IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 05-2265

CROSLEY A. GREEN,

Appellant/Cross-Appellee,

v. **CAPITAL POSTCONVICTION CASE**

STATE OF FLORIDA

Appellee/Cross-Appellant.

AMENDED REPLY BRIEF OF APPELLANT/CROSS-APPELLEE

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SUMMARY OF ARGUMENT ON CROSS APPEAL

The postconviction court has denied Crosley Green's guilt phase claims but vacated his death sentence and ordered a new penalty phase before a jury. Crosley Green appeals the lower court's denial of his guilt phase claims and seeks provisional review of those penalty phase claims which the court denied. The State appeals the court's vacatur of the death sentence.

At trial, the State urged, and the trial court eventually found, that Green previously had been convicted of committing an armed robbery with a firearm in New York. However, the evidence in postconviction showed that Green had pled to a lesser offense of simple robbery, and that the final disposition of the case was what was termed a Youthful Offender Disposition, which was not a criminal conviction according to the New York penal code. That fact was never brought to light at trial.

As the postconviction court found, "the Defendant's penalty phase counsel… made no efforts to verify the New York offense by obtaining the Defendant's court file from New York." The postconviction court found that counsel was ineffective under *Rompilla v. Beard*, and that prejudice had been shown for a variety of reasons: the New York offense was the only crime supporting the prior violent felony aggravator, this Court had struck an aggravator on direct appeal but expressly relied on the "three remaining aggravators" (of which the New York offense was arguably the most significant) in upholding the death sentence, and there was extensive information in the file which mitigated both the defendant's circumstances and called into question whether he had participated in the offense at all.

The State now argues that the mitigating information contained in the New York file is inadmissible hearsay and therefore should not have been considered by the postconviction court. That argument is simply wrong as a matter of settled law.

Although the postconviction court vacated Green's death sentence and ordered a new penalty phase, the court erred by finding that Green's plea to the lesser offense of

simple robbery resulted in a criminal conviction. This issue is not merely academic because the New York offense is the only basis for now asserting the prior violent felony aggravator.

The State relies entirely on some federal cases which hold that a New York youthful offender disposition can be treated as a prior conviction for federal sentencing guidelines purposes. In fact, some federal cases dealing with deportation law have concluded the opposite. Whatever their persuasive affect, if any, those cases are not controlling here.

New York law unequivocally states that a youthful offender disposition is not a criminal conviction. The judge in New York told Green that he did not have a criminal conviction.[1] In *Merck v. State*, this Court held that a juvenile delinquency adjudication could not support the prior violent felony aggravator. *Merck* itself dealt with an out-of-state offense, and the Court relied on the harmony between the sentencing schemes of the sending state and Florida. The explicit text of the New York statutes, the case law applying them, and the policy statements appearing in their commentary all establish that a New York youthful offender disposition is analogous to a juvenile delinquency disposition in Florida, and therefore cannot be used to support a violent felony aggravator.

This situation is not analogous to that where adjudication of guilt is withheld. In that case, the conviction exists but is deferred. In New York, a youthful offender disposition cannot be converted into a criminal conviction through subsequent misconduct by the defendant or other events.

The State appears to argue that seating a penalty phase jury is unnecessary. The State's argument is that, because of a few off-hand references during the penalty phase to the New York offense as a "robbery" instead of an "armed robbery," the fact that

[1] At a new penalty phase, Green presumably would be able to introduce Judge Doherty's statement and obtain a special instruction regarding New York law to the effect that Green did not have a criminal conviction.

Crosley Green pled to a lesser offense was raised and argued to the jury. That simply is false. The offense was repeatedly referred to as an armed robbery, and most importantly the PSI listed it as such and the judge so found.

SUMMARY OF ARGUMENT ON APPEAL

GROUNDS I AND II

The Appellant's claims are not procedurally barred. Claims involving ineffective assistance of counsel due to trial counsel's failure to investigate and obtain records, and the state's knowing failure to disclose information favorable to the defendant are cognizable in post-conviction proceedings.

The post-conviction court erred in concluding that the Appellant's Youthful Offender Adjudication in New York was a prior conviction for sentencing purposes. Under the laws of New York a youthful offender adjudication operates differently under New York law versus Florida law, and is not an actual conviction if the terms of the sentence are completed. In fact, at sentencing, the Appellant was advised by the Court that the finding of youthful offender relieved him of a criminal record in spite of the severity of the crime. Thus the postconviction court erred in turning the Appellant's youthful offender adjudication from the state of New York into a criminal conviction which is contrary to the laws of New York in which the sentence was rendered and federal law.

GROUNDS III

Trial counsel's investigation into possible mitigating circumstances was deficient under *Strickland*, *Wiggins*, and the *ABA*. The post-conviction court erred in concluding that the ten hours of investigation and preparation was sufficient to provide the Appellant with the constitutional guarantee of effective assistance of counsel. During the post-

conviction proceedings, a more accurate and complete picture of the Appellant's background was presented to the court. This case is not an example of more being better or simply different mitigation but still the same during post-conviction because trial counsel failed to present any portions of the testimony that was presented during the post-conviction proceedings. The Appellant's jury did not learn of the extreme levels of poverty, family violence, parental neglect, lack of nurturing environment, alcoholism, or sibling rivalries instigated by the mother and grandmother that the Appellant endured during his formidable years or the kinder side of the Appellant in loving his handicapped sister. Deficient performance was established through the testimony of the Appellant's siblings, expert testimony by Marjorie Hammock, and Professor David Dowe.

