IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1847

RICKEY BERNARD ROBERTS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

Defendant was charged, in an indictment filed on June 21, 1984, with committing, on June 4, 1984: (1) the first degree murder of George Napoles, (2) the armed sexual battery of Michelle Rimondi, (3) the armed robbery of Napoles, (4) the armed robbery of Rimondi and (5) the armed kidnapping of Rimondi. (DAR. 1-3)[1] Trial of this cause commenced on December 3, 1985. (DAR. 7) The jury found Defendant guilty as charge of the murder, the sexual battery and the kidnapping but found Defendant not guilty on both of the armed robberies. (DAR. 476-80)

On December 17 and 19, 1985, a sentencing hearing was held before the same jury. (DAR. 35-39) After the State and Defendant presented evidence, the jury, by a seven to five vote, returned a recommendation of death for the murder. (DAR. 3502)

[1] The symbol "DAR." will refer to the record on appeal and transcript of proceedings from Defendant's direct appeal, FSC Case No. 68,296. The symbol "PCR1." will refer to the record on appeal from Defendant's first post conviction motion, FSC Case No. 74,920. The symbol "PCR2." will refer to the record on appeal from the summary denial of the second motion for post conviction relief, FSC Case No. 87,438. The symbols "PCT2-2/20/96." and PCT2-2/21/96." will refer to the separately numbered transcripts for the hearings held on summary denial of the second motion for post conviction relief, FSC Case No. 87,438. The symbols "PCR3." and "PCR3-SR." will refer to the record on appeal and the supplemental record on appeal regarding the denial of the second motion for post conviction and granting of the third motion for post conviction relief, FSC Case No. 92,496, respectively.

The trial court sentenced Defendant, on December 31, 1985, to death for the murder and life for the armed sexual battery and armed kidnapping. (DAR. 576-79) The life sentences were ordered to be served consecutively to the death sentence but concurrently with one another. *Id.*

Defendant appealed his convictions and sentences to this Court, raising the following issues:

> I.
> THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S REPEATED MOTIONS FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE AND AFTER THE PRESENTATION OF ALL THE EVIDENCE WHERE THE EVIDENCE WAS INSUFFICIENT, AS A MATTER OF LAW, TO ESTABLISH EITHER THE DEFENDANT'S PREMEDITATION OR HIS COMMISSION OF A FELONY-MURDER REQUIRED TO SUPPORT HIS CONVICTION FOR FIRST DEGREE MURDER, THEREBY DENYING HIM HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS.
>
> II.
> THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ITS FAILURE TO BE PRESENT AT A VIEW BY THE JURY, THEREBY DENYING THE DEFENDANT HIS RIGHT TO AN IMPARTIAL JURY AND DUE PROCESS OF LAW GUARANTEED BY ARTICLE 1, §16 OF THE FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
>
> III.
> THE TRIAL COURT ERRED IN RESTRICTING THE DEFENDANT'S DIRECT EXAMINATION TESTIMONY, THEREBY DENYING THE DEFENDANT HIS RIGHT TO TESTIFY AND HIS RIGHT TO PRESENT A FULL DEFENSE AND CONFRONT THE WITNESSES AGAINST HIS GUARANTEED BY ARTICLE 1, §9 OF THE FLORIDA CONSTITUTION AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
>
> IV.
> THE DEFENDANT'S ABSENCE DURING VARIOUS CRITICAL STAGES OF HIS TRIAL PROCEEDINGS, INCLUDING PRE-TRIAL CONFERENCES, A CONFERENCE CONDUCTED TO DETERMINE THE

PROPER RESPONSE TO A QUESTION BY THE JURY, AND AT THE JURY VIEW, DENIED THE DEFENDANT HIS RIGHT TO BE PRESENT AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE 1, §16 OF THE FLORIDA CONSTITUTION.

V.

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CROSS-EXAMINE A DEFENSE WITNESS OUTSIDE THE SCOPE OF DIRECT EXAMINATION, THEREBY ELICITING HEARSAY STATEMENTS OF CHIEF PROSECUTION WITNESS RIMONDI WHICH WERE ADDUCED SOLELY AND IMPROPERLY TO REHABILITATE RIMONDI'S DIRECT EXAMINATION TESTIMONY, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND COMPULSORY PROCESS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VI.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND EQUAL PROTECTION WHILE IMPOSING A CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The Trial Court's Determination as Justification for the Imposition of the Death Penalty that the Capital Felony was Especially Heinous, Atrocious or Cruel was Erroneous Where Such an Aggravating Circumstance Was Neither Proved Beyond a Reasonable Doubt, Nor Appropriate Under the Circumstances of This Case.

B. The Trial Court Erred in Determining That the Capital Felony Was Committed While the Defendant Was Engaged in the Commission of or the Attempt to Commit a Sexual Battery.

C. The Trial Court Erred in Rejecting Evidence That the Capital Felony Was Committed While the Defendant was Under the Influence of Extreme Mental or Emotional Disturbance and that the Capacity of the Defendant to Appreciate the Criminality of His Conduct or to Conform his Conduct to the Requirements of Law was Substantially Impaired in Light

of Uncontradicted Expert Testimony Presented By the Defense.

D. The Trial Court Erred in Imposing the Death Penalty Where the Evidence Was Insufficient as a Matter of Law to Establish the Defendant's Guilt of First Degree Murder beyond a Reasonable Doubt.

E. The Death Penalty in Florida is Unconstitutional Because it Discriminates Based on the Race of the Victim and Because it Discriminates Based on the Sex of the Offender.

On July 2, 1987, this Court affirmed, finding that the evidence was sufficient to support the convictions under either a felony or premeditated murder theory, that the issues regarding presence were waived and not prejudicial, that the trial court had properly excluded evidence regarding Rimondi's alleged prostitution, that the cross examination was proper, that the aggravators were properly found, that the mitigators were properly rejected and that death was a proportionate sentence. *Roberts v. State*, 510 So. 2d 885 (Fla. 1987). On September 3, 1987, rehearing was denied. *Id.* The United States Supreme Court denied certiorari review on March 7, 1988. *Roberts v. Florida*, 485 U.S. 943 (1988).

In affirming Defendant's convictions and sentences, this Court outlined the facts of the case as follows:

> According to the state's key witness, Michelle Rimondi, during the early morning hours of June 4, 1984, she, the murder victim George Napoles, and Rimondi's friend Jammie Campbell were parked on the beach off the Rickenbacker Causeway near Key Biscayne

drinking wine. While Campbell slept in the front passenger seat in Napoles' Omni, [Defendant] drove up to the Omni, got out of his car and asked Napoles and Rimondi what they were doing and for identification. Believing that [Defendant] was an undercover beach patrol officer, Napoles gave [Defendant] his driver's license. [Defendant] first frisked Napoles and then frisked Rimondi. When [Defendant] touched Rimondi on the breasts and thighs, Napoles became suspicious and asked [Defendant] for his identification. [Defendant] took Napoles to his car to get his identification. Once at the car, [Defendant] reached into the back seat and pulled out a baseball bat. [Defendant] then forcibly brought Napoles back to the Omni where he ordered Rimondi to face the interior of the Omni and not to turn around. Looking over her right arm, Rimondi saw [Defendant] repeatedly hit Napoles in the back of the head with the bat. Rimondi was unable to scream. [Defendant] then pushed Napoles' body towards the beach. Still holding the bat, he grabbed Rimondi and pulled her near the body and told her that if she did not take her clothes off she "was going to get it just like George or worse." When it appeared that someone might be coming, [Defendant] told Rimondi to get dressed and forced her into his car where he eventually raped her. [Defendant] then left the beach with Rimondi. Realizing that he had lost his wallet, [Defendant] returned to the beach with Rimondi, found the wallet and again left the scene. [Defendant] raped Rimondi a second time, before taking her to her sister's boyfriend's house where she was staying that weekend. Napoles' body was discovered on the beach later that morning.

Soon after the body was discovered, Rimondi informed the police that a black man wearing a shirt with the name "Rick" on the front had killed Napoles and raped her. After receiving a tip that [Defendant] was the "Rick" responsible for the murder, detectives questioned [Defendant] concerning the incident. Rimondi identified both [Defendant] and his car. [Defendant] initially denied having been on Key Biscayne in the past two months. However, after he was told his palm print was found on the roof of Napoles' Omni, [Defendant] admitted being on the Key during the early morning hours of June 4 but maintained that he had merely picked up Rimondi

> hitchhiking on the causeway. According to [Defendant], who testified at the trial, Rimondi told him that she needed a ride home because her friends had passed out from drinking wine. [Defendant] claims that after Rimondi got into his car she asked him to return to her friend's car to get her purse. While Rimondi was getting her purse, [Defendant] claims to have leaned into the car to look at her friend on the front seat, placing his hand on the roof. According to [Defendant] after retrieving the purse, he then drove Rimondi home. [Defendant] claimed he never saw Napoles and never raped Rimondi.
>
> [Defendant] was indicted for first-degree murder, armed sexual battery, armed kidnapping and two counts of armed robbery. He was found guilty of first-degree murder, armed sexual battery and armed kidnapping and not guilty of either robbery count. In connection with the armed sexual battery and armed kidnapping convictions, [Defendant] was sentenced to concurrent life sentences. In accordance with the jury's recommendation, the trial court imposed the death penalty finding four aggravating circumstances: (1) the defendant had been previously convicted of a violent felony, section 921.141(5)(b), Florida Statutes; (2) at the time of the commission of the capital felony the defendant was under a sentence of imprisonment, section 921.141(5)(a), Florida Statutes; (3) the capital felony was committed while the defendant was engaged in the commission of or the attempt to commit a sexual battery, section 921.141(5)(d), Florida Statutes; and (4) the capital felony was especially heinous, atrocious or cruel, section 921.141(5)(h), Florida Statutes. The trial judge found no mitigating circumstances.

Roberts, 510 So. 2d at 887-88.

After the Governor signed a death warrant, Defendant filed his first motion for post conviction relief on September 28, 1989. (PCR1. 1-183) In this motion, Defendant claimed, *inter alia*:

IV.

[DEFENDANT'S] RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM WERE DENIED WHEN THE COURT PROHIBITED THE CROSS EXAMINATION OF THE STATE'S KEY WITNESS, MICHELLE RIMONDI, ABOUT HER SEXUAL HISTORY AND WHEN THE DEFENDANT WAS FORECLOSED FROM TESTIFYING ABOUT HER SEXUAL HISTORY.

V.

[DEFENDANT] WAS DENIED THE RIGHT TO PRESENT A DEFENSE WHEN THE COURT APPLIED THE RAPE SHIELD LAW TO LIMIT [DEFENDANT'S] RIGHT TO TESTIFY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

* * * *

VII.

[DEFENDANT'S] RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT WERE DENIED WHEN HE WAS DENIED ACCESS TO THE RAPE TREATMENT COUNSELOR WHO HAD TREATED MICHELLE RIMONDI.

VIII.

[DEFENDANT] WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN THE COURT LIMITED CROSS EXAMINATION INTO CRIMES COMMITTED BY THE STATE'S WITNESSES.

* * * *

XIV.

THE STATE'S WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE VIOLATED [DEFENDANT'S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

(PCR1. 62, 69, 76, 82, 125) In his *Brady* claim, Defendant did not allege what evidence has allegedly been withheld. (PCR1. 125-26) Subsequently, Defendant filed a supplement to his motion, alleging what information the State had allegedly withheld. (PCR1. 316-28) Defendant also provided an appendix of documents culled from the State's files in support of this

claim. (PCR1. 184-284) The State responded that claims IV, V, VII and VIII were all procedurally barred as claims that could have been, should have been or were raised on direct appeal. (PCR1. 339) The State also asserted that the supplement was procedurally barred because it was not timely filed. (PCR1. 340) The trial court summarily denied the motion on October 25, 1989. (PCR1. 342) At the *Huff* hearing, the trial court indicated that claims IV, V, VII and VIII were procedurally barred. (PCR1. 396) The trial court stated that it was accepting the supplement to claim XIV but denied the claim as meritless. (PCR1. 452)

Concurrently with the filing of the first motion for post conviction relief in the trial court, Defendant also filed a petition for writ of habeas corpus in this Court. *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990). In this Petition, Defendant contended, *inter alia*:

> CLAIM I
>
> [DEFENDANT'S] RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM WERE DENIED WHEN THE COURT PROHIBITED THE CROSS EXAMINATION OF THE STATE'S KEY WITNESS, MICHELLE RIMONDI, ABOUT HER SEXUAL HISTORY AND WHEN THE DEFENDANT WAS FORECLOSED FROM TESTIFYING ABOUT HER SEXUAL HISTORY. OLDEN V. KENTUCKY, 109 S. CT. 480 (1988), ESTABLISHED THAT THIS COURT ERRED IN [DEFENDANT'S] DIRECT APPEAL.
>
> CLAIM II
>
> [DEFENDANT] WAS DENIED THE RIGHT TO PRESENT A DEFENSE WHEN THE COURT APPLIED THE RAPE SHIELD LAW TO LIMIT [DEFENDANT'S] RIGHT TO TESTIFY IN VIOLATION OF THE

> FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS UNDER BOTH ROCK V. ARKANSAS, 107 S. CT. 2407 (1987); AND OLDEN V. KENTUCKY, 109 S. CT. (1989), THIS COURT ERRED IN [DEFENDANT'S] DIRECT APPEAL. [sic]
>
> * * * *
>
> CLAIM IV
>
> [DEFENDANT] WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN THE COURT LIMITED CROSS EXAMINATION INTO CRIMES COMMITTED BY THE STATE'S WITNESSES.

Petition for Writ of Habeas Corpus, *Roberts v. Dugger*, Case No. 74,920 (Fla. 1990). In Claims I and II, Defendant did not contend that his appellate counsel was ineffective.

