (R V10/1273) Defense counsel's subsequent closing argument reasserted the facts as recalled by him. (R V10/1289-1290) Defense counsel did not object to the prosecutor's recollection of the testimony, nor was this claim raised on appeal as fundamental error. As noted in Caballero v. State, 851 So. 2d 655, 660 (Fla. 2003), "[e]rroneous comments [in closing argument] require reversal only where there is a reasonable possibility that the error affected the verdict." Here, the record does not support even the speculation that the prosecutor's recollection affected the verdict. Furthermore,

the trial court reminded the jurors just before the closing argument that what the attorneys said in final arguments was not evidence. (R V10/1227) Defense counsel's initial closing reminded the jurors that what the attorneys said was not evidence. (R V10/1228, 1235-1236) The trial court's instructions to the jury after closing arguments included that they could look only to the evidence in considering whether the State had proven guilt beyond a reasonable doubt. (R V10/1307) Allegedly improper comments alluding to facts not in evidence may be cured by jury instruction. See, Ferguson v. State, 417 So. 2d 639 (Fla. 1982). The cumulative effect is not shown to have affected the outcome because the prosecutor's recollection was either arguably fairly supported on the record, or invited by defense counsel's own closing arguments, Walls v. State, 926 So. 2d 1156 (Fla. 2006), or cured by the trial court's instructions to the jury instructions regarding the non-evidentiary nature of the attorneys' closing arguments.

Cumulative Effect Claim

At pages 60-63 of his initial brief, Dailey also asserts a "cumulative effect" argument, attempting to resurrect claims which were raised on direct appeal and deemed harmless error. These underlying sub-claims are procedurally barred in post-conviction and may not be renewed as substantive claims under

the guise of ineffective assistance of counsel. Assuming, *arguendo*, that the four additional instances alleged in Dailey's "cumulative effect" argument are properly before this Court, which the State does not concede and specifically disputes, Dailey still is not entitled to any relief for the following reasons.

Dailey's extradition-evidence claim was raised on direct appeal as an improper ruling of the trial court after defense objection and motion for mistrial. On direct appeal, this Court held that the trial court's ruling allowing the evidence was harmless error. Dailey I, 594 So. 2d at 256. Likewise, on direct appeal, this Court found the State's introduction of a knife sheath was harmless error. Id. at 256, n.2. Issues raised and ruled on in direct appeal are not proper for post-conviction relief. See Kimbrough v. State, 886 So. 2d 965, 983 (Fla. 2004) (concluding that to the extent the defendant seeks review of the substantive issue underlying his IAC claim, the claim is procedurally barred because it could have been raised on direct appeal).

Dailey also alleges instances of trial counsel's failure to object to allegedly improper comments in closing argument on the defendant's failure to testify. The comments were that only three people know what happened, the dead victim and the two

defendants. The prosecutor's first comment (R V10/1260-1261), was in the context of rebutting the defense closing argument of the lack of evidence. The prosecutor's second comment (R V10/1264), was in the context of rebutting the defense closing argument on reasonable doubt, and explaining that the State need not prove motive. (R V10/1262-1264) The third comment (R V10/1270), regarding fingernails, was also in the context of rebutting the defense closing of the lack of the State's evidence about Dailey's fingernails. (R V10/1232-1233, 1267-1270) Defense counsel did object and he moved for a mistrial. (R V10/1270) Although allegedly impacting the cumulative effect, no testimony was presented at the evidentiary hearing concerning this sub-issue. Therefore, it should be deemed abandoned. See Anderson v. State, 822 So. 2d 1261, 1266-67 (Fla. 2002). Moreover, the prosecutor's comment was invited response to defense counsel's initial closing argument that the medical examiner's testimony showed that the strangulation was by one having fingernails and that the jury had heard no testimony about Dailey having fingernails. (R V10/1232-1233) A prosecutor's comments are not improper where they fall into the category of an "invited response" by the preceding argument of defense counsel concerning the same subject. See, Walls v. State, 926 So. 2d 1156 (Fla. 2006). In any event, these

comments were raised on direct appeal, and this Court found "beyond a reasonable doubt that the error did not affect the verdict. Dailey, 594 So. 2d at 258, citing State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). Dailey has not shown any deficiency of counsel and resulting prejudice under Strickland. Finally, contrary to Dailey's argument, the Circuit Court did conduct a cumulative error analysis in this case, and the Circuit Court's order states, in pertinent part:

> **N. Cumulative Error**.
>
> Mr. Dailey claims that all of the errors alleged of his trial counsel in Ground I, taken together are serious enough to demonstrate Mr. Dailey's trial counsel was prejudicially deficient. Even if none of the grounds for relief in ground I, are sufficient to establish ineffective assistance of counsel individually, Mr. Dailey contends these grounds taken all together show that his trial counsel was ineffective and that as a result he was denied a fundamentally fair trial in violation of the Eighth and Fourteenth Amendments to the United States Constitution, citing State v. Gunsby, 670 So. 2d 920 (Fla. 1996), and Derden v. McNeel, 938 F. 2d 605 (5th Cir. 1991). Mr. Dailey also argues that as a result of all these errors of his trial counsel, his conviction and sentence are unreliable and must be corrected, citing Kyles v. Whitley, 115 S. Ct. 1555 (1995).
>
> The sources cited by Mr. Dailey are distinguishable from the instant circumstances. In this case, all of the specific grounds for relief have been found either to be waived by Mr. Dailey, or without legal merit. Therefore, Mr. Dailey is not entitled to relief based on a claim of cumulative error when all of the alleged individual errors have been found to be waived or baseless. Griffin v. State, 866 So. 2d 1, 22 (Fla. 2003) ("However, where individual claims of error alleged are either procedurally barred or without merit, the claim of

> cumulative error must fail.") (citing Downs v. State, 740 So. 2d 506, 509 n.5 (Fla. 1999)). As such, no relief is warranted on this ground.
>
> (PCR V2/166-167)

See also, Reed v. State, 875 So. 2d 415, 438 (Fla. 2004) (because this Court affirmed the denial of each of Reed's individual post-conviction claims, including his IAC/prosecutor comment claims, this Court likewise affirmed the denial of Reed's cumulative error claim). Based on the foregoing arguments and authorities, the Circuit Court's well-reasoned order denying post-conviction relief should be affirmed.

ISSUE II

THE GIGLIO CLAIM AND NEWLY DISCOVERED EVIDENCE CLAIM BASED ON INMATE PAUL SKALNIK.

In his second issue on appeal, Dailey combines the following post-conviction claims: Claim 7 [Giglio claim/Paul Skalnik] and Claim 5 [newly discovered evidence]. The Circuit Court granted an evidentiary hearing and also allowed CCRC to amend their newly discovered evidence claim based on prosecutor Beverly Andringa's proffered deposition testimony (that she did not consider Skalnik to be a credible witness after Skalnik's 1988 motions). Skalnik has repeatedly disavowed these 1988 motions; and, at the evidentiary hearing, prosecutor Andringa

did not testify that she thought that any of Skalnik's testimony in Dailey's trial in 1987 was not credible, but that she believed Skalnik when she put him on the stand at trial. See, PCR V3/395-397.

The Legal Standards

To establish a Giglio violation [Giglio v. United States, 405 U.S. 150 (1972)], a petitioner must show that (1) some testimony at trial was false; (2) the prosecutor knew that the testimony was false; and (3) the testimony was material. Suggs v. State, 923 So. 2d 419 (Fla. 2005).

This Court applies a mixed standard of review to Giglio claims, "deferring to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but reviewing *de novo* the application of those facts to the law." Suggs, citing Sochor v. State, 883 So. 2d 766, 785 (Fla. 2004) (quoting Lightbourne v. State, 841 So. 2d 431, 437-38 (Fla. 2003) (alterations in original); Lamarca (same).

Newly Discovered Evidence

For a conviction to be set aside based on a claim of newly discovered evidence, two requirements must be met. First, to qualify as newly discovered, the evidence must not have been known at the time of trial by the court, the party, or counsel, and "it must appear that the defendant or his counsel could not

have known [of it] by the use of diligence." [Derrick T.] Smith v. State, 2006 Fla. LEXIS 388 (Fla. 2006), quoting Jones v. State, 591 So. 2d 911, 916 (Fla. 1991). Second, the nature of the evidence must be such that on retrial it would probably produce an acquittal. Id.

Circuit Court's Ruling:

In denying post-conviction claim 7, the Giglio claim, the Circuit Court ruled, in pertinent part:

> **B. PAUL SKALNIK.** [FN4][8]
>
> Mr. Dailey alleges that Paul Skalnik testified falsely during the guilt phase of Mr. Dailey's trial, the State was aware of this fact, and failed to correct this testimony. The substance of Mr. Skalnik's testimony was that he was incarcerated in the Pinellas County Jail at the same time as Mr. Dailey, and that during this time period, Mr. Dailey made statements implicating himself in the murder of Shelley Boggio. Mr. Skalnik also testified that he had no agreement with the State for leniency in exchange for his testimony against Mr. Dailey. The prosecutor also argued the veracity of Skalnik's testimony when she stated:
>
> > Ms. Andrews: They're not getting out of jail free. They were each honest with you about what they expect to receive... So far all you have heard about these three men, from the defense, is their deals and motives. Not once, not once, did they rebut or impeach what they said. Not once. They can't attack what they said because they were telling the truth.