GROUND IV

The states argument is unresponsive particularly to the issue presented to this Court for review. The issue before this Court is whether the postconviction erred in rejecting the newly discovered evidence as to the recantations of Sheila Green and Lonnie Hillery. The projected argument as to the evidence the state would present to a new trial jury regarding the physical evidence is a matter for a jury and the state's attempt to have this court adjudicate the weight of the mtDNA results, which can not be reviewed by the Appellant because of the state's consumption of the physical evidence without a court order, in effect denies the Appellant of due process of law and a fair trial.

GROUND V

The state waived its right to assert a procedural bar as to this issue at the evidentiary hearing. This issue was presented to the postconviction court, responded to by the state, admitted into evidence without objection by the state, and addressed on the merits by the postconviction court. Thus this issue has been properly preserved for review by this Court and is not procedurally barred.

GROUND VI

The postconviction court erred in finding that trial counsel was not deficient for failing to offer impeachment testimony as to Jerome Murray, a key prosecution witness. At the evidentiary hearing, Jerome Murray asserted his Fifth Amendment right against self-incrimination. However, certified copies of Mr. Murray's criminal convictions were introduced during the evidentiary hearing during Mr. Murray's testimony. Trial counsel was ineffective in providing any impeachment evidence as to Mr. Murray during the Appellant's trial which was argued in Mr. Green's postconviction evidentiary closing.

GROUND VII

The state merely reiterates the evidentiary court's summary denial order. However, the state has failed to respond to the primary issue of whether the postconviction court was correct in concluding that cross-race identification expert testimony was barred at the time of the trial proceeding which is contrary to this Court's determination that the introduction of this evidence is discretionary by the trial court.

GROUND IX and X

The evidentiary court erred in denying the Appellant the opportunity to develop the claim of juror bias and recantation evidence of Tim Curtis at the evidentiary hearing.

ARGUMENT

The undersigned relies on the facts and arguments set out in Appellant's Initial Brief and Petition for Writ of Habeas Corpus with regard to all matters not specifically addressed herein.

ARGUMENT ON CROSS-APPEAL

The Court Did Not Err in Vacating the Death Sentence

The Hearsay Argument

At trial, the State urged, and the trial court eventually found, that Green previously had been convicted of committing an armed robbery with a firearm in New York. However, the evidence in postconviction showed that Green had pled to a lesser offense of simple robbery, and that the final disposition of the case was what was termed a Youthful Offender Adjudication by the New York penal code, which was not a criminal conviction. Trial counsel had not sought the New York file. The postconviction court denied Green's guilt phase claims, but vacated the death sentence and ordered a new penalty phase before a jury because of the false evidence about the New York offense in light of *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005).

The postconviction court also found that:

> Had Mr. Parker received the New York file, he would have found information regarding the crime to which the Defendant [pled], and would have found information that could have mitigated the New York conviction. For instance, there was a substantial identification question, the co-defendant's case was nolle prossed for lack of evidence, and the Defendant was in New York as a migrant worker with no family or friends to help him obtain a release from jail. There is information in the New York file that the Defendant pled to get out of custody and resolve the case. There was a real question if the Defendant was ever involved in the New York crime.

PC-R XXIV 4076-7.

The New York file contains a Parole Report prepared by Officer V. L. Stevenson which described the circumstances of the offense this way:

> This lad is now confined as a result of his allegedly participating in the robbery of a service station while armed with a weapon. The instant offense is alleged to have

> occurred on 4/18/76 when the Kendall all night gas station located on West Avenue in Albion, New York was robbed of about $70. This youth and his co-defendant Hardy supposedly robbed the station but this lad has denied from the beginning that he [had] any involvement whatsoever in the crime. According to the youth, Hardy was released on bail and shortly thereafter was arrested with two other individuals for an additional robbery at which time he was placed on probation for a period of five years. Strangely enough, in this youth's probation report, it states that the district attorney felt that the evidence against co-defendant Hardy was insufficient for the Grand Jury to return an indictment and dismissed all charges against him. There are no real details of the instant [offense], there are never any indications that he was identified by anyone and he apparently was finally persuaded to plead guilty after spending about ten months in County Jail and being a migrant in the area, he had no one to testify in his behalf. He still denies any knowledge of the offense whatsoever and from the writer's point of view, it is somewhat believable. He had only been known to the courts on one other occasion.

PC-R Vol. XV 2246-49.