Defendant also appealed the denial of the first motion, raising, *inter alia*, the following claims:

> I.
>
> OLDEN V. KENTUCKY IS NEW CASE LAW WHICH ESTABLISHES THAT [DEFENDANT] WAS DEPRIVED OF HIS RIGHT TO CONFRONT WITNESSES AGAINST HIM WHEN THE TRIAL COURT PROHIBITED CROSS-EXAMINATION OF THE STATE'S WITNESS, MICHELLE RIMONDI, REGARDING HER WORK AS A PROSTITUTE AND HOW THAT LED TO THE VICTIM'S DEATH.
>
> II.
>
> [DEFENDANT] WAS DENIED THE RIGHT TO PRESENT A DEFENSE WHEN THE COURT APPLIED THE RAPE SHIELD LAW TO LIMIT [DEFENDANT'S] RIGHT TO TESTIFY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS UNDER TAYLOR V. ILLINOIS, 108 S. CT. 646 (1988); ROCK V. ARKANSAS, 107 S. CT. 2407 (1988); AND OLDEN V. KENTUCKY, 109 S. CT. 480 (1989), ALL OF WHICH ARE DECISIONS SUBSEQUENT TO THE SUBMISSION OF THIS CASE ON DIRECT APPEAL AND ESTABLISH A CHANGE IN LAW IN THAT THIS COURT ERRONEOUSLY RESOLVED THIS ISSUE.
>
> III.
>
> THE STATE'S DELIBERATE WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE VIOLATED [DEFENDANT'S] RIGHTS

> UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.
>
> IV.
> PENNSYLVANIA V. RITCHIE IS NEW CASE LAW WHICH ESTABLISHES THAT [DEFENDANT'S] RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT WERE DENIED WHEN THE RAPE TREATMENT COUNSELOR, WHO HAD TREATED MICHELLE RIMONDI AND WAS AN EMPLOYEE OF THE STATE ATTORNEY'S OFFICE, INVOKED PRIVILEGE AND REFUSED TO DISCLOSE WHETHER IN HER CONVERSATIONS WITH MS. RIMONDI SHE HAD LEARNED ANY EXCULPATORY EVIDENCE.
>
> * * * *
>
> VII.
> [DEFENDANT] WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN THE COURT LIMITED CROSS EXAMINATION INTO CRIMES COMMITTED BY THE STATE'S WITNESSES.

Initial Brief of Appellant, *Roberts v. State*, Case No. 74,788 (Fla. 1990).

This Court considered the state habeas petition and the appeal from the denial of the motion for post conviction relief together. *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990). This Court affirmed the denial of the motion for post conviction relief and denied the petition for writ of habeas corpus. *Id.*

With regard to the motion for post conviction relief, the Court found that Issues I, II, IV and VII were procedurally barred as issues that either were or could have and should have been raised on direct appeal. *Roberts*, 568 So. 2d at 1257-58. The Court also noted that neither *Olden* or *Rock* was such a change in law as to avoid the procedural bar. *Id.* at 1258. The

Court rejected Issue III because the claim was insufficient plead and the allegedly withheld information was not material. *Id.* at 1260.

With regard to the state habeas petition, this Court found that Claims I and II were procedurally barred as issues that could have and should have been raised on direct appeal. *Id.* at 1260-61. This Court also found that appellate counsel was not ineffective with regard to Claim IV, because the issue had not been preserved. *Id.* at 1261.

Defendant then proceeded to federal district court and filed a Petition for Writ of Habeas Corpus. *Roberts v. Singletary*, 794 F. Supp. 1106 (S.D. Fla. 1992). The federal district court ordered an evidentiary hearing regarding Defendant's claims of ineffective assistance of trial counsel and his *Brady* claim.

The federal district court denied the petition. *Id.* During its discussion of the various claims, the court found that the testimony of Ken Lange, Defendant's trial attorney, was unworthy of belief.[2] *Id.* at 1118, 1121. With regard to the

[2]Lange was suspended from the practice of law for one year, *inter alia*, for his conduct in this case. *Florida Bar v. Lange*, 711 So. 2d 518 (Fla. 1998). In the course of discussing the appropriate discipline for Lange, this Court agreed with the federal court's assessment that Lange's testimony was unworthy of belief. *Id.* at 524.

claims that evidence of Rimondi's alleged prostitution was improperly excluded, the court found that this evidence was not relevant. *Id.* at 1113-17. The court denied the *Brady* claim, finding that "the alleged 'exculpatory material' was either immaterial, or already in petitioner's possession." *Id.* at 1122. The court also rejected a claim that the State had violated Defendant's rights when a rape treatment counselor refused to answer deposition questions regarding Rimondi's statements to her under the counselor/sexual assault victim privilege. *Id.* at 1122-24. The court found that this claim was procedurally barred. *Id.* In discussing whether Defendant had satisfied the fundamental miscarriage of justice exception to the procedural bar doctrine, the court noted that:

> [F]urther impeachment of Rimondi with more inconsistent statements would not effect the outcome of the trial. It cannot be said that the trial court's denial of disclosure probably resulted in the conviction of an actually innocent man. Here the evidence of defendant's guilt is overwhelming.

Id. at 1124. The court also denied as meritless related claims of ineffective assistance of counsel regarding the alleged failure "to learn of money payments to Rimondi by the state" and the failure "to adequately cross-examine certain State witnesses about charges pending against them." *Id.* at 1121. The court concluded that "the 'money payments' to Rimondi were merely per diem expenses, normally paid to state witnesses, while she was

attending a deposition" and that Defendant "was not prejudiced by any failure of defense counsel to further impeach the State's witnesses." *Id.* at 1122.

Defendant appealed the denial of the Petition to the Eleventh Circuit, raising nine issues:

> 1. Whether the application of Florida's Rape Shield Statute violated the Sixth and Fourteenth Amendments where [Defendant] was precluded from cross-examining a State's witness about her occupation as a prostitute which gave her a potential motive and where he was precluded from testifying about her statement to him concerning her occupation as a prostitute.
>
> 2. Whether the withholding of material exculpatory evidence from the defense violated the Fifth, Sixth, and Fourteenth Amendments.
>
> 3. Whether the refusal to disclose during a deposition the contents of statements of a State's witness to an agent of the State violated the Fifth, Sixth, and Fourteenth Amendments.
>
> 4. Whether the trial court's ruling that [Defendant] could not cross-examine several State's witnesses about pending charges violated the Sixth and Fourteenth Amendments.
>
> 5. Whether [Defendant] was deprived of the effective assistance of counsel at the guilt-innocence phase of his capital trial in violation of the Sixth and Fourteenth Amendments.
>
> 6. Whether [Defendant] was denied the effective assistance of appellate counsel when counsel failed to raise meritorious issues on appeal.
>
> 7. Whether [Defendant] was denied the effective assistance of counsel at his capital penalty phase.

> 8. Whether [Defendant's] sentencing jury was inadequately instructed regarding the aggravating circumstances.
>
> 9. Whether [Defendant] was deprived of his right to have the sentencer consider valid mitigating factors.

Roberts v. Singletary, 29 F.3d 1474, 1477 (11th Cir. 1994). The court affirmed the denial of the habeas petition, agreeing with the district court's conclusions and adding no analysis regarding the alleged *Brady* violations. *Id.* at 1477.

With regard to the first issue, the circuit court added to the district court's analysis that this claim was procedurally barred and noted that even if the claim was not barred, it was without merit. *Id.* at 1477-79 & 1478 n.2. In discussing the fact that Defendant could not avail himself of the fundamental miscarriage of justice exemption to the procedural bar, the Court noted that Rimondi had undergone a "tenacious cross-examination" and that "further impeachment of Rimondi with any inconsistent statements would not have changed the outcome of the trial." *Id.* at 1478-79. The court also noted that the evidence of Defendant's guilt was overwhelming, including that Defendant confessed to Haines, that Defendant changed his appearance after the crime, that Defendant's finger and palm prints were found at the scene, that Defendant had blood in his car and on his clothes and that Defendant had admitted to owning a baseball bat the night before the crime. *Id.* at 1479. As

such, the court concluded that Defendant had not shown he was actually innocent, such that the fundamental miscarriage of justice exemption would permit consideration of a procedurally barred claim.

Defendant sought certiorari review of this decision in the United States Supreme Court, which was denied. *Roberts v. Singletary*, 515 U.S. 1133 (1995). The Court denied rehearing on August 11, 1995. *Roberts v. Singletary*, 515 U.S. 1197 (1995).

On February 20, 1996, after a second death warrant had been issued, Defendant filed his second motion for post conviction relief, raising 6 issues :

> CLAIM I
>
> [DEFENDANT] WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE GUILT/INNOCENCE OR PENALTY PHASES OF [DEFENDANT'S] TRIAL. AS A RESULT, [DEFENDANT] WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JUDGMENT AND SENTENCE. MOREOVER, NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT AN INNOCENT [DEFENDANT] WAS ERRONEOUSLY CONVICTED.
>
> CLAIM II
>
> [DEFENDANT] IS INNOCENT OF FIRST DEGREE MURDER AND HE IS INNOCENT OF THE DEATH SENTENCE.
>
> CLAIM III
>
> ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT'S] CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM IV

[DEFENDANT] WAS DENIED DUE PROCESS OF LAW WHEN HIS DEATH SENTENCE WAS IMPOSED ON THE BASIS OF INFORMATION WHICH HE HAD NO OPPORTUNITY TO DENY OR REBUT.

CLAIM V

[DEFENDANT'S] DEATH SENTENCE IS BASED UPON THE STATE'S KNOWING AND PRESENTATION OF FALSE TESTIMONY FROM A LAW ENFORCEMENT OFFICER IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM VI

[DEFENDANT'S] SENTENCE OF DEATH IS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND THEREFORE ALSO ON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

(PCR2. 16, 69, 82-83, 86, 90) Claim I was based on allegedly newly discovered evidence that Rhonda Haines had lied at Defendant's trial. (PCR2. 16-69) Specifically, Defendant asserted that he had recently discovered that Haines lied at trial about Defendant confessing to her, that Mr. Rabin had promised to take care of her prostitution charges, that Mr. Rabin had taken care of prostitution charges from Broward County after trial and that Mr. Rabin threatened and harassed Haines into testifying falsely. (PCR2. 16-42) There was no assertion that the State failed to disclose Haines' arrest history under any name, including the name of Shannon Harvey. *Id.* Claim III pertained, *inter alia*, to certain deposition questions of employees and former employees of the State Attorney's Office that had not been answered.

The State responded that Haines' change of testimony did not constitute newly discovered evidence, as it was refuted by the record and did not show that Defendant was innocent. (PCR2. 274-78) The State also asserted that the remainder of the claims were procedurally barred.

On February 21, 1996, the post conviction court held a hearing on Defendant's motion for post conviction relief. (PCT2-2/21/96. at 1-69) At the hearing, Defendant asserted that Haines' alleged recantation was sufficient to merit an evidentiary hearing. (PCT2-2/21/96. at 11-21) The State responded that the deposition testimony of Samuel Rabin, the former prosecutor whom Haines alleged induced her allegedly false testimony at the time trial, refuted the claim as Rabin had left the employment of the State Attorney's Office by the time Haines alleged that he assisted her with her own prostitution charges. (PCT2-2/21/96. at 21-24) However, the State also stated that it had offered to hold a limited evidentiary hearing on Haines' credibility if that could be accomplished within the time frame of the death warrant. (PCT2.-2/21/96. at 21-24)

Defendant responded that he was unwilling to have an evidentiary hearing conducted within that time frame. (PCT2-2/21/96. at 24-28) He alleged that he could not arrange for

Haines' presence on such short notice and that he would have to subpoena her and get that subpoena issued in California. *Id.* The State replied that it had been willing to assist Defendant in obtaining Haines' presence but that Defendant had refused to provide the State with an address for her. (PCT2-2/21/96. at 28-29) After listening to these arguments, the court denied the motion for post conviction relief. (PCT2-2/21/96. at 64) Defendant never mentioned any failure to disclose any arrests of Haines under any name at the hearing. (PCT2-2/21/96. at 1-69)

Defendant appealed the denial of his second motion for post conviction relief to this Court, asserting:

> ARGUMENT I
>
> [DEFENDANT] WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE GUILT/INNOCENCE OR PENALTY PHASE OF [DEFENDANT'S] TRIAL. AS A RESULT, [DEFENDANT] WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JUDGMENT AND SENTENCE. MOREOVER, NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT AN INNOCENT [DEFENDANT] WAS ERRONEOUSLY CONVICTED.
>
> ARGUMENT II
>
> [DEFENDANT'S] SENTENCE OF DEATH IS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND THEREFORE ALSO ON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.
>
> ARGUMENT III
>
> ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT'S] CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE

> EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.
>
> ARGUMENT IV
>
> [DEFENDANT] WAS DENIED A FAIR HEARING BEFORE AN IMPARTIAL TRIBUNAL BY THE LOWER COURT'S DENIAL OF THE MOTION TO DISQUALIFY.
>
> ARGUMENT V
>
> [DEFENDANT'S] DEATH SENTENCE IS BASED UPON THE STATE'S KNOWING AND [sic] PRESENTATION OF FALSE TESTIMONY FROM A LAW ENFORCEMENT OFFICER IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.
>
> ARGUMENT VI
>
> [DEFENDANT] IS INNOCENT OF FIRST DEGREE MURDER AND HE IS INNOCENT OF THE DEATH SENTENCE.

Defendant did not argue that the State withheld any arrests of Haines under any name. Initial Brief of Appellant, Florida Supreme Court Case No. SC87438.