[8] [FN4 of the Circuit Court's order states: Section VIIA of Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence With Special Leave to Amend set out the Giglio standard.]

(See Jury Trial Transcript, Vol. 6, p. 703, attached). Subsequently, Mr. Dailey argues, Mr. Skalnik stated in a sworn Motion to Dismiss for Prosecutorial Misconduct dated August 7, 1988, that the prosecutors were aware that his testimony was questionable, and that the prosecutors knew that an agreement for leniency in exchange for testimony against Mr. Dailey existed. (See Motion to Dismiss For Prosecaoria1 Misconduct, attached). Mr. Dailey argues that Mr. Skalnik's testimony was material to his trial, and was the only direct evidence linking Mr. Dailey to the murder of Shelley Boggio. Thus, Mr. Dailey argues the prosecutors knowingly presented false and material testimony to the jury, and as a result, Mr. Dailey was prejudiced and denied the right to a fair trial.

This c1aim is essentially the same as ground VIC, with some added specificity and additional citation to trial testimony. However, there is nothing Mr. Dailey pleads in this ground which changes the analysis in ground VIC.[9] As explained earlier, Mr. Dailey was

[9] As noted above, the Circuit Court found that claim 7 was essentially the same as ground 6-C, and the Circuit Court's Order denying claim VI-C stated, in pertinent part:

C. Paul Skalnik.

Mr. Dailey alleges that the State utilized the testimony of Paul Skalnik during the guilt phase of the trial, and the State's reliance on this testimony amounted to prosecutorial misconduct. Mr. Dailey alleges that Mr. Skalnik testified that he was incarcerated in the Pinellas County Jail with Mr. Dailey, and that Mr. Dailey made statements implicating himself in the murder of Shelley Boggio. (See Jury Trial Transcript, Vol. 5, p. 540, attached). In addition, Mr. Skalnik also testified he had reached no agreement for leniency with the State in exchange for his testimony. (See Jury Trial Transcript, Vol. 5, p. 582-583, attached). However, Mr. Dailey argues that in a sworn Motion to Dismiss for Prosecutorial Misconduct, dated August 7, 1988, and a statement to the Court dated August 8, 1988, Mr. Skalnik stated that the Office of the State Attorney for the Sixth Judicial Circuit, including Beverly Andrews, were aware of the "potential questionability" of confessions Mr. Skalnik had testified about. (Motion to Dismiss For Prosecutorial Misconduct, Affidavit of Paul Skalnik, Statement dated 08-08-88, Letter to Mr. Bob Heyman, attached). Mr. Dailey argues that Mr. Skalnik specifically indicated that he testified falsely in Mr. Dailey's case, and that the State was aware of this fact. Mr.

Dailey also argues that Mr. Skalnik stated that the prosecutors in Mr. Dailey's case were aware of an agreement for leniency in exchange for testimony against Mr. Dailey, and they allowed him to testify otherwise. Therefore, Mr. Dailey argues the prosecutors in this case engaged in misconduct, and as a result he is entitled to relief.

Mr. Dailey essentially makes two claims of prosecutorial misconduct. First, Mr. Dailey claims the prosecutors in this case presented false testimony to the Court and the Jury. Next, Mr. Dailey claims the prosecutors in this case failed to disclose evidence favorable to the defense. These claims amount to allegations that the prosecution violated Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed. 2d 104 (1972), as well as Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963) . . .

* * *

Mr. Dailey has not established that either a Giglio or a Brady violation occurred in this case. With respect to Mr. Dailey's claim that a Giglio violation occurred when the prosecutors in this case allowed Mr. Skalnik to testify falsely about Mr. Dailey's incriminating statements, **Mr. Dailey failed to establish that the testimony was false and that the prosecutors were aware of this fact. At the evidentiary hearing Mr. Skalnik testified that his testimony at Mr. Dailey's trial was truthful, and he provided an explanation for several statements that he made to the contrary after Mr. Dailey's trial**. (See Evidentiary Hearing Transcript, dated November 7, 2003, pp. 23-87, attached). **In addition, the prosecutor in question, Beverly Andringa testified that she would not have called Mr. Skalnik to the stand if she felt his testimony was not truthful**. (Evidentiary Hearing Transcript, dated March 19, 2003, p. 99, attached). **She also testified that she believed Mr. Skalnik' s testimony was true at the time he was called to testify against Mr. Dailey**. (Evidentiary Hearing Transcript, dated March 19, 2003, p. 105, attached). Therefore, Mr. Dailey has failed to establish that Mr. Skalnik's testimony was false, and that the prosecutor was aware of this falsity at the time. As such, no relief is warranted on this ground.

With regard to Mr. Dailey's allegation that a Brady violation occurred when the prosecutors failed to disclose to Mr. Dailey that the State offered him leniency in exchange for his testimony. **Mr. Skalnik testified at the evidentiary hearing that the State never offered him anything of value in exchange for his testimony**. (See Evidentiary Hearing Transcripts, dated November 7, 2003, pp. 23-29, 32, 36, 39, 47-49, 53-54, 57-58,

unable to establish at the evidentiary hearing any of the elements of either a Brady or a Giglio violation as explained in Guzman. As such, no relief is warranted on this ground.

> Excerpt, Order Denying Amended Motion to Vacate Judgments of Conviction and Sentence with Special Leave to Amend, July 20, 2005 (PCR V2/207-208).

Also, in denying post-conviction claim 4, an alleged Brady claim based on inmate witness Paul Skalnik, the Circuit Court ruled:

> **B. Paul Skalnik.** [FN1][10]
>
> Mr. Dailey alleges Paul Skalnik was a witness for the State during the guilt phase of the trial, testifying that Mr. Dailey made several incriminating statements to him while they were both incarcerated in the Pinellas County Jail prior to Mr. Dailey's trial. In addition to testifying that Mr. Dailey essentially confessed to killing Shelley Boggio, Mr. Skalnik also testified that he did not receive any preferential treatment including any pre-arranged deals or promises of consideration for his testimony. (See Jury Trial Transcript, Vol. 5, pp. 582-583, attached). He also testified that his only motivation for testifying against Mr. Dailey was that he continued to feel a part of the law enforcement community, and his outrage

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71, 80-8l, attached). **The prosecutor also testified that she did not offer anything of value to Mr. Skalnik in exchange for his testimony**. (See Evidentiary Hearing Transcript, dated March 19, 2003, p. 105, attached). Furthermore, the facts surrounding Mr. Skalnik's testimony and subsequent events are not consistent with the existence of an agreement between Mr. Skalnik and the State. As a result, Mr. Dailey cannot demonstrate to this Court that either of the prosecutors knowingly presented false evidence, or that they suppressed evidence favorable to the Defense. As such, Mr. Dailey cannot demonstrate prosecutorial misconduct, and no relief is warranted on this ground. (e.s.)

[10] FN1 of the Circuit Court's Order states: Section IVA of Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence With Special Leave to Amend set out the Brady standard.

over the murder of Ms. Boggio. (See Jury Trial Transcript, Vol. 5, p. 581, attached).

However, Mr. Dailey argues, in a sworn Motion to Dismiss For Prosecutorial Misconduct, dated August 7, 1988, Mr. Skalnik claimed that his previous testimony against Mr. Dailey was all untrue, that he never had any conversations with Mr. Dailey, and that the State provided him details of the crime as well as agreed to a deal for leniency in exchange for his testimony. (See Motion to Dismiss For Prosecutorial Misconduct, attached). Mr. Dailey also argues that Mr. Skalnik claimed in open court, as well as in a signed statement submitted to the court as an exhibit, that the prosecutors in Mr. Dailey's case knew of this arrangement. (See Affidavit of Paul Skalnik, Statement dated 08-08-88, Letter to Mr. Bob Heyman, attached). Mr. Dailey argues the evidence of this arrangement was exculpatory, and would have been invaluable to impeaching the credibility of Mr. Skalnik. Mr. Dailey contends he was unduly prejudiced by the State's withholding of this information, and that as a result, his conviction and sentence are not worthy of confidence.

After a thorough review of the record, it is clear these claims are completely refuted by the record. Mr. Skalnik testified extensively at the hearing about his testimony during Mr. Dailey's trial, the events which he testified about, and the claims he made after Mr. Dailey's case concluded. (See Evidentiary Hearing Transcript, dated November 7, 2003, pp. 5-87, attached). **At the hearing, Mr. Skalnik testified that he was never promised anything by the State in exchange for his testimony against Mr. Dailey, and that no one from the State ever suggested facts to him, or otherwise told him how to testify**. (See Evidentiary Hearing Transcript, dated November 7, 2003, pp. 47, 77-78, attached). **He also testified that all of his testimony against Mr. Dailey was true to the best of his knowledge.** (See Evidentiary Hearing Transcript, dated November 7, 2003, p. 82, attached).

