IN THE SUPREME COURT OF FLORIDA

CROSLEY ALEXANDER GREEN,

Appellant/Cross-Appellee, CASE NO. SC05-2265

vs.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

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ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE/INITIAL BRIEF ON CROSS-APPEAL

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STATEMENT OF THE CASE

Green was convicted by a jury of first-degree felony murder, two counts of robbery with a firearm, and two counts of kidnapping. Green raised nine issues on direct appeal.[1] The convictions and sentences were affirmed. *Green v. State,* 641 So. 2d 391, 394 (Fla. 1994*).* Green's petition for writ of certiorari was denied on February 21, 1995. *Green v. Florida*, 513 U.S. 1159 (1995). Green filed a "shell" Rule 3.850 motion on March 18, 1997, to toll the time. He filed an amended motion on November 30, 2001. (V13, R1791-1946).

After a case management conference, the trial court entered an order dated July 19, 2002, setting an evidentiary hearing on Claims I, III(A), III (C)(1), III(E), III(F), III(G), III (H)(1), IV, V, VI, and VII. (V18, R2865-2901). The court attached sections of the record to support the claims which were

[1] (1) The trial court erred in admitting evidence of dog scent tracking; (2) The trial court erred in denying Green's motion to suppress Kim Hallock's photographic and in-court identifications; (3) The trial court erred in denying Green's motion for the jury to view the murder scene; (4) The trial court erred in instructing the jury on flight; (5) The trial court erred in considering as separate aggravating circumstances that Green committed the murder for pecuniary gain and Green committed the murder during a kidnapping; (6) The trial court erred in finding that the murder was heinous, atrocious, and cruel; (7) The trial court improperly refused to find mitigating circumstances; (8) The death penalty is disproportionate; and(9) The heinous, atrocious, or cruel aggravator is unconstitutionally vague.

summarily denied. (Vol.18, R2902-3065; Vol.19, R3066-3250). The court ruled it would hear legal argument on Claims II, VIII, IX, X, XI, and XII. All other claims were summarily denied as outlined in the July 19 order. The evidentiary hearing was held April 24-25, 2003; October 28-29, 2003; February 24-26, 2004; June 24-25, 2004; and October 4, 2004.

The trial court heard argument on the Rule 3.850 issues on September 13, 2005. (V10, R1451-1485). On November 22, 2005, the trial judge entered an order denying the guilt phase claims but granting the claim that trial counsel was ineffective in his investigation of the prior violent felony from New York. (V24, R4026-4089). The trial judge attached numerous documents to substantiate his order. (V24, R4090-4141; V25, R4142-4342; V26, R4343-4543; V27, R4544-4744; V28, 4745-4945; V29, 4946-5145; V30, R5146-5326). The trial judge ordered a new penalty phase. (V24, R4089). Green appealed the denial of the guilt phase claims, and the State cross-appealed the finding counsel was ineffective and granting a new penalty phase. (V30, R5327, 5333).

STATEMENT OF THE FACTS

The facts on direct appeal were summarized by this Court as follows:

> Late in the evening of April 3, 1989, Kim Hallock and Flynn, whom she had dated, drove to a park in Flynn's

pickup truck. They parked near dunes in a wooded area and smoked marijuana. As they smoked, a sheriff's car drove by and shined its spotlight, but did not stop at the truck. After the sheriff's car passed, a man walked in front of the truck and stopped at the driver's door. He warned Hallock and Flynn to watch out for the police, then walked on.

A few minutes later, Flynn stepped outside the truck to relieve himself. Hallock testified that she soon heard Flynn say nervously: "Hold on. Wait a minute, man. Hold on. Put it down." She retrieved a gun from the truck's glove compartment and put it under some jeans on the seat next to her. She testified that when she looked outside the truck, she saw the man she had seen earlier. He was now walking around Flynn and carrying a gun. The man ordered Flynn to the ground, then asked if either of them had any money. Hallock gave him five dollars, but Flynn said he had no money.