This Court found that Issues II and V were procedurally barred, and Issues IV and VI without merit. *Roberts v. State*, 678 So. 2d 1232, 1235-36 (Fla. 1996). However, this Court reversed the summary denial of the claim regarding Haines' affidavit and remanded the matter for the expressed purpose of holding an evidentiary hearing on whether Haines' alleged recantation of her trial testimony satisfied the standard for relief as newly discovered evidence:

> The first issue involves [Defendant's] claim that he is entitled to relief because a prosecution witness has recanted her trial testimony. This claim is based upon an affidavit executed under oath by prosecution witness Rhonda Haines, who was [Defendant's] girlfriend at the time of the killing. In the

affidavit that was appended to [Defendant's] 3.850 motion, Haines recants her trial testimony that [Defendant] confessed to killing the victim and that he told her some details of the killing. She also recants her trial testimony that no promises or threats prompted her testimony. She now alleges that an assistant state attorney pressured her for a "better" story and suggested facts to her and that she adopted those suggested facts as her testimony. She further states that the assistant state attorney arranged to have her outstanding prostitution charges in Broward County "disappear" in return for her testimony.

[Defendant] argues that he was entitled to an evidentiary hearing on this claim as the recanted testimony constitutes newly discovered evidence that establishes that he was erroneously convicted. The State asserts that Haines' factual allegations are disputed by prosecutor Sam Rabin's deposition, wherein Rabin states that he left the state attorney's office almost ten months before [Defendant's] case was tried. This, the State argues, disputes Haines' allegations that Rabin coerced or cajoled her trial testimony. Moreover, the State contends, Haines' affidavit does not meet the test set forth in *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991), because it probably would not "produce an acquittal on retrial."

We find that the trial court improperly denied this claim without an evidentiary hearing. Haines' recanted testimony qualifies as newly discovered evidence because "the asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'" *Id.* at 916 (quoting *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979)). Such claims are cognizable under rule 3.850, which provides that a motion for postconviction relief should only be denied without hearing "if the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850(d).

In this case, the State acknowledged the necessity of an evidentiary hearing before the trial judge. It would have been helpful for the judge to give reasons for his ruling, but the judge's order is

> silent as to why he denied the evidentiary hearing. We agree that this issue should be remanded for an evidentiary hearing. *See Johnson v. Singletary*, 647 So. 2d 106, 111 (Fla. 1994)(remanding case for limited evidentiary hearing to permit affiants to testify and allow appellant to "demonstrate the corroborating circumstances sufficient to establish the trustworthiness of [the newly discovered evidence]").

Id. at 1236. This Court ordered the evidentiary hearing to occur within 60 days of the opinion. *Id.*

On remand, Defendant sought to recuse the trial judge because he had testified in an unrelated case that the State had drafted his sentencing order for him and that the judge must have spoken to the State in preparing to testify in that case. (PCR3. 37-44, 109-71) The trial court refused to recuse itself. (PCR3. 205)

On April 1, 1997, Defendant filed a memorandum regarding the issuance of a certificate of materiality for Haines. (PCR3-SR. 575-77) In this memo, Defendant acknowledged that the statute on certificates of materiality did not apply to post conviction proceeding expressly. *Id.* The State filed a written response indicating that the statute at issue applied only to criminal proceeding and was inapplicable to post conviction proceedings. (PCR3. 386-87) The court denied this motion. (PCR3-SR. 578)

On May 12, 1997, Defendant moved for a certificate of materiality to compel Haines' attendance at a deposition to

perpetuate her testimony. (PCR3-SR. 578-81) In this motion, Defendant requested that the lower court issue an order to compel Haines' presence at a deposition in California and that the court compel the county to pay the costs of such a deposition. *Id.* On May 28, 1997, Defendant again moved for a certificate of materiality, claiming that it was necessary to protect Haines from being arrested. (PCR3 405-07) The State filed another response to this motion. (PCR3-SR. 582-86) In this response, the State noted that the lower court had already ruled that the statute did not authorize the issuance of a certificate of materiality for a post conviction proceeding, that Haines had already agreed to appear voluntarily at the evidentiary hearing, that seeking a certificate of materiality would only delay the proceedings and that Haines would not be immune from prosecution for any crime that she might commit in Florida while here to testify. *Id.*

At a hearing on July 2, 1997, Defendant again argued for the certificate but acknowledged that the court had previously denied it. (PCR3. 431-34) The State then indicated that the witness had agreed to voluntarily appear at the hearing. (PCR3. 434) Defendant responded that he needed the certificate to ensure that if the witness did not voluntarily appear, he had a

method of compelling her appearance. (PCR3. 434) The lower court again denied the motion. (PCR3. 435)

At the beginning of the evidentiary hearing, Defendant indicated that Haines would not be present because the court would not issue a certificate of materiality. (PCR3. 456) Bill Howell, one of the prosecutors on the case, responded that he had spoken to Haines in person and on the telephone on numerous occasions between June 1996 and June 1997, and that Haines had always been cooperative and willing to appear without a subpoena. (PCR3. 456-58) However, when he spoke to Haines on the Tuesday before the hearing, Haines stated that she was not coming. (PCR3. 458) When Howell asked why, Haines indicated that Defendant had told her that if she came to Florida, she would be prosecuted for perjury. (PCR3. 458-59)

Defendant's counsel acknowledged that she had told Haines that the State would arrest her if she came to Florida. (PCR3. 459-60) Defendant contended that a subpoena would immunize Haines from perjury charges and that Defendant needed to have Haines under a subpoena to assure her presence. (PCR3. 459-61) Defendant also asserted that the State had lied to Haines by telling her that nothing bad would happen to her and telling the court it would prosecute her for perjury. (PCR3. 460-61)

The State responded that it had no intention of charging Haines with perjury based on her trial testimony because it believed that testimony was truthful and because the statute of limitation had already run. (PCR3. 461) Moreover, the State asserted that no subpoena would protect Haines if she lied on the stand during the post conviction hearing. (PCR3. 461-62) As Defendant's counsel had undertaken to advise Haines, whom she did not represent, against appearing, the State contended that any failure to produce Haines was attributable to the defense. (PCR3. 462-63)

Defendant replied that he could not rely upon Haines' voluntary appearance. (PCR3. 463-64) Moreover, Defendant contended that the change in the statute of limitation might apply retroactively and permit the State to charge Haines with perjury because of her original trial testimony. (PCR3. 464) Defendant then indicated that he was not offering Haines' affidavit as evidence but that it was in the record. (PCR3. 466) Defendant rested without presenting any witnesses or evidence. (PCR3. 486) The State presented the testimony of Harvey Wasserman, Leonard Glick and Sam Rabin, (PCR3 491-573) Defendant called William Howell as a rebuttal witness. (PCR3. 584) During the hearing, Defendant made no mention of a claim

that the State had failed to disclose any arrest of Haines under any name. (PCR3. 491-573)

After considering this testimony, the trial court denied Defendant's second motion for post conviction by order dated August 11, 1997. (PCR3. 751-58) The lower court found that Defendant had not shown that the evidence was newly discovered and could not have previously been discovered through the exercise of due diligence. *Id.* The lower court also determined that the failure to present Haines at the evidentiary hearing was attributable to the defense. *Id.* The lower court concluded that Haines' affidavit was refuted by the evidence that the charges that had been pending against her had been resolved by her guilty plea three years after the trial in this matter, that Rabin, Howell and Glick had not interceded on Haines' behalf regarding any charges, that they had not threatened or coerced Haines' regarding her testimony and that they had not made any promises to Haines to secure her testimony. *Id.* Finally, the lower court found that Haines' affidavit would not have sufficiently shown a likelihood of acquittal on retrial even if it had been shown to have been true. *Id.*

The order was not filed with the clerk until October 1, 1997. Defendant filed a motion for rehearing on November 17,

1997. (PCR3. 761-74) The lower court denied the motion for rehearing on January 8, 1998. (PCR3. 787)

Defendant appealed the denial of the second motion for post conviction relief to this Court. (PCR3. 790-91) During the pendency of the appeal, Defendant filed a Motion to Get Facts, asserting that there had been *ex parte* proceedings before a judge who was assigned to the division in which the case was assigned but who was not hearing the motion and that there must have been *ex parte* contact between the State and the judge who did hear the motion because the State knew that the order had been entered after it was signed but before it was filed. (PCR3-SR. 21-26) This Court remanded the matter to the post conviction court for a hearing on this issue. (PCR3-SR. 27)

The hearing was held on the motion to get facts on April 7, 2000. (PCR3-SR. 65-72) At the hearing, Defendant presented the testimony of Fariba Komeily, Joel Rosenblatt, William Howell, Alberto Rios, and Judge Harold Solomon. (PCR3-SR. 72-144-46) The testimony at the hearing revealed that no *ex parte* communication had occurred in connection with the second motion for post conviction relief but that the State had drafted the sentencing order. *Id.*

As a result, Defendant filed a third motion for post conviction relief in May 2000, claiming that he was entitled to

a new sentencing proceeding because the State drafted the sentencing order and because Judge Solomon should not have presided over the second motion for post conviction relief. (PCR3-SR. 153-82) This Court again relinquished jurisdiction and another evidentiary hearing was held. (PCR3-SR. 401-61) After the hearing, the post conviction court granted Defendant a new penalty phase but refused to reconsider the second motion for post conviction relief. (PCR3-SR. 520-28)

Defendant then continued with his appeal of the second motion for post conviction relief, raising 5 issues:

> I.
> JUDGE SOLOMON ERRED WHEN HE DENIED [DEFENDANT'S] MOTION TO DISQUALIFY. JUDGE SOLOMON WAS A MATERIAL WITNESS AND SHOULD NOT HAVE PRESIDED OVER THE RULE 3.850 MOTION.
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> II.
> [DEFENDANT] WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND DENIED ACCESS TO THE COURTS WHEN THE CIRCUIT COURT REFUSED TO ISSUE A CERTIFICATE OF MATERIALITY SO THAT [DEFENDANT] COULD OBTAIN AN OUT-OF-STATE SUBPEONA REQUIRING RHODA HAINES APPEARANCE AS A WITNESS.
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> III.
> [DEFENDANT] WAS DENIED HIS RIGHT TO DUE PROCESS IN RULE 3.850 PROCEEDINGS WHEN THE STATE OBTAINED THE ASSIGNMENT OF JUDGE SOLOMON IN AN EX PARTE PROCEEDING WITHOUT NOTICE TO [DEFENDANT] OR AN OPPORTUNITY FOR [DEFENDANT] TO BE HEARD AND WHEN THE STATE THROUGH EX PARTE CONTACT ON THE MERITS OF THE CASE LEARNED OF JUDGE SOLOMON'S RULING TWENTY DAYS BEFORE IT WAS FILED WITH THE CLERK'S OFFICE AND SERVED ON THE PARTIES.
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> IV.
> THE CIRCUIT COURT ERRONEOUSLY DENIED [DEFENDANT'S] MOTION TO DISQUALIFY ASSISTANT STATE ATTORNEY WILLIAM

> HOWELL FROM ACTING AS BOTH A WITNESS AND ADVOCATE IN PROCEEDINGS BELOW. FURTHERMORE, MR. HOWELL'S REPEATED EX PARTE BEHAVIOR WHICH DEPRIVED [DEFENDANT] OF DUE PROCESS WARRANTS MR. HOWELL'S DISQUALIFICATION FROM FUTURE PROCEEDINGS UPON REMAND.
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> V.
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> IN DENYING [DEFENDANT'S] 3.850 IN 1997, JUDGE SOLOMON ERRONEOUSLY FAILED TO CONDUCT A CUMULATIVE ANALYSIS OF [DEFENDANT'S] BRADY/GUNSBY CLAIM ARISING FROM RHODA HAINES' 1996 AFFIFDAVIT [sic] ALONG WITH THE BRADY CLAIMS PRESENTED IN 1989 PRIMARILY REGARDING MICHELLE RIMONDI.

Initial Brief of Appellant, FSC Case No. SC92496. Again, Defendant did not make any argument that the State had withheld any arrest of Haines under any name. In fact, Defendant acknowledged that the purpose of the evidentiary hearing he was requesting was to determine the credibility of Haines' recantation. *Id.* at 2-3, 36, 53. He characterized the *Brady* aspect of the claim as "consideration given Ms. Haines for testimony was not disclosed to [Defendant's] counsel." *Id.* at 11, 76-77, 79.

This Court reversed the denial of the second motion for post conviction relief because Judge Solomon should have recused himself. *Roberts v.* State, 840 So. 2d 962 (Fla. 2003). It again characterized Defendant's claim as a recantation of Haines' trial testimony. *Id.* at 966, 970, 971, 972. This Court also found that Issues III and IV were without merit. *Id.* at 969-70. It also found that the lower court should issue a

certificate of materiality and that it should consider the cumulative error. *Id.* at 970-72. In describing the cumulative error analysis to be undertaken, the Court noted that no cumulative error analysis was necessary if the individual claims were barred or lack merit. *Id.* at 972. The Court further stated that a cumulative error analysis only needed to be undertaken if Haines was credible. *Id.*

On remand, the post conviction court set the evidentiary hearing for November 14, 2003, and Defendant indicated he would submit a motion for a certificate of materiality. (PCR4. 707)[2] At the next hearing, Defendant indicated that he would prefer to have Haines deposed rather than get a certificate of materiality and present her testimony. (PCR4. 687) The State responded that the lower court should issue the certificate of materiality for her live testimony as this Court had ordered. (PCR4. 687) The post conviction court indicated that it was going to issue the certificate of materiality for Haines' live testimony, which it did on October 14, 2003. (PCR4. 687, 435-38)

Once the certificate had been issued, Defendant went to California and urged the California court not to issue the a subpoena for Haines. In doing so, Defendant asserted:

[2] The symbol "PCR4." will refer to the record of proceedings in the present appeal.

> And in the Florida Supreme Court pending, there is a passage there **where the State takes the position they won't charge her with perjury if she comes and testifies in accordance with the affidavit she's already given.** The prosecution out there had been threatening her which is also sort of adding to her concern about leaving her three kids and running the risk that something could happen to her because they've indicated even though she's entitled to immunity, **they're saying she's not entitled to immunity from perjury charges if she takes the stand and testifies contrary to the affidavit that she's already signed**.