In addition to Mr. Skalnik's testimony, the Court also heard the testimony of John Halliday, the lead detective in the case against Mr. Dailey, and Beverly Andringa (nee' Andrews), the prosecuting attorney. While Mr. Halliday was on the stand, Mr. Dailey's

> counsel failed to ask any questions about whether Mr. Halliday or any other representative of the State ever offered Mr. Skalnik anything in exchange for his testimony. (See Evidentiary Hearing Transcripts, dated March 19, 2003, pp. 70-90, November 7, 2003, pp. 100-104, attached). **Mr. Halliday also testified that he found Mr. Skalnik to be credible at the time**. (See Evidentiary Hearing Transcripts, dated March 19, 2003, pp. 70-90, November 7, 2003, pp. 100-104, attached). **Mr. Dailey's counsel at the hearing also asked Ms. Andringa about these matters, and she also testified that she found Mr. Skalnik to be credible at the time, and that she did not offer him anything in exchange for his testimony**. (See Evidentiary Hearing Transcript, dated March 19, 2003, pp. 91-108, attached). **It is clear that no evidence of preferential treatment in exchange for Mr. Skalnik's testimony existed, and there was no evidence known to the State which would have shown Mr. Skalnik did not speak with Mr. Dailey. Therefore, Mr. Dailey has failed to prove the State withheld evidence from him with regards to Mr. Skalnik's testimony. As such, no relief is warranted on this ground**.
>
> Excerpt, Order Denying Amended Motion to Vacate Judgments of Conviction and Sentence with Special Leave to Amend, July 20, 2005 (PCR V2/174-176) (e.s.)

Analysis

After conducting extensive evidentiary hearing proceedings, the Circuit Court specifically found that Dailey failed to establish that Paul Skalnik's "testimony was false and that the prosecutors were aware of this fact. At the evidentiary hearing Mr. Skalnik testified that his testimony at Mr. Dailey's trial was truthful, and he provided an explanation for several statements that he made to the contrary after Mr. Dailey's trial

. . . In addition, the prosecutor in question, Beverly Andringa testified that she would not have called Mr. Skalnik to the stand if she felt his testimony was not truthful . . . She also testified that she believed Mr. Skalnik' s testimony was true at the time he was called to testify against Mr. Dailey . . . Therefore, Mr. Dailey has failed to establish that Mr. Skalnik's testimony was false, and that the prosecutor was aware of this falsity at the time. As such, no relief is warranted on this ground." (PCR V2/174-176)

The Circuit Court's order is supported by competent, substantial evidence. At the post-conviction evidentiary hearing, Paul Skalnik testified that he had no agreement with the State, that he received no leniency, and that his testimony at Dailey's trial was the truth. (PCR V4/443, 445-446, 451, 455-56, 458, 460, 466-67, 474, 487, 496, 499-501, 503) At the evidentiary hearing, prosecutor Beverly Andringa also confirmed that she did not offer anything of value to Skalnik in exchange for his testimony and that she believed Skalnik when she put him on the stand at trial. The evidentiary hearing in this case established no basis for post-conviction relief based on Paul Skalnik. See, Cooper v. State, 856 So. 2d 969, 974 (Fla. 2003) (agreeing with the trial court's conclusion that "there is a dearth of evidence in the record to suggest that Skalnik ever

received anything of value from the State"); See also, Lamarca v. State, 2006 Fla. LEXIS 653 (Fla. 2006) (affirming trial court's post-conviction ruling that defendant failed to establish a Brady or Giglio violation and finding that defendant did not establish that the State put forth false testimony or made deals with inmate in exchange for testimony); Mansfield v. State, 911 So. 2d 1160 (Fla. 2005) (affirming trial court's post-conviction finding that there was no evidence that inmate witness was promised any benefit in exchange for his testimony).

Furthermore, Dailey's post-conviction exhibits did not refute Skalnik's in-court testimony that he received no deal or leniency from the State in exchange for his testimony. For example, defense evidentiary exhibit 18 reflecting Skalnik's release on his own recognizance as a reduction of bail on August 12, 1987, occurred about a month and a half after his trial testimony. Skalnik's pleadings submitted in 1988, a year after Dailey's trial, alleging that he had a deal with the State and was coached, were withdrawn by Skalnik and have been repeatedly disclaimed by him since, including at this post-conviction evidentiary hearing. They were public record and available to defense counsel. Prosecutor Beverly Andringa's proffered deposition testimony (that she did not consider Skalnik to be a credible witness after his 1988 motions, the motions which

Skalnik repeatedly disavowed), is not newly discovered evidence, but an attorney's immaterial, after-the-fact impression of a witness based on his subsequent out-of-court false allegations, which the witness steadfastly renounced in court. Most significantly, prosecutor Andringa did not testify that she thought that any of Skalnik's testimony in Dailey's trial in 1987 was not credible, but that she believed him when she put him on the stand. See, PCR V3/395-397. Dailey has not shown that there was any agreement for Skalnik's testimony at trial or that his testimony at trial was false.

Collateral counsel spends several pages of the initial brief now offering his own personal opinions of Skalnik's testimony as not credible. However, the principle is well-settled that the determination of the credibility of witnesses is reserved to the trial court. See, Windom v. State, 886 So. 2d 915, 927 (Fla. 2004). In this case, the testimony and evidence introduced at the evidentiary hearing did not show that the State withheld any evidence, presented any false evidence, or knew anything not known to defense counsel. No Giglio violation is shown and, accordingly, the Circuit Court's order denying post-conviction relief should be affirmed. See, Consalvo v. State, 2006 Fla. LEXIS 890 (Fla. 2006); State v. Riechmann, 777 So. 2d 342, 361 (Fla. 2000); Lamarca, *supra*; Mansfield, *supra*.

Finally, although the trial court's written order painstakingly addressed the multiple "newly discovered evidence" allegations in claim 5 of the defendant's post-conviction motion (See, PCR V2/177-183), the trial court's final order did not include a discussion of Dailey's additional amendment based on prosecutor Andringa's proffered deposition. However, the absence of a specific ruling on this amendment to the "newly discovered evidence claim" does not entitle Dailey to any relief because the Circuit Court, in rejecting Dailey's Brady claim, specifically relied on the identical inquiry of the prosecutor, Beverly Andringa, who testified, as the trial court found, "that she found Mr. Skalnik to be credible at the time [of trial], and that she did not offer him anything in exchange for his testimony." (PCR V2/176) Newly discovered evidence must be "of such a character that it would probably produce an acquittal on retrial." Johnson v. State, 904 So. 2d 400, 404 (Fla. 2005). The newly discovered evidence standard imposes a greater burden upon a defendant seeking a new trial than the "materiality" prong of Brady. See, Floyd v. State, 902 So. 2d 775, 783 (Fla. 2005).[11] Thus, if Dailey could not establish any entitlement to

[11] In Floyd, this Court emphasized that, under Brady, "[A]ll we have required is a "reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different." (citation omitted). "In other words, the test in Brady focuses on the fairness and

relief under Brady, he certainly could not satisfy the greater burden required of the defendant under the "newly-discovered evidence" standard.

ISSUE III

THE NEWLY DISCOVERED EVIDENCE CLAIM BASED ON OZA SHAW AND CO-DEFENDANT JACK PEARCY.

Dailey's "newly discovered" evidence claim on appeal is based on post-conviction claim 5, which the Circuit Court denied after an evidentiary hearing. "For a conviction to be set aside based on a claim of newly discovered evidence, two requirements must be met. First, to qualify as newly discovered, the evidence must not have been known at the time of trial by the court, the party, or counsel, and "it must appear that the defendant or his counsel could not have known [of it] by the use of diligence." [Derrick T.] Smith v. State, 2006 Fla. LEXIS 388 (Fla. 2006)(quoting Jones v. State, 591 So. 2d 911, 916 (Fla. 1991). Second, the nature of the evidence must be such that on retrial it would probably produce an acquittal. Id.

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reliability of a trial that took place without access to the suppressed exculpatory evidence, rather than requiring a showing that the actual result would have been different as is required when a new trial is sought based on newly discovered evidence." Floyd, 902 So. 2d at 783, n6 (e.s.) See also, Trepal v. State, 846 So. 2d 405, 437 (Fla. 2003) (Pariente, J., specially concurring, setting out the different standards). The majority opinion in Trepal was receded from, in part, in Guzman v. State, 868 So. 2d 498, 506 (Fla. 2003).

Standard of Review

In Walls v. State, 926 So. 2d 1156 (Fla. 2006), this Court recently reiterated:

> Generally, this Court's standard of review following the denial of a postconviction claim where the trial court has conducted an evidentiary hearing affords deference to the trial court's factual findings. McLin v. State, 827 So. 2d 948, 954 n.4 (Fla. 2002). "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997) (quoting Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984)).