The State now argues that the report was inadmissible. On the contrary, hearsay evidence is admissible in a penalty proceeding, subject to the defendant's due process and confrontation rights. Fla. Stat. 921.141(1); *Perri v. State*, 441 So.2d 606 (1983). During the penalty phase of a capital case, "[a]ny such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." *Evans v. State*, 838 So.2d 1090 (Fla. 2002); *see*, *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam) (hearsay rule cannot be used to exclude mitigation) cited in *Garcia v. State*, 816 So.2d 554 (Fla. 2002). A criminal defendant has the right in all

sentencing proceedings to offer "submissions and evidence . . . which are relevant to the sentence." Fla. R. Crim. P. Rule 3.720(b): The court shall entertain submissions and evidence by the parties that are relevant to the sentence. That includes information about out-of-state offenses. *Messer v. State*, 403 So.2d 341 (1981); *Justus v. State*, 438 So.2d 358 (1983). The State's argument is incorrect.

The "armed" versus "simple" robbery argument.

Both here and in its answer to Arguments I & II, *infra*, the State offers an argument that constitutes a straightforward disagreement with the postconviction court's findings and which flatly misreads the record. The State's reading supposes that the true status of the New York offense was known at trial and was fairly litigated in open court. That simply is not the case. That there was an issue about whether or not the offense constituted a criminal conviction was known to the prosecutor and no one else. Even if the prosecutor had an honest disagreement with the New York authorities about whether he was entitled to treat the offense as a criminal conviction in his case, the existence of such a dispute was never brought to the attention of defense counsel or the sentencing court. Instead, the prosecutor stood silent when the judge received and reviewed the Florida PSI, which under the category "juvenile record" listed "none," and listed the New York offense as an armed robbery under "adult record." Defense counsel did not know enough to raise any issues about the level of the offense or whether there was an actual conviction because he did not even make an attempt to obtain the New York file. While he argued that Green was young at the time and the offense had happened a long time

ago, that was a far cry from arguing that the offense should not have been considered at all, or that the charge had been reduced as part of a plea bargain.

The State also quotes a number of times on the record that the New York offense was referred to as a "robbery" as opposed to an "armed robbery," evidently as an inference that an issue about level of the offense was litigated. That is not the case. The offense was repeatedly referred to as an armed robbery, and most importantly the PSI listed it as such and the judge so found. Dir. ROA Vol. XVI 2840 (sentencing order). Taking the prosecutor at his word, neither he (because the New York authorities refused to turn over the file), nor defense counsel nor the judge nor the Florida DOC official who prepared the PSI knew that the charge had been reduced to a lesser offense.

ARGUMENTS ON APPEAL

GROUNDS I & II

The procedural bar argument.

Beginning at page 31 of the answer brief, the State urges that Appellant's argument about whether or not the New York offense was a conviction under Florida's death penalty statute is somehow procedurally barred. The State's argument conflates claims with arguments. The actual claims for relief are that counsel provided ineffective assistance through his failure to obtain the file and that the prosecutor failed to disclose what he knew. They are cognizable in postconviction proceedings and there is no procedural bar.

Whether Green had a criminal conviction as a result of his New York Youthful Offender Adjudication.

If the offense was not a conviction at all, then the prior violent felony aggravator felony was predicated on nothing. The prosecution would not be able to rely on this aggravator at resentencing. The postconviction court concluded that Green's New York youthful offender adjudication based on his plea to a lesser offense comparable to strong armed robbery was still a conviction for purposes of the Florida death penalty statute. The court erred in doing so. The facts underlying this issue are undisputed, so the legal issue is subject to de novo review.

Fla. Stat. 921.141(5) (b) limits the sentencing court's consideration to those prior felonies which resulted in an actual criminal conviction. § 720.35(1) of the New York Penal Code now reads:

> A youthful offender adjudication is not a judgment of conviction for a crime or any other offense, and does not operate as a disqualification of any person so adjudged to hold public office or public employment or to receive any license granted by public authority but shall be deemed a conviction only for the purposes of transfer of supervision and custody pursuant to section 259(m) of the executive law.

The last clause of the act was added by way of an amendment in 1992:

> Subdivision one of this section was amended in 1992 at the request of the State Division of Probation and Correctional Alternatives to deal with a problem encountered in permitting youthful offenders to reside out-of-state while under supervision of the authorities of the sister state pursuant to the terms of the interstate compact for supervision of such persons. The clause at the end deeming the adjudication as a conviction for purposes of transfer and supervision of custody

> was added to overcome the technical objection raised by our sister states so that New York Youthful Offenders will be accepted there for out-of-state supervision in cases where such transfer is in the best interest of a youth's successful adjustment to a law-abiding future. The compact provides that it applies to persons "convicted of an offense" (see Executive Law, Sec. 259-m[1]), and some of the compact states had taken the position that a New York youthful offender does not fulfill the status of one who has been convicted for this purpose; because, although there was a conviction, the law provides that it has been "vacated" and replaced by the youthful offender finding (see CPL Sec. 720.20[3]).

Commentary to NY Crim.Pro.L. § 720.35 by Peter Preiser.