(PCR4. 992) Based on Defendant's representations, the California refused to order Haines to appear in Florida. (PCR4. 993)

Having convinced the California court not to send Haines, Defendant then moved the post conviction court to order a deposition to perpetuate Haines' testimony. (PCR4. 439-43) The State argued that Defendant should not be allowed to take a deposition to perpetuate Haines' testimony as he had made Haines unavailable first by convincing Haines not to appear at the 1997 evidentiary hearing and again by urging the California court not to issue a subpoena for Haines. (PCR4. 693-94) The State further argued that Haines should be required to testify by satellite if she was going to testify. (PCR4. 694-95) Defendant insisted that he had merely informed Haines and the California court about the State's assertion that she would be charged with perjury if she came to Florida and committed

perjury to see how Haines would reacted to questions about perjury charges on cross examination. (PCR4. 696) He asserted that a deposition would be easier because counsel would need to be present with Haines to hand her documents whether she testified by deposition or satellite. (PCR4. 696-97) The Florida post conviction court ordered that Defendant present Haines' testimony by satellite so that it could see Haines' demeanor and ask any questions it wanted to ask. (PCR4. 697-98)

Haines then testified by satellite that she ran away to Florida around 1982 or 1983 and supported herself through prostitution. (PCR4. 459) She plied her trade in Fort Pierce, Fort Lauderdale, Orlando and Miami and was arrested in each of these cities except Orlando. (PCR4. 459-60) Haines was also using drugs at the time. (PCR4. 460)

While in Orlando, Haines met Defendant, who was using the name Less McCullars and the nickname Rick. (PCR4. 460-61) Defendant suggested moving to Miami because he had an uncle in Miami, Haines agreed and they did so. (PCR4. 462) In June 1984, Haines was arrested for being an accessory after the fact in this case. (PCR4. 462-63) Haines stated that she had been taken to the police station shortly after Defendant was arrested and informed the police that Defendant had been with her when the crimes were committed. (PCR4. 462) After being in jail for

around 18 to 20 days, Haines was brought to the State Attorney's Office and told she would be released if she provided a truthful statement. (PCR4. 463) Haines then stated that the truth was that Defendant had been with her the evening of the crime when Haines fell asleep between 8:30 and 9:00 p.m. and was there the next morning she woke up. (PCR4. 463) However, she did not know what Defendant did while she slept. (PCR4. 463) She gave a sworn statement to this effect to Mr. Rabin and was released. (PCR4. 463-65)

After she was released, Haines spent a week or two in the apartment where she had been staying with Defendant and then went back to living on the streets. (PCR4. 465) On the streets, Haines resumed being a prostitute and a drug addict. (PCR4. 465) At some point after her released and before Thanksgiving, Haines was arrested for prostitution 10 to 12 times under different names, including the name Shannon Harvey, with a different date of birth and social security number. (PCR4. 465-67) However, she did not recall any of the dates of her arrests and did not know if the police knew of her involvement in this case or whether the arrests were "taken care of." (PCR4. 465, 467) Mr. Rabin did tell her not to worry about her prostitution arrests. (PCR4. 467)

Some time in November or December, Haines learned that she was 3 or 4 months pregnant and moved to Arizona to be with her mother. (PCR4. 468) While in Arizona, Mr. Rabin called and spoke to Haines' mother. (PCR4. 468) Haines returned the call. (PCR4. 469) Mr. Rabin asked her if she knew anything more about the crime and indicated that he believed that she did. (PCR4. 469) Haines' mother told her that she should put this behind her so when Mr. Rabin placed a second call, Haines told Mr. Rabin that Defendant has stated that he thought he kill someone. (PCR4. 469) Haines stated that she made this statement to "get [Mr. Rabin] off her back" and that it was untrue. (PCR4. 469)

Haines stated that she was brought to Florida to give a statement to this effect to Mr. Rabin. (PCR4. 470) She stated that she had expressed concern about coming to Florida because of her prior arrests and that Mr. Rabin had told her not to worry. (PCR4. 471) Haines traveled to Miami again to testify. (PCR4. 471-72) Haines stated that she believed that her prostitution charges were then "taken care of." (PCR4. 472)

Haines denied ever returning to Florida after she testified. (PCR4. 472) She stated that any arrests under her name in Florida in October 1986 and October 1988 were not hers. (PCR4. 472, 474) She stated that she lived in Arizona for a period of time and then moved to California. (PCR4. 472) While

in California, Haines participated in drug rehab in 1991. (PCR4. 474)

Haines stated that she was in contact with her mother in Arizona when she lived in California. (PCR4. 474) However, she told her mother not to divulge her whereabouts. (PCR4. 474) Haines stated that she was contacted by Defendant's investigator in 1996 or 1997 and told the investigator that she had lied. (PCR4. 473, 475)

On cross, Haines stated that lived with Defendant for six months before his arrest and had a romantic relationship with him. (PCR4. 477-78) Her relationship with Defendant was the longest relationship she had with a man before 1996. (PCR4. 478) However, for the last 7 years, she had been with her son's father and was still with him. (PCR4. 478-79)

Before this crime, Haines had never been involved in serious criminal activity or been with anyone who had. (PCR4. 479-80) Before going to the police station, Haines had told the police that Defendant was with her at the time of the crime. (PCR4. 481) When she was arrested for being an accessory after the fact, Mr. Rabin was not present. (PCR4. 481) She admitted that this statement was a lie that she had come up with herself to protect Defendant. (PCR4. 481-82)

Haines admitted that she first met Mr. Rabin the day she gave him a sworn statement recanting that alibi. (PCR4. 482-83) She claimed that this statement was truthful and that she recanted the prior alibi without any pressure being placed on her. (PCR4. 484-85)

Haines stated that before she came to give a deposition in October 1985, Mr. Rabin called her in Arizona more than once but that she did not recall the number of calls. (PCR4. 486) However, she stated that it was only in the first two calls that Mr. Rabin stated that he believed that she knew more than she was saying. (PCR4. 487) She admitted that Mr. Rabin did not threaten her when he spoke to her. (PCR4. 487) She stated that she told Mr. Rabin that Defendant confessed to her after these two calls because she wanted Mr. Rabin to stop calling and because her mother and aunt encouraged her to give a further statement. (PCR4. 487-88)

Haines remembered testifying at trial that she admitted that Defendant confessed to her because she had turned her life around and because her mother encouraged her to tell the truth. (PCR4. 488-90) She acknowledged that she stated that there were no threats or promises from the State. (PCR4. 488-90)

Haines claimed that when she came to Miami to be deposed in October 1985, Mr. Rabin met with her, told her not to worry

about her prostitution arrests and stated they would be "taken care of." (PCR4. 491) Haines stated that she distinctly recalled having this conversation with Mr. Rabin even though Mr. Rabin had not been employed by the State Attorney's Office for almost a year at that time. (PCR4. 491-92) When asked if she might be mistaken, Haines first claimed in might have been another prosecutor and then claimed that the promise was made when she gave her first statement to Rabin before she was released from her arrest for being an accessory after the fact. (PCR4. 492-93) She then claimed not to be able to recall if promises were made by another prosecutor but then insisted it was Mr. Rabin and not Mr. Howell or Mr. Glick. (PCR4. 493) Finally, Haines stated that she would not be surprised to learn that she met with Mr. Howell before her deposition. (PCR4. 493) Haines then admitted that her deposition testimony was consistent with the statement she gave Mr. Rabin after her arrest. (PCR4. 493)

Haines stated that she did not recall meeting with Defendant's investigator before trial. (PCR4. 494-96) However, she stated that she had no reason to dispute her trial testimony that she did so or that she told him what she testified to at trial. (PCR4. 494-96) She acknowledged that the investigator

from the time of trial did not threaten her or make any promises to her to change her testimony. (PCR4. 496)

Haines admitted that she had visited Defendant in jail about once a week for 3 or 4 months after she was released from her arrest on charges of being an accessory after the fact. (PCR4. 497-98) She admitted that she had testified at trial that Defendant had told her, during these meetings, that he had been with a group of the same description as the victims on Key Biscayne, had used drugs with a Latin male, had sex with a girl, gotten into a fight with the man over the girl, hit the man in the head with a baseball bat and threw the bat off of the bridge. (PCR4. 499) When asked if she was claiming this testimony was false, Haines admitted that the only part of this story she was claiming was false was the portion about the baseball bat. (PCR4. 499-500) Haines acknowledged that Defendant had, in fact, confessed to going to Key Biscayne at the time of the murder, meeting the group, using drugs, having sex with the girl, and fighting with the man. (PCR4. 500-01)

When Haines was then asked to identify specifically the portions of her trial testimony that she now claimed were untrue, Haines stated that Defendant had never mentioned the baseball bat and had never said that he thought he killed someone. (PCR4. 501) However, she insisted that Defendant had

confessed to being at the scene of the crime with the victims and having a fight at the time of the murder. (PCR4. 501) Haines claimed that she had the details concerning the baseball bat based on news articles and statements by the police. (PCR4. 501)

Haines claimed that she was now making this statement because she felt guilty. (PCR4. 502) She stated that she was willing to give her trial testimony at the time because she was naïve. (PCR4. 502) She stated that she now wished to change her testimony because she had changed her lifestyle. (PCR4. 502-03) She also stated that she gave her pretrial statements and trial testimony so that Mr. Rabin would quit calling her and so that she could put her past behind her. (PCR4. 503) Haines also claimed that she was scared because of her prostitution arrests. (PCR4. 504) Haines claimed that she gave her statement to Defendant's investigator but did not think that giving this statement would help Defendant and claimed she was not pressured. (PCR4. 505-06)

Haines stated that she was unaware of the status of her prostitution charges at the time of trial. (PCR4. 506-07) She did not know what was done about these charges. (PCR4. 507-08) Instead, she simply knew that Mr. Rabin had told her not to worry about them and stated that she was speculating that Mr.

Rabin personally took care of them. (PCR4. 507-08) Haines believed that Mr. Rabin would have been the only person who would have taken care of her charges. (PCR4. 508)

Haines stated that she continued to live in Arizona with her mother for 18 months to 2 years after trial. (PCR4. 508-09) They lived in different places there. (PCR4. 509) Haines stated that she then moved to Los Angeles County, California and had been there since that time. (PCR4. 510) Within 2 years, Haines stated that she was using crack so heavily that she had her mother take custody of her daughter. (PCR4. 511-12) Haines stated that she lived under the names Rhonda Haines and Rhonda Williams in California. (PCR4. 512-13)

Haines stated that Williams was her married name. (PCR4. 513) She stated that she was married to Williams for six months in 1985 or 1986. (PCR4. 513) The marriage occurred in Hollywood, Florida. (PCR4. 513-14) When asked how she could have gotten married in Florida if she never returned to Florida after testifying, Haines admitted that she had returned to Florida and claimed to have forgotten doing so. (PCR4. 513) She stated that she only came to Florida to get married. (PCR4. 514) She had a marriage license from Broward County that listed both her maiden name of Haines and her married name of Williams. (PCR4. 514)

Haines denied having a California driver's license between the time she moved there and 1996. (PCR4. 514-15) However, she then stated that she got a driver's license after going through recovery. (PCR4. 515) Haines stated that she had gotten her first legitimate job in 1992, and paid taxes under the name of Rhonda Williams. (PCR4. 515) Haines stated that she changed her name back to Haines in February 2003. (PCR4. 516)

Haines admitted that she went through recovery in 1991. Thereafter, she was living openly, was in contact with her mother and was no longer forbidding her mother from providing contact information for her. (PCR4. 516) Haines then admitted that she was imprisoned in California for possession of cocaine in 1990, paroled, jailed again and placed in drug treatment as an alternative to returning to prison. (PCR4. 517) Haines then admitted that she was arrested in California more than 10 times before 1990, that some of the arrests were under Rhonda Haines, and that she was fingerprinted every time she was arrested. (PCR4. 517-18) Haines also acknowledged that she was regularly reporting to her parole officer and that the officer knew her whereabouts. (PCR4. 518-19)

Haines stated that she had been with Marvin Reynolds, the father of her youngest child for 7 years, and was presenting living with him. (PCR4. 520-21) She then claimed that he lived

with her sometimes and not others. (PCR4. 521) When asked if Reynolds could have cared for the children while she came to Miami to testify, Haines claimed that Reynolds would not watch the children. (PCR4. 521) However, she admitted that she had not even asked him. (PCR4. 522) She stated that their relationship was not good and that he was not really living with her presently. (PCR4. 522) She stated first that he did not even get his mail at her apartment and then reversed herself and said he did. (PCR4. 522)

On redirect, Haines stated that she was released from jail after she gave her truthful sworn statement. (PCR4. 524-25) She stated that she spoke to Mr. Rabin before giving the statement. (PCR4. 524) She first indicated that she was not promised she would be released after making this statement and then claimed that she was promised release in exchange for the statement. (PCR4. 525)

Haines stated that she came to Florida and met with Mr. Rabin when the matter was first set for trial. (PCR4. 525-26) However, she did not testify at that time because the trial was continued. (PCR4. 526) She stated that it was during this meeting, she told Mr. Rabin that Defendant had confessed to her to stop him from calling. (PCR4. 527) On the subject of her

prostitution charges, Haines described her conversation with Mr. Rabin:

> He told me I didn't have to worry about it. That's all he told me. **He didn't say, you know what Rhonda, I'm going to go down and get them dropped. He never said anything like that to me**, but he told me not to worry about anything. He said, you're going to be okay, don't worry about it.