"[A]bsent an abuse of discretion, a trial court's decision on a motion based on newly discovered evidence [including a witness's newly recanted testimony] will not be overturned on appeal." Consalvo v. State, 2006 Fla. LEXIS 890 (Fla. 2006), quoting Mills v. State, 786 So. 2d 547, 549 (Fla. 2001).

The Circuit Court's Order

In denying post-conviction relief on Dailey's claim of "newly discovered" evidence based on Oza Shaw and co-defendant Jack Pearcy, the Circuit Court ruled, in pertinent part:

> **B. Oza Shaw.**
>
> Mr. Dailey claims the existence of newly discovered evidence in the form of new testimony from Oza Dwaine Shaw, which would prove Mr. Dailey's innocence and therefore entitle him to relief. During Mr. Dailey's trial, Mr. Shaw testified that he lived

at the same house in Seminole, Florida as Jack Pearcy, Gayle Bailey, and James Dailey at the time that Shelley Boggio was murdered. (See Jury Trial Transcripts, Vol. 4, pp. 418-419, attached). Mr. Dailey argues that, in substance, Mr. Shaw testified he left the house the night of May 5, 1985 with Mr. Pearcy and Ms. Boggio, they dropped him off at a phone booth so that he could make a phone call, and he then walked back to the house alone. In the early morning hours of May 6, 1985, Mr. Shaw witnessed Mr. Dailey and Mr. Pearcy return to the house together. However, at the evidentiary hearing held on March 19, 2003, Mr. Shaw testified that on the night in question he also witnessed Mr. Pearcy return to the house alone, go into Mr. Dailey's bedroom, and leave with Mr. Dailey prior to watching the two of them return to the house together on the morning of May 6, 1985. (See Evidentiary Hearing Transcript, dated March 19, 2003, pp. 53-54, attached). Mr. Dailey argues this new testimony provides evidentiary support for Mr. Dailey's argument that Mr. Pearcy acted alone, and therefore justifies granting Mr. Dailey a new trial.

While recantation of trial testimony may be the basis for granting a new trial, it does not automatically warrant a new trial. Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994). When a witness recants trial testimony, in order to decide whether a new trial should be granted, the court must consider all of the surrounding circumstances including testimony heard on the motion for a new trial. Id. "Recantation testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied such testimony is true." (quoting Henderson v. State, 185 So. 625, 630 (Fla. 1938)). Furthermore, granting a new trial based on such testimony is proper only when the witness's new testimony is a change to the extent that is probable that the verdict would be different. Marquard v. State, 850 So. 2d 417, 424 (Fla. 2002).

In this case, Mr. Shaw's new testimony is of questionable value, and the changes in his testimony are not significant. Mr. Shaw testified at the trial, and during the evidentiary hearing that he had been drinking heavily on the day in question, and that he spent much of the time in question asleep on the couch. (See Jury Trial Transcript, Vol. 4, pp. 419-

420, 433, Evidentiary Hearing Transcript, dated March 19, 2003, pp. 46-47, 49, attached). **As such, his ability to remember the actual events is questionable, and it would seem most likely that his memory in the time closer to the actual events would be more reliable than nearly twenty years later. Furthermore, Mr. Shaw's testimony does not seem to truly recant or change his earlier testimony, but instead only adds some detail. Reasonable minds may differ about the significance of these added details, but they could not be fairly characterized as being of the magnitude that would compel a different verdict. Therefore, this is not truly newly discovered evidence, just Mr. Shaw's newest version of events.** See Walton v. State, 847 So. 2d 438, 454-55 (Fla. 2003). As such, no relief is warranted on this ground.

C. Jack Pearcy.

Mr. Dailey alleges the existence of newly discovered evidence which would prove his innocence, and therefore entitle him to relief. Mr. Dailey alleges that Jack Pearcy refused to testify at Mr. Dailey's trial, citing his fifth amendment right against self incrimination, and was found in contempt of court. However, Mr. Dailey argues that Mr. Pearcy made a sworn statement which would support Mr. Dailey and Mr. Shaw's accounts of how the events transpired on the fifth and sixth of May, 1985. Specifically, Mr. Dailey alleges that Mr. Pearcy would testify that he took Mr. Shaw and Ms. Boggio to a phone booth, that he left the phone booth with just Ms. Boggio, and that he later returned to the house he shared with Ms. Bailey and Mr. Dailey, alone. Mr. Dailey also claims Mr. Pearcy would testify that he and Mr. Dailey then played frisbee in the water near the Bellair Causeway before returning home in the early morning hours of May 6, 1985.

However, **Mr. Pearcy again refused to testify at the evidentiary hearing, asserting his fifth amendment right against self incrimination**. (See Evidentiary Hearing Transcript, dated November 7, 2003, pp. 117-118, attached). **As a result, there is no new testimony to serve as a basis for relief, and Mr. Dailey must rely on Mr. Pearcy's sworn statement to obtain a new trial. However, the sworn statement Mr.**

Pearcy made on March 19, 1993 is not admissible as evidence before this Court as it is hearsay, and does not qualify as a statement against interest under Fla. Stat. §90.804(2)(c). A statement must be contrary to the speaker's pecuniary, proprietary interest, or expose him to criminal liability to be against the speaker's interest. Lightbourne v. State, 644 So. 2d 54, 57 (Fla. 1994). In addition, a statement which is exculpatory to the defendant and which could expose the speaker to criminal liability is not admissible unless there are additional circumstances which demonstrate the statement is reliable. Id. See Lecroy v. State, 533 So. 2d 750, 754 (Fla. 1988) (Statement by separately tried co-defendant who said he saw victims after defendant, was not a statement against interest, and not admissible against defendant.)

In the instant case, the only way Mr. Pearcy's statement can be said to be against his interest, is that it is consistent with Mr. Dailey's version of events. **Nowhere in the statement does Mr. Pearcy take responsibility for Shelley Boggio's murder, or in any way state that he committed any other crime. Furthermore, there are no circumstances which indicate Mr. Pearcy's statement is reliable. Finally, even if the statement were admissible, it cannot be said that it contains the type of information that would be likely to require an acquittal on retrial**. Wright v. State, 857 So. 2d 861, 870-71 (F1a. 2003). As such, no relief is warranted on this ground.

> Excerpt, Order Denying Amended Motion to Vacate Judgments of Conviction and Sentence with Special Leave to Amend, July 20, 2005 (PCR V2/177-183) (e.s.).

Analysis:

The Circuit Court's order is supported by competent, substantial evidence; and as in Consalvo v. State, 2006 Fla. LEXIS 890, 17-18 (Fla. 2006), the Circuit Court's well-reasoned order denying post-conviction relief should be affirmed. In

Consalvo, this Court, quoting Armstrong v. State, 642 So. 2d 730 (Fla. 1994), emphasized the standard for granting a new trial based upon a claim of newly discovered evidence that a state witness has recanted his or her trial testimony. As this Court explained:

> Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. Brown v. State, 381 So. 2d 690 (Fla. 1980), cert. denied, 449 U.S. 1118, 101 S. Ct. 931, 66 L. Ed. 2d 847 (1981); Bell v. State, 90 So. 2d 704 (Fla. 1956). 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. [Bell, 90 So. 2d at 705]. "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." [Id.] (quoting Henderson v. State, 135 Fla. 548, 561, 185 So. 625, 630 (1938) (Brown, J., concurring specially)). 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. Id.
>
> Consalvo, 2006 Fla. LEXIS 890, quoting Armstrong, at 735.

Oza Dwaine Shaw

The testimony of Oza Dwaine Shaw at the post-conviction hearing does not constitute “newly discovered evidence” warranting a new trial. First, changed and recanted testimony is exceedingly suspect. See, Consalvo, Lightbourne v. State,

742 So. 2d 238, 247 (Fla. 1999). A court should not grant a new trial based on recantation unless "satisfied that such testimony is true." Marquard v. State, 850 So. 2d 417, 424-25 (Fla. 2003). In Marquard, a co-defendant [Abshire] recanted, in post-conviction, the testimony that he gave at Marquard's initial trial. In Marquard, Abshire's changed testimony was held not to be newly discovered evidence, but only his latest version of the events. Similarly, Shaw's latest version presented at the evidentiary hearing is inconsistent with (1) Shaw's trial testimony and (2) his pretrial deposition and (3) his statement to police, and, therefore, does not qualify a "newly discovered evidence," but, rather, is only his latest version of events. See Walton v. State, 847 So. 2d 438, 454-455 (Fla. 2003).