At trial, the State relied on a "Criminal Registration Form" which Green had filled out in order to obtain identification so that he could get a job. As the postconviction court found:

> Bob Rubin testified that he was a parole officer with the State of Florida Department of Corrections from 1977 to 1989. Mr. Rubin testified that he supervised the Defendant's parole on armed robbery that originated from the State of New York. . . . Mr. Rubin further testified that on March 2, 1978, the Defendant came to his office and advised that he needed some form of identification for employment purposes because he could not secure a birth certificate or any other substantial form of identification… Mr. Rubin testified that he suggested to the Defendant to register as a felon with the Brevard County Sheriffs Office, then he would be able to obtain necessary identification documents… The State introduced into evidence a "Criminal Registration Form" which indicated that the Defendant was a convicted felon…

PC-R Vol. XXIV 4064-77. The State has not shown and cannot show that a judge or anyone else acting in a quasi-judiciary capacity ever altered the original terms of Green's youthful offender adjudication. The fact that Mr. Rubin suggested that Green sign a

particular form, and that Green acted on that suggestion, was not an adjudication or conviction of anything. Hypothetically, for someone whose supervision was transferred after the 1992 amendment may support an argument that a criminal conviction becomes one by operation of statute. In any event, nothing of the sort happened here. The amendment was not in effect at the time Green transferred probation nor was it in effect at the time of his trial and sentence on the present charges. According to New York, by statute and repeated case interpretation, Green did not have a criminal conviction.

The State has not cited any New York state case law to support its argument. There is none. Rather, the state has cited a number of federal cases from the Second Circuit US Court of Appeals, which has interpreted the federal sentencing guidelines so as to count a New York youthful offender adjudication as a prior offense. The postconviction court also cited a federal district court case out of Virginia holding the same way with regard to the federal career offender statute. Whatever the persuasiveness of those cases may or may not be, they are not controlling authority either in the New York state courts or here.

The postconviction court accepted the State's argument that: Green was convicted of an adult sanction . . . AB 38. People are not convicted of sanctions. People are found to have committed acts which may or may not result in an adjudication of guilt and a felony conviction as the case may be, and then sanctions are imposed. The postconviction court also followed the State's argument that *State v. Richardson*, 766 So.2d 1111 (Fla. 3d DCA 2000) held that a youthful offender *conviction* is an adult

sanction, not a juvenile sanction. (Emphasis added). This is an incorrect citation. In fact, the language in *Richardson* is that a youthful offender *sentence* is an adult sanction…not a juvenile sanction… *Richardson, id.* 1113 n.1 (emphasis added). The State's argument is a bit like saying that someone is convicted of ten years in prison. One might be sentenced to prison for ten years as the result of a conviction, but the sentence is not the conviction.

A youthful offender adjudication in New York is not the same thing as a youthful offender conviction in Florida. "Florida's Youthful Offender Statute (Fla.Stat.Ann. § 958.04) does not operate in similar fashion to New York's CPL 720.35[1])." *People v. Arroyo*, 179 A.D.2d 393, 577 N.Y.S.2d 843; *People v. Cahill*, 190 A.D.2d 744, 745, 593 N.Y.S.2d 537. *Merck v. State*, 664 So.2d 939 (Fla. 1995) itself dealt with an out of state offense. There, the Court relied on both the Florida statutory scheme and that of the sending state in deciding that the out of state case could not be used to support a prior violent felony aggravator. Likewise, the policy of New York is clear: a defendant who receives a youthful offender disposition is not to be treated as if he has a criminal conviction. Vacation of a conviction subsequent to a youthful offender adjudication has the practical and legal effect of a reversal. *People v. Floyd J.*, 462 N.E.2d 1194 (N.Y. 1994). "The benefit in being adjudicated a youthful offender is that there is no conviction; a 'Y.O.' adjudication may not be used to enhance the sentence for a future conviction, and the youth need not report the incident in the future if asked whether he or

she had ever been convicted of a crime." *People v. Evelyn J.*, 11 Misc.3d 277, 811 N.Y.S.2d 881 (N.Y.Sup. 2005).

Also, a New York youthful offender disposition is not analogous to one involving an adult defendant where the court withholds adjudication of guilt as a condition of probation. Cf. *McCrae v. State*, 395 So.2d 1145, 1154 (Fla.1980). In that situation, a defendant who successfully completes his conditions of probation must still move to have his record expunged before his civil rights are restored. He has a criminal record at least until that is done. The term "vacated" is not used in pronouncing sentence, nor is he advised that he does not have a criminal record. Here, consistent with applicable state law, Green was told by the judge in New York that "the conviction of robbery in the third degree is vacated and the finding of youthful offender is made . . . what that does is relieve you of a criminal record. You now have no criminal record in spite of the fact that this was a serious crime."

In New York, a youthful offender disposition cannot be converted into a criminal conviction by the defendant's subsequent conduct. *People v. Gary O'D*, 93 A.D.2d 841, 461 N.Y.S.2d 65, N.Y.A.D. 2 Dept., 1983 (While trial court was authorized to revoke youthful offender's sentence of probation and to impose amended sentence for offender's probation violations, court was not empowered to convert youthful offender adjudication of burglary into judgment of conviction; citing McKinney's CPL §§ 410.70, subd. 5, 720.35, subd. 1; McKinney's Penal Law § 60.01).