(PCR4. 528) Haines claimed that she thought he would have the charges dismissed. (PCR4. 528-29) Haines asserted that she was afraid about the charges because she believed she would be arrested but was not. (PCR4. 529-30)

Haines stated that she originally gave Defendant an alibi because she thought Defendant might have been involved in this crime. (PCR4. 531) This belief was caused by seeing a sketch of the perpetrator in the newspaper and believing it was Defendant. (PCR4. 531) Haines believed that Defendant could be the father of her oldest child. (PCR4. 531-32)

Haines first stated that she was only in Florida for one week when she got married. (PCR4. 535-36) However, she then immediately stated that she was in Florida for 6 months. (PCR4. 536)

Defendant next called Mr. Howell. (PCR4. 719) Mr. Howell stated that he was asked to be the second chair prosecutor in this matter by Mr. Rabin after Defendant was arrested. (PCR4. 720) When Mr. Rabin left the State Attorney's Office in early

1985, Leonard Glick replaced him on the prosecution team and tried the case with Mr. Howell. (PCR4. 720) Since Mr. Glick left the State Attorney's Office in the early 1990's, Mr. Howell had been working on the case. (PCR4. 720)

Mr. Howell stated that he first learned that Haines had outstanding charges when she mentioned them in deposition. (PCR4. 721-24) Mr. Howell believed that he discussed Haines' claim that she had 11 outstanding warrants with Judge Glick and that they decided to do nothing about them. (PCR4. 725) He did not even recall if he verified that the warrants existed. (PCR4. 725)

Mr. Howell stated that Haines had four prior arrests and not the 11 she claimed. (PCR4. 725) Two of these had been disposed of at the time of arrest in 1982. (PCR4. 725-26) The other two remained pending for 3 years after Haines testified and were disposed of in 1988, without the State's assistance. (PCR4. 726) Mr. Howell believed Haines resolved these matters on her own after another arrest in Florida in 1988. (PCR4. 726) Mr. Howell believed that Haines was mistaken about the number of her prior arrests but did not recall if he ever told her that she was wrong. (PCR4. 726-27)

Mr. Howell was shown an FBI printout of Haines' criminal history from August 1984. (PCR4. 728-29) Mr. Howell did not

recall Haines having any prostitution arrests in Dade County at the time of trial. (PCR4. 729) The printout, which Mr. Howell believed he would have seen pretrial, did not reflect any such arrests. (PCR4. 729)

Mr. Howell had no idea why a booking card for a Shannon Harvey from August 17, 1984 had been attached to the printout of Haines' criminal history printout. (PCR4. 730) Mr. Howell did not know who Shannon Harvey was. (PCR4. 730) Mr. Howell had no idea if this information was disclosed. (PCR4. 731) Mr. Howell also did not recall seeing an arrest form for Shannon Harvey or Rhonda Haines from 1984. (PCR4. 733) Neither of these arrests appeared on Haines' FBI printout. (PCR4. 733)

Mr. Howell knew that he had an investigator get some documents from Haines' Broward County court files for the last hearing. (PCR4. 734) He did not recall if the documents shown him were part of what the investigator gave him. (PCR4. 734-35)

Mr. Howell recalled a trial date having been set in early 1985. (PCR4. 736) Mr. Howell did not know if that was a realistic date but doubted it was. (PCR4. 736) Mr. Howell recalled that the trial date was once continued because of a conflict with defense counsel but he did not recall what the conflict was or when the continuance was. (PCR4. 737-38) Mr. Howell was shown a document indicating that travel arrangements

had been made for Ms. Haines and her mother for the end of January 1985, but Mr. Howell did not recall why the arrangements were made. (PCR4. 738-39) Mr. Howell recognized documents that indicated that the State was in contact with Haines pretrial. (PCR4. 742-46) Among the documents were telephone messages from Haines' mother in Arizona indicating that Haines was in Arizona. *Id.*

At the end of Mr. Howell's testimony, Defendant claimed that the documents regarding Haines' travel and contact with her had been obtained from the State Attorney's Office in 1989. (PCR4. 746-47) He stated that a defense motion for continuance had been obtained from the court file. (PCR4. 747)

Teresa Farley Walsh testified that she was employed as an investigator for CCR from September 1985 until April 2000. (PCR4. 748-49) After Defendant's first death warrant was signed, Farley Walsh was assigned to Defendant's case. (PCR4. 749) Farley Walsh was asked by Thomas Dunn, the lead attorney on Defendant's case, to try to find Haines and Ms. Rimondi. (PCR4. 750) In looking for Haines, Farley Walsh sought documents containing her social security number, date of birth and police records. (PCR4. 750) She pulled a rap sheet from FDLE. (PCR4. 751) She went to the Dade and Broward Counties to

attempt to find documentation of the outstanding warrants that Haines had claimed. (PCR4. 752-53)

Farley Walsh had read the trial transcript and knew that Haines was living in Arizona at the time of trial. (PCR4. 753) She found a phone number for Haines' mother in Arizona and gave it to Dunn. (PCR4. 753-54) This phone number was located in the State Attorney's file. (PCR4. 760-62)

In 1992, Farley Walsh contacted the Arizona Capital Project, a nonprofit organization from a law school, to obtain assistance in finding Haines. (PCR4. 755-56) This was part of an effort in connection with the federal evidentiary hearing. (PCR4. 756-57) At that same time, Farley Walsh sent a records request to the Sheriff's Office in Phoenix. (PCR4. 757) Farley Walsh did not recall if she got a response. (PCR4. 757) She did get responses from other Phoenix area law enforcement agencies in 1992. (PCR4. 757-58)

Farley Walsh stated that in the mid-1990's, CCR finally hired a search company. (PCR4. 758-59) This company found an address for Haines. (PCR4. 759)

Farley Walsh stated that the rap sheet she got from FDLE only involved criminal activity in Florida. (PCR4. 759-60) She claimed that she was unable to obtain an NCIC printout because they are only available to law enforcement. (PCR4. 760)

On cross, Farley Walsh stated that prior to working for CCR, she had previously worked for a criminal justice clearing house helping attorneys for a year. (PCR4. 765-66) Even though she characterized this as investigative experience, Farley Walsh admitted that she had worked as a paralegal and helped to find witnesses. (PCR4. 766-67) The only formal investigative training that Farley Walsh recalled attending before being assigned to this matter was the Life Over Death Seminar put on by the Florida Public Defender's Association. (PCR4. 767-68) She believed that she was the best trained of the 4 to 6 investigators working at CCR. (PCR4. 769)

Farley Walsh stated that her initial search for Haines consisted of searching Florida employment records, Florida criminal records, Florida motor vehicle records, the State Attorney's file, and records of law enforcement agencies in Dade and Broward Counties. (PCR4. 769-70) She could only remember making calls to Arizona even though she knew Haines' last known address was there. (PCR4. 770-71) However, she insisted that she did look in Phoenix at that time even though the documents she produced were not sent until 1992. (PCR4. 771-72)

Farley Walsh admitted that her efforts to find Haines slowed after the first warrant was stayed but insisted that she did make efforts to look for Haines between the stay and 1992.

(PCR4. 773-74) However, she was unable to state anything she did during this time period. (PCR4. 774-75) She admitted that no one from the defense actually went to Arizona in an attempt to find Haines before she was found. (PCR4. 776-77) Instead, the attorney simply called Haines' mother in the late 1980's and maybe again in 1992 and accepted her answer. (PCR4. 777)

Farley Walsh ceased to be the lead investigator in this case in 1993 but continued to work at CCR and attend meetings about this case. (PCR4. 778) While she insisted that efforts were made to find Haines after 1992, she was unable to specify anything that was done in the search. (PCR4. 778-79)

Defendant next called Thomas Dunn, an attorney who represented death row inmate in Georgia and who had previously worked for CCR. (PCR4. 778-89) Dunn stated that he was assigned to Defendant's case shortly after he came to CCR in May 1989. (PCR4. 789-90) At the time that he got involved, a warrant had been signed. (PCR4. 790) He assembled a litigation team, obtained public records and reviewed them and the trial transcript. (PCR4. 791) Based on that review, Dunn believed that investigating Haines and Ms. Rimondi should be the focus of any guilt phase challenge. (PCR4. 792) Dunn admitted that he wanted to talk to Haines about recanting her testimony, consideration for her testimony and coercion. (PCR4. 792-93)

Dunn asked Farley Walsh to look for Haines and the outstanding warrants she claimed to have at the time of trial. (PCR4. 793) He stated that the best method to find a witness like Haines was to go out into the street and look for the witness. (PCR4. 794) He said this was necessary because people like Haines did not have formal employment records, addresses or credit histories. (PCR4. 794)

Dunn admitted that he knew that Haines' mother lived in Arizona. (PCR4. 795) Based on documents from the State Attorney's file, Farley Walsh told Dunn that she had located Haines' mother. (PCR4. 795-96) Dunn called the phone number and spoke to Haines' mother. (PCR4. 796) Haines' mother listened to him but did not provide any information to locate Haines. (PCR4. 796-97) He called Haines' mother again in 1991 or 1992 while preparing for the federal evidentiary hearing. (PCR4. 797) Again, she did not provide information about contacting Haines. (PCR4. 797-98) Dunn took the information from Haines' mother at face value. (PCR4. 798)

Around the time that Defendant's second warrant was signed, Dunn decided to use Global Tracking Service to find Haines. (PCR4. 798-800) Dunn, who no longer worked at CCR, had come back to assist with the warrant. (PCR4. 800-01) Once Haines

was located, Jeff Walsh was sent to interview her and returned with the affidavit. (PCR4. 801)

Defendant next called Jeff Walsh, a former investigator with CCR. (PCR4. 810-11) Walsh stated that he was initially involved in investigating penalty phase issues around 1989. (PCR4. 811) He did not become involved in looking for Haines until late 1995 or early 1996, when the second warrant was signed. (PCR4. 811, 812) Walsh stated that Global located Haines and that he then travel to California to meet with Haines. (PCR4. 812-13)

Walsh stated that Haines appeared afraid and asked about the status of the case before she spoke to him. (PCR4. 813) After he told her about the case, she then spoke to him. (PCR4. 813) Walsh then went to Arizona and spoke to Haines' mother. (PCR4. 814) After speaking to Haines' mother, Walsh returned to California and obtained the affidavit from Haines. (PCR4. 814)

On cross, Walsh admitted that he worded the affidavit. (PCR4. 818) However, he claimed that the affidavit was completed based on his discussions with Haines. (PCR4. 818-19)

Defendant next called Daniel Ashton, another investigator with CCR. (PCR4. 824) Ashton testified that he went to the Dade and Broward Clerk's offices and pulled documents regarding prior arrests under the names Haines, Harvey and Williams.

(PCR4. 825-28) Based on these documents, he ran criminal history checks on alias listed in these court files, which showed that someone was being arrested under these names in Florida through 2004. (PCR4. 828-33) On cross, Ashton admitted that he had no way to know if Harvey and Haines were the same person or if the printouts he obtained accurately reflected the arrests of one person. (PCR4. 833-36)

As his final witness, Defendant called Ken Lange, Defendant's trial counsel. (PCR4. 890) Lange testified that he had no knowledge of the name Shannon Harvey being associated with Haines. (PCR4. 892-93) If he knew that Shannon Harvey was an alias for Haines, he would have attempted to research any criminal history for Harvey and attempted to use it to impeach Haines. (PCR4. 893) On cross, Lange admitted that there was nothing in the documents he was shown that indicated that Shannon Harvey and Haines were the same person or that the person arrested under the name Harvey was Haines. (PCR4. 902-04)

The State then called Leonard Glick, who had been a circuit court judge since 1991 and had previously been an Assistant State Attorney. (PCR4. 838-39) Judge Glick became involved in prosecuting Defendant in 1985, after Mr. Rabin left the State Attorney's Office. (PCR4. 839-40) Judge Glick was involved in

the deposition of Haines and recalled that she had charges pending against her at the time of trial. (PCR4. 840) Judge Glick first learned of these charges when Haines was deposed. (PCR4. 841) Judge Glick stated that the State did nothing to assist Haines with these charges either before or after trial. (PCR4. 841) Judge Glick was sure that he would have been contacted if anyone from the State had tried to assist Haines with her charges but he was never contacted. (PCR4. 842)

Judge Glick conducted the State's examination of Haines. (PCR4. 842) He recalled Defendant's trial counsel cross examining Haines about these pending charges and the fact that the State was doing nothing about them. (PCR4. 843-44)

Judge Glick recalled Haines providing a series of statements pretrial and at trial. (PCR4. 845-45) He did not believe that Haines had indicated that Defendant had made any incriminating statements to her until after Mr. Rabin had left the State Attorney's Office. (PCR4. 846) Judge Glick did nothing to coerce this change in Haines' testimony and believed that it was voluntary. (PCR4. 846) No threats or promises were made to Haines to induce this statement. (PCR4. 846) Haines never told Judge Glick that Mr. Rabin had threatened or coerced her even though he met with her without Mr. Rabin being present in preparing her to testify. (PCR4. 846-48)

On cross, Judge Glick stated that he did not recall if he ever verified if Haines' testimony regarding the outstanding warrants was accurate. (PCR4. 849-50) If he had verified the number of warrants and Haines had testified to a number of warrants that was inconsistent with his investigation, he would have attempted to correct her testimony. (PCR4. 850-51)

Judge Glick stated that he had no idea who Shannon Harvey was. (PCR4. 852) He did not know if it was an alias used by Haines. (PCR4. 852)

The State next called Harvey Wasserman, an investigator with the State Attorney's Office. (PCR4. 855-56) Mr. Wasserman stated that he was asked to find Haines. (PCR4. 857) He learned that she was in California and was able to locate her in a couple of days by contacting the prosecutor's office in Los Angeles. (PCR4. 857)

Mr. Wasserman also went to the Broward County Clerk's Office to look for prior arrests and warrants regarding Haines in 1996. (PCR4. 858) He obtained documents from the clerk, which showed 4 arrests for Haines. (PCR4. 858-62) Two of these arrests were pending at the time of trial and the other two had been resolved. (PCR4. 862) The two that were resolved had been resolved by credit time served pleas in 1982. (PCR4. 862-63)

The other two were disposed of with a credit time served plea after an arrest in 1988. (PCR4. 863-64)