Additionally, Shaw's testimony at both the trial and evidentiary hearing is of questionable reliance as to his inability to recall any specifics. See, Sims v. State, 754 So. 2d 657 (Fla. 2000) (newly discovered evidence consisting of hearsay statements which lack credibility and trustworthiness do not constitute grounds for new trial). At the time of Shaw's trial testimony in June of 1987, Shaw was in federal prison for armed robbery and he was already complaining about not being able to recall facts from the dates of May 5-6, 1985, and Shaw admitted to be guessing at times. (R V8/993, 996) Shaw admitted

to drinking heavily the day of the murder and said that he passed out on the couch. (R V8/1003-1004, 1009) At trial, Shaw claimed to have been on the telephone for at least an hour, talking to both his girlfriend and his wife (R V8/997, 1005), although the phone records showed only 26 minutes to his girlfriend and Shaw now admits not reaching his wife at all. (PCR V3/340, 342) At the time of trial, Shaw claimed to have known Pearcy for five years (R V8/994), but, at the evidentiary hearing, to only 1 1/2 to two years. (PCR V3/335) At the evidentiary hearing, Shaw said he first told CCRC (about seeing Dailey leave with Pearcy) only a year earlier (PCR V3/345, 353), but Dailey's post-conviction motion alleging Shaw's new testimony was filed on November 12, 1999, over three years earlier. On cross-examination at the post-conviction hearing, Shaw admitted that he (1) gave a statement to Detective Halliday about three weeks after the murder, (2) was deposed on April 27, 1987, (3) testified at trial, and (4) gave another deposition two years later, all without ever mentioning that he also saw Dailey leave with Pearcy about an hour after Shaw's return from the phone call. (PCR V3/346-352)

Regardless of the reliability of Shaw's recollections, any new addition in Shaw's post-conviction testimony -- of first seeing Pearcy once return alone, go to Dailey's bedroom, and the

two of them leave and return about an hour later with Dailey's pants wet -- does not affect the outcome of the trial. At trial, it was clear in Shaw's testimony that only Pearcy and Shelley had taken Shaw to the phone booth and that they left him there to walk home. At trial, it also was clear that Shaw did not look for Dailey in the bedroom when Shaw returned home and fell asleep on the couch. And, at trial, it was clear that Shaw was awakened when Pearcy and Dailey returned home about 2 or 2:30 a.m. or later, with Dailey carrying his shirt, his pants wet and possibly wearing no shoes. (R V8/997-999, 1004-1007) Shaw's testimony, both at trial and the evidentiary hearing, clearly places Pearcy and Dailey together for over an hour during the time frame estimated by the M.E. as encompassing the time of the victim's death. There is no possibility that this additional evidence would probably produce an acquittal on retrial. See Brown v. State, 846 So. 2d 1114, 1126 (Fla. 2003). Furthermore, evidence which did not exist at the time of the defendant's trial is not legally "newly discovered evidence." See, Wright v. State, 857 So. 2d 861, 871 (Fla. 2003).

Co-defendant Jack Pearcy

Dailey's reliance on Jack Pearcy's statement on March 19, 1993 to CCRC, filed as court-exhibit 2, does not qualify as newly discovered evidence in support of his Motion to Vacate

filed April 1, 1997, because the Motion was not timely filed after the 1993 statement. Dailey's 1997 Motion to Vacate was only a shell motion, and was not presented as a full motion until November 12, 1999. See, Swafford v. State, 828 So. 2d 966, 977-978 (Fla. 2002); Mills v. State, 684 So. 2d 801, 805 n.7 (Fla. 1996). More significantly, a co-defendant's latest version of the events has been held not to constitute newly discovered evidence. See, Marquard v. State, 850 So. 2d 417, 424-25 (Fla. 2003). In Walton v. State, 847 So. 2d 438, 455 (Fla. 2003), this Court ruled that what Walton presented as "newly discovered evidence" was "simply a new version of the events from a witness/participant who has presented multiple stories since the time of the occurrence of the events themselves." Moreover, even if the co-defendant's "newest version of the events culminating in the murders qualifies as newly discovered evidence, it is obvious that this evidence is composed of statements made by an extremely untrustworthy person." If [the co-defendant's] new statements were introduced into the current body of evidence in the instant case -- subject to impeachment through introduction of prior inconsistent statements -- its effect would likely be negligible." Walton, 847 So. 2d at 455.

Additionally, Pearcy's version of events offered on March

19, 1993, was not unknown to defense counsel at the time of trial, as required to qualify as newly discovered, but was the same version of events argued by the defense to the jury in closing argument. (R V10/1289-1291) Also, Pearcy's 1993 statement does not qualify as newly discovered evidence as not admissible evidence because of Pearcy's refusal to testify. See, Lightbourne v. State, 841 So. 2d 431, 440 (Fla. 2003) (discussing legal requirements); Robinson v. State, 865 So. 2d 1259 (Fla. 2004).

The mere fact that the Circuit Court allowed co-defendant Pearcy's March 19, 1993 statement to CCRC as court's exhibit 2 does not establish any purported right to rely on the statement as though it were admitted by the defense as substantive evidence. Rather, the Circuit Court was clear that both the defense offer of Pearcy's March 19, 1993 statement and the State's rebuttal documents, consisting of Pearcy's sworn statement of June 19, 1985, the police report of Detective Halliday concerning Pearcy's polygraph of June 20, 1985, and assistant public defender Wayne Shipp's deposition of November 17, 1986, were accepted only as court exhibits. (PCR V/538-540)

Dailey's claim - that Pearcy's March 19, 1993 statement is admissible under the hearsay exception of a statement against interest by an unavailable witness - is legally incorrect.

First, having been previously convicted and sentenced and both affirmed on direct appeal, Pearcy v. State, 518 So. 2d 273 (Fla. 2d DCA 1987), Pearcy was not legally unavailable to testify. See McDonald v. State, 321 So. 2d 453, 455 (Fla. 4th DCA 1975). However, Pearcy made himself factually unavailable for the evidentiary hearing and asserted a Fifth Amendment right. Second, Pearcy's March 19, 1993 statement is not sufficiently against his penal interest to qualify for the hearsay exception of Section 90.804(2), Florida Statutes. Pearcy's statement does not state that Pearcy committed the murder, and is uncorroborated by any material, trustworthy evidence. Dailey's own testimony, offered at the evidentiary hearing for the first time seventeen years after his trial, is not the kind of trustworthy evidence that can be considered to corroborate alleged "newly discovered evidence." See also, Rutherford v. State, 926 So. 2d 1100 (Fla. 2006). Significantly, the Dailey-Pearcy pretrial notes intercepted in the jail showed their intentions to be "fall partners" for each other. Pearcy's statement of March 19, 1993 to CCRC is not trustworthy. Such a statement of co-defendant Pearcy would not be credible because it would be contradicted by Pearcy's own pretrial statements to police, to family, to other inmates, and to the State Attorney's Office. The March 1993 statement is consistent with the

arrangements between Pearcy and Dailey in jail to be "fall partners" for each other. (R V9/1093)

The March 19, 1993 statement of co-defendant Pearcy is not credible, does not establish Dailey's innocence, and would not have affected the outcome. Co-defendant Pearcy invoked the 5th Amendment at Dailey's trial and continues to do so to this day. Pearcy had the opportunity at that time, more than a dozen years before the evidentiary hearing, to have given whatever version of events he had decided to give. Pearcy's subsequent statement to CCRC does not qualify as admissible evidence. See, Sims v. State, 754 So. 2d 657, 660-62 (Fla. 2000), and Lightbourne v. State, 644 So. 2d 54, 56-57 (Fla. 1994) (affirming inadmissibility of affidavits pursuant to Section 90.804(2) (c), for lack of trustworthiness).

Finally, Pearcy's March 19, 1993 statement is not against penal interest for perjury as beyond the statute of limitations before it was even made known to the State in Dailey's Amended Motion to Vacate in November of 1999. See, Lightbourne v. State, 644 So. 2d 54, 57 (Fla. 1994). Even if Pearcy testified consistent with the March 19, 1993 statement, the Circuit Court properly rejected his statement as unreliable. See Order, PCR V2/182-183, citing LeCroy v. State, 533 So. 2d 750, 754 (Fla. 1988); See also, Robinson v. State, 865 So. 2d 1259 (Fla. 2004).

(affirming rejection of the codefendant's testimony as unreliable; Consalvo, *supra* (finding competent, substantial evidence supported the trial court's findings, including the trial court's assessment of the recanting witnesses history of lying and psychiatric deficiencies and their inconsistencies and lack of memory when testifying at the evidentiary hearing).

ISSUE IV

THE IAC – GUILT PHASE CLAIM.

In his final issue, which consists of a total of two pages, Dailey asserts that his trial attorneys were ineffective during the guilt phase in allegedly failing to (1) use phone records to impeach Gayle Bailey's trial testimony, (2) cross-examine inmate Paul Skalnik about the facts and circumstances of his pending charges, (3) use newspaper articles to impeach Skalnik, and (4) call Dailey to testify at trial. (See, Initial Brief at 81-82).

Procedural Bars:

As a preliminary matter, the State submits that Dailey's conclusory arguments are insufficient to state any cognizable issue on appeal. See, Randolph v. State, 853 So. 2d 1051, 1063 n.12 (Fla. 2003) ("The purpose of an appellate brief is to present arguments in support of the points on appeal." (quoting Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990)).