The federal immigration courts have determined that a New York Youthful Offender disposition is not a conviction for purposes of deportation. *See*, *In re Miguel Devison-Charles*, 22 I & N Dec. 1362, 2000 WL 1470461 (BIA 2000). In *Devison*, the Board of Immigration Appeals considered whether an adjudication as a "youthful offender" under the New York criminal code could nonetheless constitute an aggravated felony conviction as defined by the INA. The Board compared the New York scheme to the Federal Juvenile Delinquency Act ("FJDA"), 18 U.S.C. 5031-42, and concluded, "[T]he New York procedure under which the respondent was adjudicated a youthful offender ... is sufficiently analogous to the procedure under the FJDA to classify that adjudication as a determination of delinquency, rather than as a conviction for a crime." *Devison* at 1367. The Board drew a critical distinction between a finding of delinquency, which involves "status" rather than guilt or innocence, and deferred adjudication or expungement. *Id*. at 1371. Deferred adjudications constitute convictions under the INA while findings of delinquency do not:

> [J]uvenile delinquency and youthful offender adjudications are not akin to expungement or deferred adjudication procedures. Under the former, proceedings are civil in nature and the adjudication of a person determined to be a juvenile delinquent or youthful offender is not a conviction ab initio, nor can it ripen into a conviction at a later date. In the case of an expungement or deferred adjudication, the judgment in the criminal proceeding either starts out as a "conviction" that can be "expunged" upon satisfactory completion of terms of punishment and petition to the court, or as a judgment that is deferred pending similar satisfaction of conditions of punishment. In either case, however, neither expungement nor deferral can be presumed, and the original judgment of guilt

> may remain, or ripen into, a "conviction" under state law. This is a dispositive difference, because a juvenile adjudication cannot become a conviction based on the occurrence or nonoccurrence of subsequent events.

Devison at 1371-72, cited in *Uritsky v. Gonzales*, 399 F.3d 728 (US 6th Cir.2005):

> In Matter of *Devison*, *supra*, we found that an adjudication of youthful offender status pursuant to N.Y.Crim. Pro. Law' 720 does not constitute a conviction under section 101(a)(48)(A) of the Act because it is analogous to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act, 18 U.S.C. 50131-5042 ("FJDA"), in several ways, the most notable being that, once an individual is determined to be a youthful offender under New York law, his or her conviction is vacated. Because the vacation of the conviction does not depend on the individual's future good behavior, we found that the adjudication is not an expungement or other rehabilitative act.

Uritsky at 730-31.

ARGUMENT III

The postconviction court erred in rejecting Green's claim of ineffective penalty phase assistance based on counsel's failure to investigate and present available mitigation.

Trial counsel spent about ten hours preparing for the penalty phase, and the entire penalty phase defense occupies about twenty pages of the record. Counsel thought that a penalty phase would not be necessary, and did not begin to prepare for one until after the verdict of guilt. There were only a few weeks between the verdict and the penalty phase, and the record shows that the court originally had intended to begin the penalty phase immediately after the verdict. An expert attorney who testified at the evidentiary hearing termed counsel's effort as grossly inadequate. By contrast, collateral counsel presented

extensive and detailed background mitigation which would have humanized Crosley Green by presenting evidence of the 'compassionate or mitigating factors stemming from the diverse frailties of humankind.'

Trial counsel presented the bare facts that Crosley Green's father had killed his mother and then himself, that Green had once saved a friend from drowning, and that Green had a son. There was no picture presented about the defendant's life during his formative years. Although the lower court ultimately denied relief on this claim, the judge did provide a detailed description of some of the evidence presented at the postconviction hearing:

> Hamp Green, the Defendant's…brother…testified that the Defendant was one of nine children, and they grew up in an impoverished household where the children shared beds and clothing, as well as worked in the orange groves as migrant workers. Hamp explained that both of his parents worked outside the home and consequently, Hamp's sisters had the responsibility of taking care of the family, including cooking meals. Hamp testified that they had to scrounge for food on occasion. Hamp testified that he witnessed physical fights between his parents, and he hid underneath the bed for safety during domestic violence incidents. Hamp testified that his father drank alcohol which contributed to fights within the family. Hamp further testified that his mother severely disciplined him and the Defendant with switches, extension cords, and water hoses, leaving welts and bruises. Hamp also described being locked in the closet by his mother as a form of discipline. Hamp discussed that his mother favored some of the siblings more than others and she would lavish her attention upon those children, but not the Defendant and Hamp. Hamp testified that the Defendant was not in Florida when his parents died, but incarcerated in New York. Hamp further testified that the Defendant's trial attorney never contacted him about providing this mitigation evidence, but

Hamp testified that he would have provided this information if he had been asked.