Mr. Wasserman ran an NCIC check on Haines and determined that she had been run twice previously. (PCR4. 864-65) In 1994, she was checked by the Little Rock, Arkansas Police and on February 8, 1996, she was run by someone using FDLE's computers. (PCR4. 865) Mr. Wasserman was unable to find anyone at FDLE who ran the check. (PCR4. 865) However, Mr. Wasserman noted the check was run 2 days before CCR was told that Haines had been found. (PCR4. 865-67)

As its final witness, the State called Sam Rabin, the original trial prosecutor. (PCR4. 906) Mr. Rabin testified that he left the State Attorney's Office in February 1985. (PCR. 906)

Mr. Rabin stated that he took a sworn statement from Haines on June 26, 1984, during which Haines recanted an alibi she had previously provided for Defendant. (PCR4. 907-10) Mr. Rabin did not recall whether he had telephonic contact with Haines between the time of the statement and the time he left the State Attorney's Office but stated that he normally would have kept in contact with a witness like Haines. (PCR4. 910) Mr. Rabin did not believe that he was aware that Haines had any pending charges in Broward County. (PCR4. 911) If he had known of the

pending charges, Mr. Rabin would have attempted to document them. (PCR4. 911-12) Mr. Rabin would have then disclosed the information. (PCR4. 912-13)

Mr. Rabin would not have assisted Haines in those cases and did not promise her he would do so. (PCR4. 913) During the time he was a prosecutor, Mr. Rabin never asked a prosecutor in a different county to assist a witness, even though it was theoretically possible to do so. (PCR4. 913-14) He had never asked any witness in any case to testify in a particular manner for a benefit. (PCR4. 914) Mr. Rabin also denied ever threatening Haines. (PCR4. 914-15)

On cross, Mr. Rabin stated that he did not recall how Haines came to give her original sworn statement. (PCR4. 916-20) Mr. Rabin stated that the Harvey document was not part of Haines' FBI rap sheet and that he had no idea how or when they came to be attached. (PCR4. 921-24) Mr. Rabin did not recall ever knowing of a connection between Harvey and Haines. (PCR4. 924) Mr. Rabin did not recall ever seeing any documents about Harvey, but stated that the documents reflected that Harvey pled out to credit time served at her jail arraignment. (PCR4. 924-25)

On redirect, Mr. Rabin stated that the documents reflecting an arrest of Ronda Haines from before the murder was committed

was also resolved at the same time as the Harvey case. (T3. 943-44, 951) Mr. Rabin stated that he had nothing to do with the resolution of this matter. (PCR4. 944, 949) Mr. Rabin stated that his only awareness of Haines' history of arrests came from Haines' sworn statement. (PCR4. 944-46)

After all of the evidence was presented, the post conviction court indicated that it would be conducting a cumulative analysis when it issued its order. (PCR4. 955) In his written closing argument, Defendant argued that the gravamen of his claim was not that Haines was recanting her trial testimony but that the State had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose information regarding Haines. (PCR4. 540-72) He asserted that the material the State allegedly failed to disclose was a prostitution arrest of a Shannon Harvey. (PCR4. 549) He insisted that he had shown that this arrest was related to Haines because Haines testified that she had used that name as an alias and because a copy of a booking card for the arrest had been attached to Haines' rap sheet in 1996, even though no one could explain how or when the documents were attached. (PCR4. 550-51) He asserted that he could not have known of this information until 1997 but that he had raised an issue about it in 1996. (PCR4. 551-52) He insisted that this allegedly undisclosed information was

material because it could have been used to impeach Haines. (PCR4. 553) He insisted that he was entitled to relief when this information was considered cumulatively with his prior *Brady* claims. (PCR4. 553-66) Defendant further argued that he had demonstrated that the State knowingly presented false testimony from Haines. (PCR4. 567-70) He asserted that the false testimony was either that Haines had 11 open warrants for her arrest or that the State had not made any promises to her about her open cases. *Id.* Finally, he briefly claimed that Haines' alleged recantation of her trial testimony constituted newly discovered evidence. (PCR4. 570-71)

In its post hearing memo, the State asserted that any issue regarding any alleged failure to disclose information about a Dade county arrest under the name Shannon Harvey or any alleged knowing presentation of false testimony about the number of open warrants was not properly before the court as Defendant had not presented these claims in his motion and they were now procedurally barred. (PCR4. 623-27) The State further asserted that the claims that Defendant had actually raised in his successive motion for post conviction relief should also be denied because Defendant had not diligently looked for Haines. (PCR4. 628-29) It further asserted that Defendant had not proven a *Brady* violation regarding an alleged failure to

disclose any alleged Dade county arrests because no one testified that the person arrested was Haines, Defendant proved that others were using the name under which the person was arrested and evidence about the alleged arrest was not material. (PCR4. 629-31) It argued that Defendant had not proven that the State knew any testimony Haines provided about the number of open warrants was false and any allegedly false testimony about the number of open warrants was not material. (PCR4. 631-33) Further, Defendant failed to prove any element of a claim that the State knowingly presented false testimony about assisting Haines' with her Broward county cases. (PCR4. 633-36) Finally, the State asserted that Haines' alleged recantation did not constitute newly discovered evidence as it was incredible and would not probably produce an acquittal on retrial, even considered cumulatively. (PCR4. 636-45)

Defendant filed a reply, in which he asserted that he had not previously raised any *Brady* claim regarding Haines' alleged arrest under the name Shannon Harvey but insisted that he should have the claim considered because he had raised a different *Brady* claim and should not be required to pled his claims in writing if he was granted an evidentiary hearing on the other claim. (PCR4. 646-53) He asserted that he had proved the claim because he was not required to show that the arrest related to

Haines or because he had shown it was Haines' arrest because the booking card was attached to Haines' rap sheet in 1997 and the charge was disposed of at the time of another arrest. (PCR4. 653-58) Defendant also asserted that the State had changed its position on whether Haines actually had 11 pending warrants at the time of trial and that it had changed its position on whether Rimondi received money from the State. (PCR4. 658-62)

After considering the evidence and memos, the post conviction court denied the motion. (PCR4. 361-81) The court noted that the claim on which an evidentiary hearing had been ordered was a claim that Haines was recanting her trial testimony. (PCR4. 361) It discussed Haines' testimony, found her incredible and found Rabin credible. (PCR4. 365-75) With regard to the assertion that State suppressed evidence of the Dade county charges, it found that even if the information was in the State's possession, it would not create a reasonable probability of a different result because Haines had already been impeached about the assertion that the State was not seeking to prosecute her on the 11 arrests she claimed existed. (PCR4. 376-79) It noted that Defendant had presented nothing but speculation about *Brady* allegations regarding Rimondi. (PCR4. 379-80) Finally, it noted that Haines' incredible

testimony did not support the claim that the State knowingly presented false testimony. (PCR4. 380) This appeal follows.

SUMMARY OF THE ARGUMENT

Any issue regarding an alleged *Brady* violation based on any alleged failure to disclose alleged arrests of Haines was not properly before the lower court, as it was first asserted in a post hearing memorandum and is procedurally barred. Moreover, the record fully supports the denial of this claim, as Defendant prove no elements of this claim.

ARGUMENT

THE LOWER COURT PROPERLY DENIED DEFENDANT'S SUCCESSIVE MOTION FOR POST CONVICTION RELIEF.

Defendant asserts in both his issues that the lower court erred in denying a claim that the State's alleged suppression of alleged arrests for Haines violated *Brady*. He asserts that the lower court should not have considered his lack of diligence in presenting this claim, that it should have found that presentation of this evidence would have impeached Haines' testimony, that a determination of materiality focuses on a defendant's perceptions of the value of the evidence, that the lower court used an improper standard in determining materiality, that the lower court allegedly failed to do a proper cumulative error analysis, that the lower court should have considered alleged evidence of a desire for money by Rimondi as impeachment evidence, and that the lower court should have found that the State improperly paid Rimondi. Defendant then appears to assert that he did prove a *Brady* violation and is entitled to relief. However, the lower court properly rejected Defendant's claim.

Initially, the State would note that the lower court properly rejected this claim because it was not properly before it. In *Vining v. State*, 827 So. 2d 201, 211-12 (Fla. 2002), this Court made clear that it expects motions for post

conviction relief to be pled fully when filed. In *Hunter v. State*, 817 So. 2d 786, 796-97 (Fla. 2002), this Court found that a claim that was first presented in a post hearing memorandum was not properly raised.

Here, the claim that Defendant raised was not that the State had violated *Brady* by failing to disclose that Haines had prostitution arrests under the any name. Instead, in his motion for post conviction relief, Defendant claimed that Haines was recanting her trial testimony that Defendant made inculpatory statements to her, that the reason that she testified falsely at trial was that the State had pressured her and made promises to her concerning the disposition of her Broward prostitution charges, that the State did not disclose the pressure and promises and that the State knowingly allowed Haines to testify falsely at trial. (PCR2. 16-42) This was the claim at the *Huff* hearing and on the first appeal to this Court. (PCT2-2/21/96 at 1-69, Initial Brief of Appellant, Florida Supreme Court Case No. SC87438)

The fact that this Court understood that this was the nature of the claim is clear from this Court's opinion on that appeal:

> The first issue involves [Defendant's] claim that he is entitled to relief because a prosecution witness has recanted her trial testimony. This claim is based upon an affidavit executed under oath by prosecution

witness Rhonda Haines, who was [Defendant's] girlfriend at the time of the killing. In the affidavit that was appended to [Defendant's] 3.850 motion, Haines recants her trial testimony that [Defendant] confessed to killing the victim and that he told her some details of the killing. She also recants her trial testimony that no promises or threats prompted her testimony. She now alleges that an assistant state attorney pressured her for a "better" story and suggested facts to her and that she adopted those suggested facts as her testimony. She further states that the assistant state attorney arranged to have her outstanding prostitution charges in Broward County "disappear" in return for her testimony.

[Defendant] argues that he was entitled to an evidentiary hearing on this claim as the recanted testimony constitutes newly discovered evidence that establishes that he was erroneously convicted. The State asserts that Haines' factual allegations are disputed by prosecutor Sam Rabin's deposition, wherein Rabin states that he left the state attorney's office almost ten months before Roberts' case was tried. This, the State argues, disputes Haines' allegations that Rabin coerced or cajoled her trial testimony. Moreover, the State contends, Haines' affidavit does not meet the test set forth in *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991), because it probably would not "produce an acquittal on retrial."

We find that the trial court improperly denied this claim without an evidentiary hearing. Haines' recanted testimony qualifies as newly discovered evidence because "the asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'" *Id.* at 916 (quoting *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979)). Such claims are cognizable under rule 3.850, which provides that a motion for postconviction relief should only be denied without hearing "if the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850(d).

In this case, the State acknowledged the necessity of an evidentiary hearing before the trial

> judge. It would have been helpful for the judge to give reasons for his ruling, but the judge's order is silent as to why he denied the evidentiary hearing. We agree that this issue should be remanded for an evidentiary hearing. *See Johnson v. Singletary*, 647 So. 2d 106, 111 (Fla. 1994)(remanding case for limited evidentiary hearing to permit affiants to testify and allow appellant to "demonstrate the corroborating circumstances sufficient to establish the trustworthiness of [the newly discovered evidence]").

Roberts v. State, 678 So. 2d 1232, 1253 (Fla. 1996).

The nature of the claim did not change at the time of the first evidentiary hearing or on the appeal after denial of that claim. (PCR3. 491-573, Initial Brief of Appellant, Florida Supreme Court Case No. SC92496) Again, this Court noted that the nature of the claim was that Haines was recanting her trial testimony. *Roberts v. State*, 840 So. 2d 962, 966, 970, 971, 972 (Fla. 2002). The nature of the claim also did not change during the second evidentiary hearing, as Defendant himself set about proving that others were using the alias Shannon Harvey and that it was therefore impossible to know which records accurately related to Haines. (PCR4. 824-36)

Despite having never previously raised the claim, Defendant asserted for the first time in his post hearing memorandum that the claim was an assertion that the State failed to disclose a prostitution arrest under the name of Shannon Harvey from August 1984 and a prostitution arrest for Haines from February 1984. (PCR4. 549) In fact, Defendant's own assertions show that he

did not properly raise the claim before the post hearing memorandum. After the State asserted that the claim was being improperly presented in the post hearing memorandum, Defendant admitted that he had not raised the claim previously in his reply. (PCR4. 647-53) Instead, he asserted that the claim was based on information that was not disclosed until 1997.[3] (PCR4. 647-53, Initial Brief at 21) Since the motion was filed in 1996, it is clear that the claim had not been asserted.

Because this claim was raised for the first time in the post hearing memo, it is procedurally barred under *Hunter*. *See also Darling v. State*, 2007 Fla. Lexis 1233, *29-*30 (Fla. Jul 12, 2007). The lower court's rejection of the claim should be affirmed.

To the extent that Defendant may assert that the claim was proper as an amendment or expansion of the claim he actually raised based on newly discovered evidence, Defendant is entitled to no relief. The only time Defendant sought to amend his motion was in his reply post hearing memorandum. (PCR4. 653) That memo was filed in April 2005. (PCR4. 662) However, claims based on newly discovered evidence must be filed within one year of when the evidence could have been discovered through an exercise of due diligence. *Swafford v. State*, 828 So. 2d 966

[3] As will be argued more fully, *infra*, the record belies this assertion.

(Fla. 2002); *Mills v. State*, 684 So. 2d 801, 804-05 & n.7 (Fla. 1996); *Bolender v. State*, 658 So. 2d 82 (Fla. 1995). Moreover, the facts must be such that they were not known or knowable through an exercise of due diligence at the time a prior pleading was filed. *See Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994). This Court has held that a defendant must meet this standard in seeking to amend or add bases even to pending post conviction pleadings. *Vining*, 827 So. 2d at 211-13.