Additionally, although Dailey frames the title of Issue IV to purportedly include an IAC claim based on the alleged failure to "cross examine Mr. Skalnik about the facts and circumstances of his pending charges," Dailey has not presented any argument, at all, in support of this specific allegation. (See Initial Brief at 81-82). Accordingly, this sub-claim is abandoned on appeal. See, Shere v. State, 742 So. 2d 215, 217 n.6 (Fla. 1999).

Furthermore, Dailey's IAC claim based on the failure to utilize newspaper articles to allegedly impeach the inmate witnesses was abandoned below. As the Circuit Court's order specifically found:

> Mr. Dailey also alleges his counsel was ineffective for failing to call as witnesses Mark Sorrention and James Wright, who had been incarcerated in the Pinellas County Jail prior to Mr. Dailey's trial. **Mr. Dailey alleges that these individuals could testify Detective Halliday approached them prior to Mr. Dailey's trial, and he showed them newspaper articles regarding Shelley Boggio's murder thereby suggesting that Detective Halliday was attempting to suggest facts to potential witnesses. Additionally, Mr. Dailey alleges this testimony would have cast further doubt on Mr. Skalnik's credibility**. Thus, Mr. Dailey argues his trial counsel was ineffective for failing to introduce this evidence, and he suffered prejudice as a result.
>
> **At an evidentiary hearing on this matter, Mr. Dailey stated that he wished to abandon this ground for strategic reasons**. (See Transcript of Evidentiary Hearing, dated November 5, 2004, pp. 7-8 attached). As such, no relief is warranted on this ground.
>
> PCR V2/154-155) (e.s.)

The Circuit Court's Order:

The Circuit Court's order rejecting Dailey's IAC/guilt phase claims stated, in pertinent part:

> **B. Failure to Adequately Cross-Examine and Impeach Gayle Bailey.**
>
> Mr. Dailey alleges his trial counsel was ineffective for failing to sufficiently cross-examine and impeach the testimony of Gayle Bailey. Mr. Dailey first argues that Gayle Bailey's testimony led the jury to believe Mr. Pearcy and Mr. Dailey left with the victim, Shelley Boggio, on the night of May 5, 1985. However, Mr. Dailey contends this testimony could have been rebutted and impeached by the testimony of Oza Shaw and Betty Mingus, as well as by phone records from Southwestern Bell. **Mr. Dailey argues the testimony of Mr. Shaw would have shown only he and Mr. Pearcy left with Shelley Boggio that night, Mr. Dailey was not with them, and that this testimony would have been supported by the testimony of Ms. Mingus and the telephone records from Southwestern Bell.**
>
> Mr. Dailey also argued his attorney was ineffective for failing to utilize the pre-trial statements of Gayle Bailey to impeach her testimony. During the trial, Gayle Bailey testified that after the group returned from Jerry's Rock Disco, Mr. Pearcy, Mr. Dailey, and Shelley Boggio left the Seminole residence together. However, Mr. Dailey argues that Gayle Bailey's statements to Detective Halliday before the trial were inconsistent with her trial testimony. Mr. Dailey alleges Ms. Bailey stated the following to Detective Halliday:
>
> > Gayle Bailey: And ah, so then we went home, me, Jimmy D., Shelley and Jack and I went into the restroom and ah, when I got out of the restroom they were in the car ready to go, you know. And I asked Dwayne, he was laying on the couch, I said well am I supposed to go or what? And as I said that the car was pulling out of the driveway. So I said, well I guess I'm not supposed to go. That made me mad, so I went into my bedroom,

> changed my clothes, and ah, turned on my radio, closed the door, *and as a matter of fact Dwayne did leave*, he did come back and I asked him, I said well where did you go and where did they go and he said well I just called Rose and Betty.

(See Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence with Special Leave to Amend, p.21 citing taped statement of Gayle Bailey given to Detective John Halliday on May 14, 1985, attached).

Mr. Dailey argues these statements were also inconsistent with Gayle Bailey's blanket testimony, and that his trial counsel was ineffective for failing to confront Ms. Bailey with these statements and impeach her testimony. Furthermore, Mr. Dailey argues that his trial counsel failed to familiarize himself with Ms. Bailey's testimony on behalf of Mr. Pearcy during the penalty phase of his trial, and that as a result was unable to effectively cross-examine her and impeach her credibility. Mr. Dailey contends this lack of familiarity constitutes ineffective assistance of counsel.

At the evidentiary hearings held in this matter on Mr. Dailey's Motion, he failed to present any evidence on these issues. (See Evidentiary Hearing Transcripts, dated March 19, 2003, November 7, 2003, December 11, 2003, June 29, 2004, and November 5, 2004, attached). **Furthermore, Mr. Dailey expressly conceded he was unable to demonstrate the requisite prejudice and expressly waived this claim**. (See Evidentiary Hearing Transcript, dated November 5, 2004, p.5, attached). As such, no relief is warranted on this ground.

> Excerpt, Order Denying Amended Motion to Vacate Judgments of Conviction and Sentence with Special Leave to Amend, July 20, 2005 (PCR V2/151-153).

* * *

F. Failure to Adequately Cross-Examine and Impeach Paul Skalnik.

Mr. Dailey contends his trial counsel was ineffective during the guilt phase of his trial for

failing to properly cross-examine and impeach State witness Paul Skalnik. Mr. Dailey argues that during the following testimony, Mr. Skalnik testified that other inmates in the jail were not aware of his status as a former police officer and "snitch":

> Mr. Denhardt: That was when he asked you primarily about whether some notes could be introduced in trial?
> Mr. Skalnik: That's correct.
> Mr. Denhardt: Did most people in the jail know you were a police officer?
> Mr. Skalnik: No, sir. They do now.
> Mr. Denhardt: At that time, didn't you suspect a lot of people really suspected you were a police officer?
> Mr. Skalnik: No, sir, I really didn't. I was hoping they wouldn't.

(See Jury Trial Transcript, Vol. 5, p. 574, attached). Mr. Dailey contends this testimony is in direct conflict with the following statements Mr. Skalnik made in his deposition:

> Mr. Andringa: Where is that cell?
> Mr. Skalnik: In detention, right at the gate, as they come in and out of the library, counselors or whatever.
> Mr. Andringa: You never met him before?
> Mr. Skalnik: No, sir, I had no idea who he was.
> Mr. Andringa: Why were you in detention?
> Mr. Skalnik: I was placed there for segregation.
> Mr. Andringa: Why?
> Mr. Skalnik: They were afraid that the inmates in this facility would kill me.
> Mr. Andringa: Why is that?
> Mr. Skalnik: After all the testimony I have done.
> Mr. Andringa: You're a notorious jail snitch? Is that the reason?
> Mr. Skalnik: I wouldn't call it notorious.
> Mr. Andringa: You tell me then.
> Mr. Skalnik: I would call it there's people that come in and out of this facility now that I have testified in previous trials. Are you, Counselor - when you have the popularity of an ex-police, much less one who's testified...

(See Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence with Special Leave to Amend, pp.27-28 citing the Deposition of Paul Skalnik at pp.

13-14, attached). Mr. Dailey contends these statements from Mr. Skalnik's deposition directly conflict with his trial testimony, and that Mr. Dailey's trial counsel was ineffective for failing to utilize these statements while cross-examining Mr. Skalnik. Had his trial counsel properly utilized Mr. Skalnik's deposition testimony, Mr. Dailey argues, Mr. Skalnik's credibility would have been damaged in the jury's eyes, and there would have been further support for the argument that Mr. Dailey and Mr. Skalnik never spoke at all.

After a thorough review of the record in this matter, it is clear that Mr. Skalnik's testimony was not in material and direct conflict with his trial testimony such that it would sufficiently impeach his credibility. During the trial, Mr. Skalnik testified that he did not suspect that the other inmates of the Pinellas County Jail were aware of his status as a former police officer and a "snitch." (See Jury Trial Transcript, Vol. 5., p. 557-589, attached). During the deposition, he merely testified that he was segregated from the general jail population because he was a former police officer and he had testified against other inmates in the past, and that he would be in danger if this became known. **However, even if Mr. Skalnik's deposition and trial testimony were in conflict, it is irrelevant since the jury was already aware that he was a felon with a record that included multiple convictions for grand theft, and that he had testified for the State in numerous trials.** (Trial Transcript, Vol. 5, pps. 578-580, attached). **These facts were brought out on both direct and cross-examination, and any testimony about inconsistent statements would have made little if any impact upon his credibility as the jury was fully equipped to evaluate Mr. Skalnik's credibility.** (Trial Transcript, Vol. 5, pps. 557-589, attached).