Shirley Green is the Defendants older sister, by approximately seven years. Shirley Green and the Defendant have the same biological father, Booker T. Green, but different biological mothers…Shirley described the impoverished lifestyle of the Green family. Shirley testified that other than one place where they lived, all of the houses did not have running water. Shirley said they were cold at night. Shirley explained that the Defendant had to go without food on occasion, but he did not complain. Shirley testified that the Defendant would watch as she stole food. Shirley said the family would eat rabbits and squirrels. Shirley also testified to one of their houses catching on fire, and the Defendant following his father into the burning house. Shirley also testified that she cared for the Defendant and the other siblings because her parents were absent from the household. Shirley described the Defendant carrying clothes back and forth to their grandmother's house for cleaning. Shirley also described the Defendant carrying boiling water from his grandmother's house so that they could bathe themselves and their siblings. Shirley testified that their father would punish the Defendant, and that the Defendant's mother did not kiss or hug him. Shirley testified that the Defendant witnessed her breast-feeding their siblings, O'Connor and Sheila. Shirley testified that her father was an alcoholic, and the Defendant would try to wake him after he passed out from drinking alcohol to excess.

Shirley described the Defendant as lonely and quiet. Shirley Green testified that Mr. Parker only spoke with her ten minutes regarding testifying after the Defendant was convicted…

Selestine Peterkin testified that they lived in small houses growing up, and the house that caught on fire was due to the Defendant's father knocking over the heater when he was drunk. Selestine testified to grabbing her father off her mother one time during a domestic violence incident. Selestine testified to witnessing her parents arguing. Selestine also testified to her mother acting as the disciplinarian in the household spanking the children with extension cords and paddles…

Marjorie Britain Hammock, currently a faculty member at Benedict College in South Carolina, testified at the Defendant's evidentiary hearing. Ms. Hammock testified that she was a former mental health consultant and chief of social work services at the Department of Corrections. Ms. Hammock currently works in the area of bio-psychosocial assessment, which helps to explain all aspects of human behavior, and she has been involved in twenty-one death penalty cases since 1999. Ms. Hammock testified that in conducting a bio- psychosocial assessment of the Defendant, she reviewed health, school, and incarceration records of the Defendant and his siblings. Ms. Hammock interviewed the Defendant, his siblings, and other members of his family. In her opinion, Ms. Hammock believes that a bio-psychosocial assessment should be conducted no less than one year before trial, and can take years to complete.

Ms. Hammock testified to a pattern of exposure to violence, both in the home and the community. Ms. Hammock testified that the Defendant assumed the role of protector and peacemaker in the family. Ms. Hammock testified that the Defendant had decent school records in his early years until he was relocated to a desegregated school and there he was in conflict with the administration, his peers, and the community. Ms. Hammock testified that the Defendant assumed the responsibility for his parents' deaths, because he was not home at the time. Ms. Hammock testified that the Defendant saw his self-appointed role as protector of his mom, and "calming down his father."

In conducting the interviews, the family members discussed with Ms. Hammock violence in the Green home to varying degrees… According to Ms. Hammock, the Defendant "saw his role and mission as being really important in contributing to the income of the family." Ms. Hammock found all of the Green children to be "polite individuals" and had been taught to "behave...in an appropriate and proper way" toward their elders. Ms. Hammock testified that some of the siblings resented the preferential treatment the others received, as well as their mother's hostility directed toward their mentally-challenged sister, Rosemary.

Ms. Hammock testified that the Defendant told her that he used alcohol at the age of twelve, and subsequently

> expanded his substance abuse to include marijuana, cocaine, and LSD. Ms. Hammock testified that various members of the Green family described their father as "being violent only when he was drinking." Ms. Hammock testified that the Green family suffered "overwhelming and prevailing abuse and neglect" which had "a lasting impact on the functioning of the entire family." Ms. Hammock noted that "some have been successful and others have not." Ms. Hammock testified that early childhood exposure to violence creates problems in a child's development. Ms. Hammock testified that this manifested itself in the Green family by four members being incarcerated; members who have alcohol abuse and dependence, and those members who failed to complete high school, failed to have satisfactory work histories, and suffered from real emotional disorders. On cross-examination, Ms. Hammock testified that she received copies of family members' depositions in order to assist her in assessing the family's background… Ms. Hammock spoke with each family member for approximately two to five hours. Ms. Hammock testified that all of her findings in the Defendant's bio-psychosocial assessments were substantiated by family interviews and records.

PC-R Vol. XXIV 4077-85 (record citations omitted). Essentially none of this was presented at trial. Also, according to Shirley Green, Crosley was the one family member who was close to sister, Rosemary, who suffered multiple disabilities including mental retardation and seizures. The rest of the family verbally abused Rosemary, and she had no friends. PC-R Vol. IV 626. Crosley alone was very kind to Rosemary; he had a way of making her laugh. It's the way he would tickle her. She would burst out and just laugh and Papa [Crosley Green] laughing…you see a teardrop out of his eye sometimes. *Id*. The court did not address David Dow's testimony about the ABA guidelines and trial counsel's performance.

The court then went on to analyze the evidence. The court cited three cases about the double-edged sword theory. The court denied relief because it found that the testimony of these witnesses would not have outweighed the aggravating factors found in this case. *Id*. That analysis and the court's conclusions are subject to de novo review.