Here, even if Defendant's own allegations were not refuted by the record, they show that Defendant waited almost seven years after he had allegedly learned of the evidence to seek to amend his pleadings. Moreover, Defendant filed, and fully litigated, a third motion for post conviction relief in 2000, after he allegedly learned of the arrests but before he sought leave to amend. Under these circumstances, the claim is barred. *Swafford v. State*, 828 So. 2d 966 (Fla. 2002); *Mills v. State*, 684 So. 2d 801, 804-05 & n.7 (Fla. 1996); *Bolender v. State*, 658 So. 2d 82 (Fla. 1995); *Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994). The lower court's rejection of the claim should be affirmed.

To the extent that Defendant may argue that this case law does not apply because he is raising a claim of a *Brady* violation and *Brady* claims cannot be barred, he is entitled to

no relief. This Court has held that *Brady* claims are properly found to be barred, when the information was available in time to be raised in a prior proceeding. *Riechmann v. State*, 32 Fla. L. Weekly S135, S136-37 (Fla. Apr. 12, 2007); *Smith v. State*, 931 So. 2d 790, 805-06 (Fla. 2006); *Davis v. State*, 928 So. 2d 1089, 1113-14 (Fla. 2005). As such, the mere fact that Defendant is asserting a *Brady* claim does not show that the claim is not barred.

To the extent that Defendant may assert that *Banks v. Dretke*, 540 U.S. 668 (2004), changed the law such that *Brady* claims can never been found to be procedurally barred, this too is untrue. *Banks* did not purport to recognize a new fundamental constitutional right. Instead, the Court claimed it was merely applying preexisting precedent regarding *Brady* claims and the determination under federal law of the existence of cause to excuse a procedural default in a federal habeas proceeding, an issue that the United States Supreme Court has characterized as an issue of federal law that does not have to depend on a constitutional claim. *Murray v. Carrier*, 477 U.S. 478, 489 (1986).

Moreover, Defendant is incorrect regarding the United States Supreme Court's holding in *Banks* about what constitutes cause to overcome a procedural default. In *Banks*, the Court

based its finding that the defendant had shown cause on three factors:

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

Banks, 540 U.S. at 692-93 (quoting *Strickler v. Greene*, 527 U.S. 263, 289 (1999)). The Court then stated that it had not decided "whether any one or two of these factors would to sufficient to constitute cause" and was not doing so in *Banks*. *Id.* at 693 n.13 (quoting *Strickler*, 527 U.S. at 289). The language that Defendant relies upon is contained in a discussion of Texas' argument regarding cause after the Court had already found cause as discussed above. *Banks*, 540 U.S. at 696. Given that Defendant's argument is basically that he only needs to satisfy part (a) of the reasons the Court found cause and the Court directly stated that it was not deciding that question, Defendant's reliance on *Banks* is misplaced.

This is particularly true when one considers the fact that, in *Strickler*, the case the Court quoted regarding the issue of cause in *Banks*, the Court expressly noted "[w]e do not reach, because it is not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of

the documents in question and knew, or could reasonably discover, how to obtain them." *Strickler*, 527 U.S. at 288 n.33. Moreover, this Court has consistent found that a *Brady* claim is meritless when the defense was aware of the information before trial. *Riechmann*, 32 Fla. L. Weekly at S137; *Davis v. State*, 928 So. 2d 1089, 1116 (Fla. 2005); *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000)("Although the 'due diligence' requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.")(quoting *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000)).

Under these circumstances, any assertion that the fact that Defendant was raising a *Brady* meant that he did not have to assert this claim properly is without merit. The rejection of the claim should be affirmed.

Even if the claim had been properly presented below, Defendant would still be entitled to no relief. First, the claim is barred. Because Defendant's conviction has been final since 1988 and Defendant had litigated a motion for post conviction relief in 1989, Defendant had to show that the claim was based on either newly discovered evidence or a fundamental

change in law that applied retroactively. *Swafford v. State*, 828 So. 2d 966 (Fla. 2002); *Mills v. State*, 684 So. 2d 801, 804-05 & n.7 (Fla. 1996); *Bolender v. State*, 658 So. 2d 82 (Fla. 1995); *Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994). As noted above, there has been no change in law regarding *Brady* claims.

Moreover, the lower court's finding that Defendant lacked diligence in presenting this claim is amply supported by the record. *Swafford*, 828 So. 2d at 977-78. The record affirmatively shows that Defendant was aware of the information that he claims the State suppressed. In her sworn statement to Mr. Rabin taken on June 26, 1984, Haines states that she was arrested for prostitution on Eighth Street about three months earlier but that she could not remember an exact date. (PCR4. 340) Defendant had this statement prior to trial and used to impeach Haines at trial. (DAR. 2419-21) The arrest report Defendant admitted at the evidentiary hearing indicates that Haines was arrested on Eighth Street for prostitution on February 22, 1984, slightly more than three months before the statement. (PCR4. 162) Thus, the record reflects that the information about the February arrest under the name of Haines was disclosed. The only connection that Defendant showed between Haines and the August 1984 arrest under the name of

Harvey was that both of these charges were disposed of in the course of the same jail arraignment. (PCR4. 924-25) As such, had Defendant exercised diligence in seeking information regarding the February arrest, he could and should have discovered evidence about the August arrest years ago. *Riechmann*, 32 Fla. L. Weekly at S136-37. Under these circumstances, the lower court properly rejected the claim as barred. It should be affirmed.

Even if the claim had been properly presented below and was not barred, Defendant would still be entitled to no relief. To demonstrate entitlement to relief under *Brady*, a defendant must plead and prove: "[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Way v. State*, 760 So. 2d 903, 910 (Fla. 2000); *see also Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003); *Maharaj v. State*, 778 So. 2d 944, 953 (Fla. 2000). To show that prejudice ensued, a defendant must show that there is a reasonable probability that the result of the proceeding would have been different had the State disclosed the evidence. *Allen*, 854 So. 2d at 1260; *Way*, 760 So. 2d at 913. Moreover, this Court has held that a *Brady* claim is unavailing when the

defendant was aware of the existence of the evidence. *Riechmann*, 32 Fla. L. Weekly at S137; *Davis v. State*, 928 So. 2d 1089, 1116 (Fla. 2005); *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000) ("Although the 'due diligence' requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.")(quoting *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000)). Applying these criteria, the lower court properly rejected this claim.

Defendant failed to prove that the evidence was favorable to him. To be considered favorable evidence, the evidence must negate the defendant's guilt, negate the defendant's punishment or impeach a state witness at trial. *Maharaj*, 778 So. 2d at 953-54; *see also United States v. Bagley*, 473 U.S. 667, 676 (1985). Here, Defendant appears to assert that the arrests could have been used to impeach Haines by showing threats and promises made by the State. However, Defendant failed to prove that the arrests would have been admissible for such a purpose.

Generally speaking, witnesses may only be questioned concerning the number of their convictions for felonies and

crimes involving dishonesty or false statement. §90.610, Fla. Stat. If the witness received a withhold of adjudication or was not otherwise convicted, the witness may not be questioned about the subject. *State v. McFadden*, 772 So. 2d 1209 (Fla. 2000). While there is a limited exception for State witnesses under pending investigation or charges, that exception is based on the expectation of a benefit to the witness from the State. *Breedlove v. State*, 580 So. 2d 605, 607-09 (Fla. 1991). Before any information about criminal conduct may be used to impeach, it must be shown that the arrest is actually of the person who is being impeached. *See Cummings v. State*, 412 So. 2d 436, 438-39 (Fla. 4th DCA 1982)(requiring possession of a certified copy of judgment of conviction before question about number of priors admissible); *Peterson v. State*, 645 So. 2d 10 (Fla. 4th DCA 1994)(relaxing need for certified copies of convictions only because the defendant was not questioned about conviction that was asserted not to belong to defendant); *see also Sinkfield v. State*, 592 So. 2d 322 (Fla. 1st DCA 1992)(requiring proof that person named in prior conviction was defendant before prior conviction admissible).

Here, Haines testified that she was arrested numerous times and that she used the alias Shannon Harvey during some of those

arrests.[4] (PCR4. 465-67) However, she was unable to state when and where she was arrested. (PCR4. 465-67) Defendant presented evidence that others were using the Shannon Harvey alias when arrested. (PCR4. 826-36) As such, the mere fact that an arrest was under that name did not show that the arrest belonged to Haines. Defendant also did not present any evidence that either of the arrests about which he complains resulted in a conviction. Moreover, these arrests were not for felonies or misdemeanors involving dishonesty or false statement. (PCR4. 162-64) Even Haines could not say that anyone involved in these arrests knew of her connection to this matter or gave here any benefit. (PCR4. 467) All of the prosecutors stated they had no memory of this arrest but that they never gave Haines any benefit. The only evidence about the disposition of these matters was that they were disposed of in the normal course. (PCR4. 924-25, 943-44, 951)

Because Defendant did not show that a connection between Haines and the arrests, that the arrest resulted in a conviction for a felony or misdemeanor involving dishonesty or false statement or that Haines expected or received a benefit, he failed to show that the information would have been admissible.

[4] Haines testified that it was her routine practice to use false information about her name, date of birth and social security number when arrested. (PCR4. 465-67) Thus, her use of an alibi was not linked to her testimony in this matter.

However, inadmissible information does not support a *Brady* claim. *Wood v. Bartholomew*, 516 U.S. 1, 5-6 (1995); *Breedlove v. State*, 580 So. 2d 605, 607-09 (Fla. 1991). The denial of the claim should be affirmed.

In an attempt to show that this information could have been used, Defendant asserts that evidence about this arrest was consistent with Haines' assertions in her affidavit that she was threatened and pressured into testifying against Defendant. However, the lower court found that the affidavit was "primed by [Defendant's] investigator" and that Haines' testimony in support of the affidavit was not credible. (PCR4. 374) This Court defers to such factual findings and credibility determinations when they are supported by the record. *Darling v. State*, 2007 Fla. Lexis 1233, *22 (Fla. Jul. 12, 2007); *Arbelaez v. State*, 898 So. 2d 25, 32 (Fla. 2005)(quoting *Sochor v. State*, 883 So. 2d 766, 781 (Fla. 2004)); *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001).

Here, the record fully supports the findings. Haines and Walsh both testified that he worded the affidavit. (PCR4. 506, 818) In seeking to have the California court refuse to honor the certificate of materiality, Defendant used a threat of perjury to convince Haines to stick to the affidavit:

> And in the Florida Supreme Court pending, there is a passage there **where the State takes the position they**

> **won't charge her with perjury if she comes and testifies in accordance with the affidavit she's already given.** The prosecution out there had been threatening her which is also sort of adding to her concern about leaving her three kids and running the risk that something could happen to her because they've indicated even though she's entitled to immunity, **they're saying she's not entitled to immunity from perjury charges if she takes the stand and testifies contrary to the affidavit that she's already signed**.

(PCR4. 992)[5] Moreover, Haines admitted that she believed that Defendant was the father of her oldest child. She also repeatedly contradicted herself during her testimony. She first stated that the only true statement she ever gave was her original sworn statement to Sam Rabin, recanting an alibi she had previously given. However, Haines later admitted that Defendant had confessed to her that he was on Key Biscayne on the night of the murder, with a group of the same composition as the victims, and that he had a fight with a Latin male, like Mr. Napoles. Haines originally denied ever being in Florida again after she testified. Yet, she later admitted that she was in Florida later to get married. The length of that stay varied as Haines testified. Haines claimed that Mr. Rabin had pressured

[5] While Defendant has claimed that he was merely communicating the State's position to ensure that Haines would withstand cross examination, Defendant's statements to the California court are inconsistent with this position. The State's position has always been that the affidavit was false and Haines would be committing perjury by testifying consistent with the false affidavit. Defendant threatened Haines with perjury for recanting the false affidavit.

her to get her to add to her testimony. Yet, she later stated that this pressure amount to no more than two phone calls, during which Mr. Rabin merely stated that he believed she knew more than she had divulged. Haines claimed to have lied about Defendant confessing to her to get Mr. Rabin to leave her alone. However, telling a prosecutor that a defendant confessed to you is hardly a way to convince a prosecutor to leave you alone. Haines claimed to be living with the father of her youngest child and then claimed that he did not really live with her. Haines changed her testimony several times concern which prosecutor told her not to worry about her prostitution arrest. While Haines had claimed in her affidavit that the State had promised her assistance with her prostitution charges, she admitted at the evidentiary hearing that no such promise was ever made.

Because the record amply supports the determination that the affidavit was not credible, it does not bolster Defendant's claim.[6] The lower court should be affirmed.

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[6] Moreover, Haines testified that she was not threatened. (PCR4. 487) The alleged "promise" consisted of nothing more than telling Haines not to worry about her charges. (PCR4. 491, 528) More substantial statements regarding letting sentencing authorities know of a witness's assistance have been found too insubstantial to support a *Brady* violation. *United States v. Curtis*, 380 F.3d 1311 (11th Cir. 2004); *Tarver v. Hopper*, 169 F.2d 710 (11th Cir. 1999); *McCleskey v. Kemp*, 753 F.2d 877, 882-84 (11th Cir. 1985). Thus, even if Haines was credible, the

Assuming that the arrests did pertain to Haines, it cannot be said that the State suppressed the information. The February arrest was disclosed. The only evidence that the August arrest concerned Haines was that it was disposed of at the same time as the February arrest. Thus, any investigation of the February arrest would have revealed the August arrest. Because the evidence was available to Defendant at the time of trial, it cannot be said that the information was suppressed. *Maharaj*, 777 So. 2d at 954. As such, the denial of the claim was proper.[7]

Moreover, the lower court also properly found that any alleged suppression of this information would not have been material. Defendant claims that allowing the jury to know of Haines' alleged motive to curry favor with the State would have affected her credibility. However, Defendant presented evidence at trial that Haines had stated in her sworn statement that she had 2 prior arrests for prostitution, that she had 11

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claim was still properly denied.