Mr. Dailey's allegation that his trial counsel failed to properly utilize Mr. Skalnik's deposition testimony is conclusively refuted by the record of the evidentiary hearings, as well as the trial transcripts. At the evidentiary hearing held on November 7, 2003, Mr. Dailey's trial counsel stated that he remembered reading Mr. Skalnik's deposition testimony prior to conducting the cross examination, and that he felt well prepared to conduct the cross

examination. (See Evidentiary Hearing Transcript, Dated November 7, 2003, pp. 112, 115, attached). **Furthermore, Mr. Dailey's trial counsel stated that in addition to reading the deposition transcripts, he also outlined his cross-examination in preparation**. (See Evidentiary Hearing Transcript, dated November 7, 2003, pp. 114-115, attached). **These facts are also clear from a review of the trial record, where a great deal of time was spent discussing alleged inconsistencies in Mr. Skalnik's statements, and errors in the deposition transcript**. (See Jury Trial Transcript, Vol. 5, pp. 558-569, attached). **Therefore, Mr. Dailey is unable to demonstrate that his trial counsel was deficient. As such, no relief is warranted on this ground**. (PCR V2/155-158)

* * *

H. Failure to Have Mr. Dailey Testify.

Mr. Dailey alleges his trial counsel was ineffective for failing to call Mr. Dailey to testify during his trial. He alleges that he was willing and able to testify, and that had his trial counsel called him to the stand, Mr. Dailey could have rebutted much of the State's evidence against him. Mr. Dailey argues that his testimony would have shown that Paul Skalnik's testimony was false, and would have revealed that it was impossible for them to have had the conversations that Mr. Skalnik alleged in his testimony. Furthermore, Mr. Dailey's testimony would have provided further support for the argument that he stayed home when Jack Pearcy left with Shelley Boggio, and would have also provided a reasonable explanation for why he appeared to return home with wet pants the morning the crime was committed.

In order to obtain relief based on a claim that trial counsel interfered with a defendant's right to testify, the defendant must still establish both the deficient performance, and prejudice prongs of Strickland. Oisorio v. State, 676 So. 2d 1363, 1364 (Fla. 1996). A waiver of the right to testify does not have to be made on the record. Torres-Arboledo v. State, 524 So. 2d. 403, 410 (Fla. 1988). Furthermore, if a defendant disagrees with his attorney's advice not to testify, the defendant must assert his right to

testify on the record in order to be entitled to relief. Cutter v. State, 460 So. 2d 538, 539 (Fla. 2d DCA 1984), Dukes v. State, 633 So. 2d 104, 105 (Fla. 2d DCA 1994).

At the evidentiary hearings held on this matter, Mr. Dailey, and his trial counsel Harry Andringa testified as to this issue. Mr. Dailey testified that Mr. Andringa advised him not to testify because he did not find Mr. Dailey's testimony believable. (See Evidentiary Hearing Transcript, dated March 19, 2003, P. 39, attached). **He also testified that his mother and his ex-wife asked him not to testify and suggested that he listen to the advice of his attorney**. (See Evidentiary Hearing Transcript, dated March 19, 2003, p. 39-40, attached). **Additionally, Mr. Dailey testified he and Mr. Andringa had discussions about whether be should testify, and that ultimately the decision was made that he should not testify**. (See Evidentiary Hearing Transcript, dated March 19, 2003, pp. 42-43, attached). **Mr. Andringa also testified that he advised Mr. Dailey not to testify because the jury would not find the testimony credible, and Mr. Dailey agreed not to testify**. (See Evidentiary Hearing Transcript, dated March 19, 2003, p. 118, attached). **Therefore, the Court finds Mr. Dailey waived his right to testify during his trial. As such, no relief is warranted on this ground**.

> Excerpt, Order Denying Amended Motion to Vacate Judgments of Conviction and Sentence with Special Leave to Amend, July 20, 2005 (PCR V2/159-160) (e.s.).

Analysis:

Following an evidentiary hearing, the Circuit Court entered a fact-specific, comprehensive written order rejecting Dailey's IAC/guilt phase claims under Strickland. The Circuit Court's order is supported by competent, substantial evidence and should be affirmed for the following reasons.

The Gayle Bailey Impeachment Claim:

Dailey abandoned his IAC/Gayle Bailey impeachment claim below regarding the failure to use her pre-trial statements as alleged impeachment. Therefore, this portion of Dailey's IAC/Gayle Bailey impeachment claim is procedurally barred. See, Trotter v. State, 2006 Fla. LEXIS 940 (Fla. 2006).

Moreover, Dailey failed to establish any deficiency of counsel and resulting prejudice under Strickland arising from the failure to confront Gayle Bailey with the records of Shaw's two phone calls to Kansas. In his post-conviction motion, Dailey alleged that Gayle Bailey's estimate of the time they returned from Jerry's Rockin' Disco on May 5, 1985, should have been impeached with phone records of Oza Dwaine Shaw's phone call to Olathe, Kansas at 12:15 a.m. On cross—examination at trial, Gayle testified that Shaw was home when the four of them got back from Jerry's Rockin' Disco, but she thought that Shaw had just returned home from making a phone call at the pay phone. (R V8/968—970) Gayle thought they left Jerry's Rockin' Disco late, possibly midnight. When asked if it could have been 10:00 p.m., Gayle answered that she did not really know. (R V8/975) Therefore, there was no basis for any impeachment of Gayle's trial testimony of the time they returned to find Shaw at home, since Gayle admitted she did not know what time it was.

Shaw did not disagree that he was home when they returned from Jerry's Rockin' Disco. (R V8/997)

At trial, defense counsel established the discrepancy of the time Shaw left to make the phone call through his questioning of Shaw. Despite Gayle Bailey's recollection that Shaw was at home that entire evening, Shaw testified he got a ride with Pearcy and Shelley to the phone booth, after the others returned from the disco, and that he stayed gone for an hour before walking home. Shaw did not know if Pearcy and Shelley returned to the house while he was gone. (R V8/977, 999, 1008) At trial, defense counsel informed the Court, outside the presence of the jury, that Gayle Bailey contacted defense counsel after she had testified and advised that there was a discrepancy between her testimony and Shaw's. (R V8/991)

Dailey now argues that trial counsel should have used the Kansas phone records to impeach Gayle's testimony that Shaw did not leave the house that night. (See, Initial Brief at 81). This new argument is procedurally barred. Moreover, at trial, defense counsel established on cross-examination of Shaw that Gayle Bailey was wrong if she said that Dailey was with Pearcy and Shelley when they took Shaw to the phone booth (R V8/1008), and wrong if she said that Shaw was sitting at home with her the entire time. (R V8/1010) Defense counsel thoroughly established

the differences between the testimony of Shaw and Gayle Bailey as to whether Dailey left with Pearcy and Shelley, and that Bailey did not see Dailey leave. (R V8/972, 977) In closing argument, defense counsel capitalized on this discrepancy between the testimony of Gayle Bailey and Shaw to remind the jury that they would be instructed that circumstantial evidence required a not guilty verdict if susceptible to two reasonable constructions, one indicating guilt and one indicating innocence. (R V10/1289—1291)

The telephone record, defense evidentiary exhibit 2, did not impeach Gayle Bailey's testimony on any materially relevant issue, and defense counsel were not ineffective for failing to attempt to use it as attempted impeachment on a collateral matter. See, Caruso v. State, 645 So. 2d 389, 394-95 (Fla. 1994). Moreover, defense counsel may not have wanted to use Betty Mingus' phone record because of call number 3 on that record which was a 13 minute call at 10:16 p.m. Kansas time on May 5th from the same coin number in St. Petersburg as the 12:15 a.m. call two hours later on May 6th, to the phone number for the Holiday Inn in Olathe, Kansas (where Betty Mingus was working). The phone record further supports Dailey's guilt in light of the time of Shaw's earlier telephone call to his girlfriend Betty Mingus in Olathe, Kansas.