Defense counsel's investigation of mitigation was deficient when considered in light of *Wiggins* and the ABA guidelines.[2] That point was made at some length in the initial brief, supported by David Dow's testimony. In considering whether counsel's investigation was deficient, reliance on strategy or double edged sword arguments is misplaced. *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy. *Wiggins* at 2538 (citing *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052). In other words, there is a distinction between two edged sword arguments which are relied on to refute allegations of deficiency and those relied on to address ultimate prejudice. The former must considered in light of the adequacy of counsel's overall investigation.[3]

In particular, the court's observation that Shirley Green White had given an inconsistent statement about the quality of the Green family's life in a 2002 deposition

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[2] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

taken in preparation for the postconviction evidentiary hearing was simply irrelevant to the deficiency prong.[4] Its relevance to the prejudice prong depended on whether the court disbelieved the accuracy of the information presented at the evidentiary hearing regardless of who presented it, and there is no indication that the court did. That calls into question the court's conclusion that if Shirley Green had been called to testify at the penalty phase, she would have been exposed to cross-examination with her prior inconsistent statements. She hadn't made any at the time of the trial. And she *was* called to testify. She was the one who testified about the murder/suicide. Parker hadn't asked her anything about Crosley Green's background in the few minutes he talked to her. Her entire penalty phase testimony comprises a little over six pages of trial transcript during which she was asked nothing about family background other than that the father murdered their mother and then killed himself. ROA XIII 2219-26.

Likewise, if counsel thought the Celestine Peterkin's behavior was inappropriate; his decision not to call the witness cannot be excused by calling it a strategic decision if his investigation into possible mitigation (and alternate ways of presenting it, such as through other witnesses or a mitigation investigator) was itself deficient.

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[3]Trying to crawl out of the hole he dug himself into is not strategy.

[4]The court's references were to Exhibit EE pages 98, 108, 111-113. In her deposition she denied that the children were beaten, then agreed that they all got whupped on, then said that the beatings were not out of the ordinary. Whether there was any inconsistency may be a matter of subjective interpretation.

The postconviction court did make some adverse credibility determinations about some of the witnesses presented at the evidentiary hearing, but the court never expressed a doubt that the information contained in Ms. Hammock's testimony was essentially true. From the foregoing it appears that the court erred by conflating the performance and prejudice prongs.

ARGUMENT IV

Newly discovered evidence based upon the recantation testimony of Sheila Green and Lonnie Hillery.

The Defendant generally relies on the initial brief with regard to this argument. At the evidentiary hearing the State offered mtDNA evidence and the testimony of a new witness, Layman Lane, that were the result of an FDLE investigation conducted in 2000 because of some public allegations questioning the reliability of the original trial. If not for the theory that a postconviction judge should mentally stage a future trial and decide what a jury would make of it, that evidence would have no connection with anything alleged or argued in these proceedings. It is not intrinsically responsive to anything the claims presented by the defense in postconviction or to anything particular point presented by either party at trial.

The State then draws an analogy between this proceeding and a resentencing hearing, which is a totally new proceeding. That is a bad analogy, but it still proves the point. It is a bad analogy because the role of a jury in sentencing is merely advisory, whereas the evidence being offered here by both sides as being newly discovered goes to

guilt or innocence. As such it undeniably implicates the defendant's right to have the facts of his case determined by a jury, not a judge. The results of mtDNA evidence in particular are relevant to identity which is an essential element of the crime which must be proven to a jury beyond a reasonable doubt in any criminal prosecution. If a defendant prevails at a postconviction hearing on a claim of newly discovered evidence, then the most that will happen is that his case will go back before a jury. Especially where the newly discovered evidence offered by a postconviction defendant is a recantation by a witness who testified for the prosecution at trial, the jury has already heard and evaluated that particular witness. A denial of relief simply leaves the existing verdict intact. Here, the State's offer of newly discovered evidence of guilt asks the court to evaluate a completely new line of evidence that no jury has ever heard.

ARGUMENT V

The court erred in denying Green's *Brady* claim based on suppression of 3 x 5 cards and related documents.

The State in passing asserts a procedural bar with regard to the 3 X 5 card issue, arguing that the claim was not adequately pled in the motion for postconviction relief. The simple fact that the State was fully apprised of the issue and had ample opportunity to respond to it; and that the postconviction court was fully apprised of the issue, took evidence, and addressed the claim on the merits; should be sufficient to defeat any claim of a procedural bar based solely on a lack of specificity in the original pleadings. To the extent further argument is necessary: The possibility of an amendment was first

volunteered by collateral counsel during Parker's testimony about the cards and associated documents. PC-R Vol. III 351. The State objected to any amendment, at least until the cards had been authenticated. *Id*. The cards and other documents were authenticated and admitted in evidence without objection and without any mention of an amendment during the testimony of Tom Fair as defense exhibit #3. PC-R Vol.V 314-24. That examination covered the various topics raised in Claim III of the 3.850; the cards and other documents contained in exhibit #3 were relevant to those issues. At the oral argument on November 30, 2004, the question of an amendment was raised. (Transcript page 74). The State commented that "I guess there is no way to amend because if I make that argument and I'm successful and you rule with us and say that he can't argue it, then we get to ineffective assistance of collateral counsel so we might as well address it." However grudgingly, the State waived any procedural bar argument. In any event, the cards are pieces of evidence, not claims or anything else that could be waived.