[7] In an attempt to avoid the fact that the information was disclosed, Defendant urges this Court to consider the claim as one of ineffective assistance of counsel. However, a claim of ineffective assistance of counsel was not presented below and is barred. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003)(claims presented for the first time on appeal are barred); *Sireci v. State*, 773 So. 2d 34, 40 n.11 (Fla. 2000)(claim of ineffective assistance of counsel logically inconsistent with a claim of newly discovered evidence); *Vining*, 827 So. 2d at 211-13 (noting that claims are to be fully pled when raised and that successive, untimely motions for post conviction relief must be based on newly discovered evidence or a retroactive change in law).

outstanding warrants for her arrest and that the State was making no effort to prosecute Haines on these charges. (DAR. 2426-38) Defendant then used this evidence to argue to the jury that Haines had a motive to lie and that the changing nature of her testimony showed that she was lying. (DAR. 3061-79) Under these circumstances, information about these arrests would simply have been cumulative evidence to support the argument Defendant already presented. However, the failure to disclose cumulative information does not support a *Brady* violation. *State v. Knight*, 866 So. 2d 1195, 1202-03 (Fla. 2003).

Moreover, the lack of materiality of this cumulative evidence is particularly lacking when the matter is placed in the context of the trial. The jury was fully aware that Haines had given several versions of her knowledge of the crimes: first, providing Defendant was an alibi, then recanting the alibi, then adding that Defendant had made an inculpatory statement the morning after the murder and finally adding a statement placing Defendant at the crime scene with the victims and admitting to the crime. During the State's initial closing argument that covered 56 pages of transcript (DAR. 2940-96), Haines' testimony was only mentioned briefly. (DAR. 2991-92) In the State's 43 page final argument (DAR. 3087-3120), Haines' testimony was again only briefly mentioned. (DAR. 3093-95,

3107-08) Moreover, the State showed that Defendant's palm print was found on the roof of the victim's car. (DAR. 1627, 1647-48) Defendant had told Sean Brown on the evening before the murder that he carried a baseball bat in his car for protection. (DAR. 1731, 2930) Defendant initially told the police that he was at home at the time of the crimes and had not been on Key Biscayne for two month prior to the crimes. (DAR. 1644, 1649, 2800-01) However, Thomas McMurray met Defendant on Key Biscayne on the night of the murder. (DAR. 1749-54) Moreover, Off. Carlos Ortiz had given Defendant a traffic ticket on Key Biscayne on May 24, 1984, when Defendant was driving slowly past parked cars with his lights off. (DAR. 1768-75) Defendant had altered his appearance by shaving off his moustache, goatee and sideburns. (DAR. 1650, 1652, 1661, 1719, 2853-54) The handle of a bat was recovered from the trunk of Defendant's car. (DAR. 1659, 1930-31) Blood samples were also taken from Defendant's car. (DAR. 1932-34, 2493-94, 2498) Blood stains, consistent with Mr. Napoles's blood type, were also found on Defendant's shorts. (DAR. 2500-06) Moreover, Ms. Rimondi identified Defendant, his clothing and his car and described how Defendant murdered Mr. Napoles and raped her. (DAR. 2156-2227, 2232-35) Under these circumstances, it cannot be said that any failure to disclose the arrests created a reasonable probability of a different

result at trial. *Brady*. The denial of the claim should be affirmed.

Despite this evidence, Defendant suggests that the lower court erred in finding the arrest immaterial because the post conviction court made an error of law in failing to consider the materiality of allegedly suppressed information from the defense's perspective. However, it is Defendant who is seeking to induce an error of law through this argument. In *Wood v. Bartholomew*, 516 U.S. 1, 2 (1995), the Court reversed the Ninth Circuit for considering the materiality of a *Brady* claim from the perspective of the defense, stating that doing so was "a misapplication of our *Brady* jurisprudence."

In *Strickland v. Washington*, 466 U.S. 668, 695 (1984), the Court adopted the test for materiality of an alleged *Brady* violation as the test for prejudice in evaluating a claim of ineffective assistance of counsel. The Court then stressed that the evaluation of whether the standard was met was based on an objective analysis of how the claimed error would have affected a rational and lawful decisionmaker and identified the decisionmaker as the entity under the law entitled to determine guilt or sentence. *Id.* at 694-95. In *United States v. Bagley*, 473 U.S. 667 (1985), the Court adopted the *Strickland* formulation of the prejudice standard as the materiality

standard for *Brady* violations. Thus, the lower court properly did not consider the materiality of the alleged *Brady* violation based on Defendant's prospective. Instead, it properly judged the likely affect the alleged suppression of information would have had on a rational decision maker. It should be affirmed.

Despite Defendant's claims to the contrary, *Kyles v. Whitley*, 514 U.S. 419 (1995), did not alter that the appropriate standard looks at how a rational fact finder would have viewed the evidence. In fact, the Court discussed how the jury may have considered the evidence in finding materiality. *Id.* at 448 ("If a police officer thought so, a juror would have, too."); *Id.* at 448-49 ("While the jury might have understood that Beanie meant simply that if the police investigated Kyles, they would probably find the murder weapon, the jury could also haven taken Beanie to have been making the more sinister suggestion that the police 'set up' Kyles.") Thus, *Kyles* does not support the suggestion that *Brady* materiality is judged from the defense perspective.

Defendant next assails the lower court for commenting that disclosure of the alleged arrests of Haines "would not have resulted in a markedly weaker case for the prosecution and a markedly stronger one for" Defendant. (PCR4. 379) He asserts that the use of this language indicates that the lower court

applied an improper standard to determine whether the alleged failure to disclose these alleged arrests was material. However, this is not true. In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court used the same language in determining that the evidence that the state had failed to disclose was material. *Id.* at 429 ("Because the State withheld evidence, its case was much stronger, and the defense case much weaker, than the full facts would have suggested."); *id.* at 441 ("Disclosure of their statements would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense.") As the United States Supreme Court has used this same language in determining materiality, the lower court's use of this language does not show that it applied an improper standard of materiality. This is particularly true when one considers that the lower court recited the materiality standard in the language Defendant admits is proper at the beginning of its analysis:

> (4) that had the evidence been disclosed, a reasonable probability exists that the outcome of the proceeding would have been different. . . . The Supreme Court defined "reasonable probability: in White v. State, 664 So2d 242, 244 (Fla. 1995) as a "probability sufficient to undermine confidence in the outcome."
>
> Applying these principles, the court finds no Brady violation. Thus, the Court does not find that there is a reasonable probability that had the foregoing evidence been disclosed to the defense, the result of the proceeding would have been different. Kyles v. Whitley, 131 L Ed 29 490, 115 S Ct 1555(1995); United States v. Bagley, 473 US 667, 87 L Ed 2d 481, 105 S Ct 3375(1985).

(PCR4. 376-77) As the lower court stated the proper standard for materiality and the other language it used was also used by the United States Supreme Court, there was nothing incorrect about the use of the language. Defendant's claim to the contrary should be rejected.

Defendant finally assails the lower court for failing to consider the alleged cumulative effect of what he characterizes as his prior *Brady* claims. However, as this Court held the last time this matter was before it, the need for a cumulative analysis hinged on whether Defendant proved his new claim was not barred and had some merit:

> Finally, we agree with [Defendant] that our case law requires cumulative analysis of newly discovered evidence. In determining whether newly discovered evidence warrants setting aside a conviction, a trial court is required to consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial to determine whether the evidence would probably produce a different result on retrial. *See Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999); *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. *Lightbourne*, 742 So. 2d at 247. However, claims of cumulative error are properly denied where individual claims have been found without merit or procedurally barred. *See Rose v. State*, 774 So. 2d 629, 637 (Fla. 2000); *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999).
>
> [Defendant] raised a number of alleged violations of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), in the appeal of his first

> postconviction motion. *See Roberts v. State*, 568 So. 2d 1255, 1260 (Fla. 1990). We concluded that one allegation did not constitute a *Brady* violation because the alleged exculpatory evidence (witness statements that [Defendant] had been drinking and taking drugs prior to the offense) was equally accessible to the defense and the prosecution. *See Roberts*, 568 So. 2d at 1260. As to the seven other alleged instances of undisclosed exculpatory evidence, we concluded there was no reasonable probability that the result of the trial would have been different had the evidence been disclosed. *See id.* However, if the trial court determines on remand that Haines' testimony is credible, then the *Brady* claims raised in [Defendant's] first postconviction motion must be considered in a cumulative analysis. At this time, no relief is warranted on this claim.

Roberts, 840 So. 2d at 972. Here, the lower court denied the newly discovered evidence claim upon which this Court ordered an evidentiary hearing because Haines was not credible. (PCR4. 374) As noted above, this finding is supported by œompetent, substantial evidence. Moreover, the claim that Defendant is belatedly attempting to present in this appeal is not properly before this Court and is barred. Defendant also failed to show that the alleged *Brady* material was favorable or suppressed. Under these circumstances, there was nothing to cumulate. The lower court should be affirmed.

To the extent that Defendant is asserting that *Kyles* entitles him to a cumulative analysis without showing his new claim is not barred, this is untrue. In *Kyles*, the Court noted that it was necessary to evaluate each item that the State

allegedly withheld individually first to determine whether there was even a *Brady* violation. 514 U.S. at 436 n.10. Only once a defendant showed that the other elements of a *Brady* claim were met did the Court then consider the cumulative effect of the undisclosed evidence in determining materiality. *Id.* at 436. Here, the claim is barred and Defendant did not meet the first two prongs of *Brady*. As such, there was no reason to determine the cumulative effect of the information for materiality purposes. As such, the lower court properly rejected this claim and should be affirmed.

Even if a cumulative analysis was necessary, Defendant would still be entitled no relief. As seen above, this Court directed that the cumulative analysis was to concern Defendant's prior *Brady* claims. The prior *Brady* claims were based on the alleged withholding of:

> 1) notes in the state attorney's office indicating that the physician who treated Ms. Rimondi for the sexual assault believed she was "too calm"; 2) notes that Rimondi received money and was lodged in a hotel during the trial; 3) notes that shortly after her arrest for grand theft Rimondi contacted the prosecutor in [Defendant's] case to ask him to intercede in the juvenile case, 4) information concerning Rimondi's history of drug use; 5) information that rebuts the results of the rape-treatment kit tests introduced at trial; 6) statements by witnesses that prior to the offense [Defendant] had been drinking heavily and had used cocaine and marijuana; 7) notes indicating that state witness Campell has a poor reputation for truth telling, used drugs, and was a liar and a thief; and 8) information

> that one of the state's witnesses has a reputation for violence.

Roberts, 568 So. 2d at 1260. This Court found that there could be no *Brady* violation regarding item 6 because Defendant knew whether he had been using alcohol and drugs. *Id.* This Court rejected the remaining items because they were not material. *Id.* The Federal District Court found that the payments to Rimondi were "merely per diem expenses, normally paid to state witnesses, while she attended depositions." *Roberts v. Singletary*, 794 F. Supp. 1106, 1122 (S.D. Fla. 1992). It further found that Defendant's *Brady* claims were unsubstantiated and that the information was "either immaterial or already in [Defendant's] possession." *Id.*

Moreover, Defendant amply impeached Ms. Rimondi at trial. He had her admit that she had used cocaine, marijuana, Quaaludes (DAR. 2236-39, 2242) Defendant impeached Ms. Rimondi with inconsistent statements concerning her history of drug use, where she was living at the time of the crime, how she was supporting herself at the time of the crime, the position of the windows of Mr. Napoles's car, whether Mr. Napoles accompanied Defendant to Defendant's car when Defendant checked his license, whether the radio in Mr. Napoles's car was on prior to the crimes, whether Ms. Rimondi screamed when she saw Defendant kill Mr. Napoles, where the first rape happened, the number of blows

that Defendant struck, when she was first shown the gun and knife, and the type of knife. (DAR. 2239-47, 2250-52, 2253-56, 2260-63, 2277-79, 2284-85, 2285-87, 2294, 2297-99, 2300-04, 2308-12) He also pointed out that Ms. Rimondi had not disclosed the second rape for months after the crimes and provided inconsistent statements about whom she told and when she disclosed it. (DAR. 2329-35) Defendant also called Cherie Gillotte, Ian Riley and Tech. Steve Evans to show that Ms. Rimondi had made inconsistent statements about the crime. (DAR. 2689-90, 2700-01, 2724-27, 2730-32, 2739-41)

While Defendant relies upon Dr. Rao's disbelief of Ms. Rimondi, one witness is not permitted to comment on the credibility of another. *See Feller v. State*, 637 So. 2d 911, 915 (Fla. 1994). As such, this statement would not support a *Brady* claim. *Wood v. Bartholomew*, 516 U.S. 1 (1995)(inadmissible facts do not support a *Brady* claim). Moreover, Det. Vasquez testified that Ms. Rimondi was very calm and quiet when she was interviewed at the police station the morning of the murder. (DAR. 1634) As such, this claim was properly denied as meritless and does not support a cumulative error analysis. *Downs*. The claim should be denied.

Given the limited usefulness of the *Brady* material, the extensive cross examination of Ms. Rimondi at trial and the

other physical evidence, the added effect of the minimal changes in Haines' testimony does not show that Defendant is entitled to any relief even when the claims are considered cumulative.

Moreover, what Defendant is actually seeking to do in the guise of a cumulative analysis is to relitigate his prior *Brady* claim. As noted above, the *Brady* claim that Defendant originally litigated was that the State paid Rimondi. Having failed to prove that claim, Defendant now asserts that Rimondi could have been impeached not with having received money but with her desire to obtain money. However, this Court has held that it is improper for a defendant to attempt to relitigate a previously rejected claim on other grounds in the guise of a cumulative analysis. *Wright v. State*, 857 So. 2d 861, 868-69, 871 (Fla. 2003). As such, Defendant's attempt to change his original *Brady* claim and have the new claim considered as part of a cumulative analysis does not entitle Defendant to any relief. The lower court should be affirmed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **Martin J. McClain**, Special Assistant CCRC-South, 141 N.E. 30th Street, Wilton Manors, Florida 33334, this 24th day of July 2007.

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CERTIFICATE OF COMPLIANCE

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

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