Although Dailey declined to testify at trial, Dailey testified at the evidentiary hearing, for the first time in court, that he left with Pearcy about 2:20 a.m. and returned about 3:30 a.m. with his pants wet. (PCR V3/307-308) At trial, Shaw testified that he made the phone call to Betty Mingus after being driven to the phone by Pearcy and Shelley. Shaw then walked home and spoke with Bailey and went to sleep without seeing Dailey until Dailey and Pearcy returned about an hour later. Dailey's pants were wet, he was carrying a bundle and possibly wearing no shoes. (R V8/997-998, 1004-1007) At trial, when the prosecutor asked Shaw whether Pearcy and Shelley may have returned for Dailey, the defense objected that it was conjecture. At trial, Shaw agreed he did not know. (R V8/1008-1009)

Shaw's testimony at the post-conviction hearing was that he awoke sometime after his return from the phone call to find Pearcy returning, getting Dailey and the two of them leaving together before they both returned one hour or one hour and a half later with Dailey's pants wet. Significantly, both Dailey's and Shaw's evidentiary hearing testimony still placed

Dailey with Pearcy for at least an hour during the time the medical examiner estimated as the victim's time of death.[12]

At trial, Gayle admitted that she did not know whether Dailey was in his bedroom when Pearcy and Shelley left. (R V8/958-959, 969, 971-973, 975-976) On cross-examination, Gayle answered that Jack [Pearcy] and Jim [Dailey] left with Shelley and had left together. (R V8/977-978) Gayle also said she believed they had come back one time prior to the final time, but then also said they returned only once. (R V8/977-978) On redirect, when Gayle was asked again whether she saw Dailey come back before returning with wet pants, Gayle Bailey said, "He went back in the bedroom." (R V8/982-983) Thereafter, Gayle said that Dailey and Pearcy were always together when she saw them. (R V8/985)

The phone records would not have impeached Gayle Bailey's testimony because she admitted at trial that she did not know

[12] The Indictment (R V1/7-8) alleged that the premeditated murder occurred between May 5 and May 6, 1985. Trial witness, Jay Hoff, the bridge tender at the Indian Rocks Bridge on Route 688, spotted the victim's body in the water about 8:20 a.m. on May 6, 1985. (R V6/759-761) The medical examiner estimated the time of death as occurring between 1:30 to 3:30 a.m. on May 6, 1985. (R V7/846-850) The victim's body was completely nude and displayed 31 stab wounds and 17 other cutting, pricking or slicing wounds, to her face, back of the head, back, hands and arms, evidence of choking and battery. It was the worst defensive wounds to hands and arms that the medical examiner had seen. Although the stab wounds to the back and neck could have caused her death, the victim died of drowning. (R V7/853-855, 864—868, 870, 873-877)

what time she and the others returned from the disco; and, with two calls to Kansas that night, it is mere speculation that showing her the time of the call could have refreshed her memory, and that Shaw's phone call necessarily was after she returned, rather than before as she testified. Nor could trial counsel be said to be ineffective for failing to show her the phone record in light of Dailey's evidentiary hearing testimony which admittedly placed him with Pearcy during the time established as the time of the murder. At trial, defense counsel argued Bailey's lack of credibility on this issue in his closing argument. (R V10/1234, 1237-1238, 1241)

In the rebuttal closing, defense counsel also noted the discrepancy in Bailey and Shaw's testimony as to when Dailey left and proposed the scenario that Pearcy [alone] "had come back to the house and picked up James Dailey during the course of the evening." (R V10/1289-1291) However, at the time of Dailey's trial, defense counsel were aware that Pearcy's statement to his own counsel and the State Attorney's Office of June 19, 1985, confirmed that Pearcy *and Shelley* returned to the house and picked up Dailey. Court's evidentiary ex. 1. Dailey's experienced defense attorneys were not ineffective in failing to introduce the records of Shaw's phone calls to Kansas as attempted impeachment of Gayle's admittedly uncertain testimony.

Failure to Adequately Cross-Examine and Impeach Paul Skalnik

This IAC sub-claim is procedurally barred. Dailey did not present any argument, at all, in support of his claim that trial counsel was ineffective in allegedly failing to cross-examine Skalnik about the "facts and circumstances of his pending charges." (See Initial Brief at 81).

Assuming, *arguendo*, that this IAC/guilt phase claim is properly before this Court, which the State does not concede and specifically disputes, it is without merit. At the evidentiary hearing, the defendant's co-counsel, James Denhardt, testified that he conducted the cross-examination of Skalnik; that he'd read Skalnik's deposition and discussed the cross-examination with Dailey and with his partner, defense counsel Andringa; that he was well-prepared; that their strategy was to discredit Skalnik, and they felt that it went well and that points had been made from the cross-examination. (PCR V4/528-534)

Paul Skalnik was one of three inmates who testified to admissions made to them by Dailey of committing the murder of Shelley Boggio. On direct appeal, this Court found substantial evidence of Dailey's guilt, and harmless error in the trial court's refusal to allow defense counsel to question inmate Skalnik concerning the specifics of charges pending against him. Dailey I, 594 So. 2d at 256, n.2. The direct appeal record

shows that both the State and defense counsel did make the jury aware of the nature of Skalnik's criminal charges. Defense counsel brought out that Skalnik had been a police officer, sworn to tell the truth, and after that Skalnik became a thief. Skalnik testified at Dailey's trial that he had a greed for money, and that all his crimes involved dishonesty. Defense counsel asked Skalnik what charges he had pending and Skalnik answered that they were two grand theft charges and a violation of parole. At trial, defense counsel had Skalnik specify that one was a second degree grand theft punishable by fifteen years in prison and the other was punishable by five years, and that Skalnik had served 42 months of the 5 year sentence for which he was on parole. (R V9/1107-1108, 1154-55) Skalnik testified at trial that he faced twenty years on the pending grand theft charges. (R V9/1107-1108) Defense counsel also made the jurors aware that Skalnik testified in five to six murder cases and gave testimony in up to three other cases, and had assisted in thirty defendants being sentenced to prison. (R V9/1156-1158) Despite defense counsel's questioning Skalnik about his motives for testifying to receive a deal, Skalnik insisted he had never received any deal. (R V9/1158-1159) According to Skalnik, law enforcement was in his blood from his having been a police officer and it was difficult for him to see jail inmates think

they could beat the system. (R V9/1157) At the post-conviction hearing, Skalnik confirmed that he'd received nothing from the State for his cooperation. (PCR V4/443-446, 455-456)

Further, as to the newspaper articles claim, Dailey's post-conviction motion alleged that trial counsel was ineffective in failing to use the testimony of Michael Sorrentino [Sorrention] and James Wright to allegedly impeach testimony of Detective Halliday and Paul Skalnik. Dailey's motion alleged that these witnesses were approached by Detective Halliday prior to Dailey's trial and shown newspaper articles about the victim's death, and that "this testimony would have shown the jury that Detective Halliday was attempting to suggest facts to potential witnesses," and "debilitated the credibility of Paul Skalnik's statement that his information about the crime came from Mr. Dailey." Dailey did not call either Wright or Sorrentino at the evidentiary hearing and abandoned this sub-claim. However, even if Detective Halliday had shown Michael Sorrentino and James Wright newspaper articles, it would not show that Paul Skalnik's facts were not from his discussions with Pearcy and Dailey. Moreover, Skalnik did not get any newspapers at the Pinellas County Jail and he did not recall reading any at the time. (PCR V4/481-482) Dailey's post-conviction claim is procedurally barred and fails for lack of proof.

Failure to Have Defendant Testify

Lastly, Dailey stated that he did not testify at trial because he was talked out of it by his mother and ex-wife, who told him when they visited him at jail that he should listen to his attorney. His attorney told Dailey that his version of how his pants got wet would not be beneficial to the defense. (PCR V3/328-330) Defense counsel Andringa discussed with Dailey, both before and during trial, whether Dailey would testify and the decision was made that he would not. Mr. Andringa told Dailey that his version lacked credibility and would not well-serve their defense. Defense counsel was concerned with trying to maintain credibility with the jury. (PCR V3/408-411)

Defense counsel Andringa's testimony established that the decision not to have Dailey testify at trial was a tactical one, made with Dailey after repeated consultation. Dailey admitted that it was his decision, but claimed that he was talked into it. However, on cross-examination at the post-conviction hearing, Dailey admitted that he agreed, after an overnight recess at trial, that he would not testify and that he had passed notes to Pearcy that he was not going to testify at trial. (PCR V3/332-333)

Additionally, the record shows that Dailey, himself, was conducting research in the jail law library in December 1986,

concerning his decision of whether he would take the stand in his own trial (R V3/387-388, 394-396, V4/430—432), and sending notes and messages to Pearcy that he would not be testifying in his own trial. (R V9/1057, V12/1476; R V9/1066) (State's Ex. 28, marked for identification, signed "Partners Jim.")

Dailey has not established that trial counsel's advice was not a reasonable tactical decision to which he agreed at the time of trial. See, Shere v. State, 742 So. 2d 215, 222 (Fla. 1999). Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. See, Brown v. State, 894 So. 2d 137, 147 (Fla. 2004). Dailey's complaint is, in reality, a mere disagreement with the trial tactics of defense counsel at the time of trial. However, collateral counsel's hindsight disagreement does not establish ineffective assistance on a strategic decision. See, Carroll v. State, 815 So. 2d 601, 616 (Fla. 2002). At the time of trial, defense counsel consulted with Dailey, advised Dailey that his Frisbee story was not credible, and Dailey personally elected not to testify. Dailey's IAC/failure to testify claim is meritless. See, Florida v. Nixon, 543 U.S. 175 (2004); Morris v. State, 2006 Fla. LEXIS 652 (Fla. 2006).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular mail to the Honorable Jack Espinosa, Jr., Circuit Court Judge, 800 E. Twiggs Street, Room 416, Tampa, Florida 33602; Eric C. Pinkard, Assistant CCRC, Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136; and to James Hellickson, Assistant State Attorney, P.O. Box 5028, Clearwater, Florida 33578-5028, this 23rd day of June, 2006.

_____
COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

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

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COUNSEL FOR APPELLEE