ARGUMENT VI

The court erred in denying Green's claim for relief based on individual instances of ineffective assistance of counsel.

One of these instances concerned counsel's failure to properly investigate Jerome Murray's record and impeach him. This subject was covered thoroughly during the examination of Mr. Parker at the evidentiary hearing. Mr. Murray's testimony at trial provided the element of flight to the State's case. On August 3, 1999, Mr. Murray executed a statement in which he recanted his trial testimony against Crosley Green.

Murray was called by the defense at the evidentiary hearing, but after being advised of his rights he elected not to testify. Counsel's failure to impeach Murray was argued in Green's closing argument. PC-R XXII 3813 (Defense Counsel Parker failed to properly offer impeachment testimony against a key state witness, Jerome Murray…).

ARGUMENT VII

The court erred in summarily denying Green's claim based on defense counsel's failure to challenge cross-race identification.

The State simply quoted the postconviction court's order summarily denying relief. The court disallowed expert testimony about cross-race identification on the theory that the law at the time of trial did not permit such testimony.[5] The court's reasoning about the claim that counsel should have requested a special jury instruction is similar. It appears that the court relied on the Fourth District's decision in *McMullen v. State*, 660 So.2d 340 (Fla. 4th DCA 1995), which this Court reviewed in *McMullen v. State*, 714 So.2d 368, 370 (Fla.1998). The district court concluded that *Johnson v. State*, 438 So.2d 774 (Fla. 1983) had created a per se rule of inadmissibility, whereas this Court held that the admission of expert testimony regarding eyewitness identification is B ***and had always been*** B discretionary with the trial court. That point has not been addressed by the court or the State.

ARGUMENTS IX & X

Juror issue

During the trial there was an issue about whether one of the juror's had made a throat slashing gesture during a tableau with one of the witnesses, Tim Curtis. Curtis described the person he had seen make the throat slashing gesture as an older white male driving a burgundy Aerostar van. Curtis recognized the vehicle easily because he ran an auto parts shop; he was in the car business. The allegation prompted a tentative motion for mistrial and voir dire examinations of Curtis and a number of the jurors. The court then individually questioned the jurors who fit that description about what vehicles they drove. Mr. Guiles said that he drove a blue and white pickup. He denied owning a van. He said he also had a Buick Century, and he expressly denied having any other vehicles. ROA Vol. IX, 1634-40. Curtis eventually changed his mind about whether the person he saw was a juror, and the matter was dropped.

In 1999, Mr. Curtis apparently executed a document recanting his recantation:

> After I testified I was in the parking lot at the courthouse when a juror, a white male made a slashing motion with his finger across his throat, indicating to me that Green was dead. I told a person the next day Green is dead, knowing that a jury member had made up his mind to convict Crosley Green. The next day I was brought into court to identify the juror. Prior to the hearing I had lunch with two detectives from the Sheriff's office who told me that if I identified this juror, there would be a mistrial and Crosley Green would go free. I lied at the hearing. I told the judge that I did not see the man who

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[5]The court did allow collateral counsel to proffer Dr. Brigham's affidavit.

> did this slashing motion. In fact I did see the man and he was on the jury and in court this day.
>
> I have read and reviewed this statement and it is true to the best of my knowledge.
>
> /s/ Timothy Curtis 8-6-99 @ 7:00 p.m.
>
> Witnessed By:
>
> /s/ Paul J. Ciolino /s/ Joseph M. Moura
> 8-6-99 8-6-99

PC-R XIV, 1948-52; also quoted in the order summarily denying certain claims at PC-R XXIV, 4105-06. These statements are also consistent with what Mr. Curtis said on a nationally televised video tape. However, Curtis invoked the Fifth Amendment in postconviction proceedings and refused to answer any questions about whether he saw a juror make the throat slashing gesture.

Independent investigation turned up the fact that juror Harold E. Guiles and one Harold E. Guiles, Jr., presumably juror Guiles' son, were both listed as residing at the same address; and that from that time to the time the motion was filed, one of them was the owner of a Ford Aerostar van.

The court concluded that the document purportedly executed by Curtis was not a sworn affidavit, and found that the further allegations concerning the ownership of a van matching the description given by Curtis were insufficient to allow the claim for relief based on juror misconduct to go further. By doing so, the court cut off any further development which would have led to authentication of the document through an order

compelling Curtis to testify or confirmation that the juror intentionally or otherwise misrepresented his ownership of a vehicle matching the one described by Curtis. The court erred because the allegations in the 3.850 motion must be taken as true; it would have been at the evidentiary hearing that authentication and other evidence would have to be produced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Reply Brief of Appellant/Cross-Appellee has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on December ___, 2006**.**

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I HEREBY CERTIFY that…Courier New 12 point font, pursuant to Fla. R. App. 9.210.

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