The man then tied Flynn's hands behind his back with shoelaces. While tying Flynn's hands, the man's gun went off but did not injure Flynn. The man pulled Flynn off the ground, found a wallet in his pants, and threw it to Hallock, who counted $185. The man ordered Hallock to start the truck and to move to the center seat. He put Flynn in the passenger seat and started driving. He forced Flynn and Hallock to ride with their heads down and held a gun to Hallock's side. During the ride, Flynn found the gun Hallock had hidden under the jeans. The man stopped the truck at an orange grove and tried to pull Hallock from the truck. Hallock freed herself and ran around the truck, but the man caught her, threw her to the ground, put a gun to her head, and threatened to blow her brains out. Flynn got out of the truck and fired a shot, but missed the man. Hallock jumped into the truck and locked the doors. She testified that she saw the man fire a shot. Flynn yelled for her to escape, and Hallock drove to a friend's house and called the police.

When police arrived at the orange grove, they found Flynn lying facedown with his hands tied behind his back. Authorities found a loaded .22-caliber revolver nearby. Flynn was alive when police arrived, but he stopped breathing several times and died of a single

> gunshot wound to the chest before paramedics arrived. Hallock later identified Green as the man she saw in the park.

Green v. State, 641 So. 2d 391, 393 (Fla. 1994*).*

Evidentiary hearing. At the April 24, 2003, hearing, one witness testified, and the hearing was continued. On October 28th, Sheila Green, Green's younger sister, waived her Fifth Amendment rights and testified. (V2, R150). Sheila testified that before Green's 1990 trial, she was approached by Assistant State Attorneys Chris White and Phil Williams to provide testimony against her brother, Crosley Green. (V2, R157). Sheila testified at trial on August 29, 1990, that she saw Green the day after Flynn was shot. (V2, R181). However, she had no current recollection of anything about which she testified. (V2, R184). Sheila did not remember testifying Flynn pulled a gun on Green, and that is why he shot Flynn. (V2, R186). Sheila was not promised any benefit by the State for testifying. (V2, R191-92).

Sheila executed an affidavit in 1992 stating Crosley never confessed to her that he murdered Flynn. (V2, R159). She said she had been placed on "suicide watch," because of depression. The State Attorney's Office took advantage by using her four children in an effort to get her to testify against her brother. (V2, R162). The State Attorneys allegedly talked Sheila into convincing Lonnie Hillary into testifying against Green. (V2,

R163-64).[2]

Questioning by the trial judge revealed that Sheila also alleged in her affidavit that she lied at Spruill's sentencing hearing because she was threatened by the State. (V2, R213). The affidavit stated she was also threatened by Government DEA. (V2, R215).

Hillary waived his Fifth Amendment rights and agreed to testify at the evidentiary hearing. (V2, R218). He testified at Green's trial that Green had made incriminating remarks to him regarding the murder of Charles Flynn. (V2, R220). He had spoken to Green after the murder. Green had been nervous. He told Hillary he "shot the kid." (V2, R241). Mr. Jancha and Mr. Williams only asked him to tell the truth. (V2, R240).

However, he claimed he testified falsely at the trial because, "I wanted to help my child's mother (Sheila Green) at the time." (V2, R220). Prior to Sheila's sentencing, he was informed (by the State Attorney's Office) that Sheila's sentence would be reduced if he provided testimony incriminating Crosley Green. (V2, R221). At the evidentiary hearing, Hillary recanted his trial testimony and said Green did not give him details of the murder and he invented answers to the questions during his trial testimony. (V2, R223). Hillary was aware that he was now

[2] Sheila and O'Connor Green, Terry Spruill and Hillary were co-defendants on federal drug charges. (V2, R170, 173). Hillary was

confessing to perjury committed at the time of Green's trial, but, "... at that time, I didn't care. It was about my kids, and that was about all of it." (V2, R232).

Jerome Murray did not waive his Fifth Amendment rights. (V2, R250). A long colloquy ensued about whether he waived his rights. (V2, R250-271). The trial judge found there was no waiver. (V2, R272). Murray did not testify at the hearing.

John Parker, currently an Assistant State Attorney, was Green's trial attorney. (V2, R305). At the time of Green's trial, he had not *defended* a penalty phase in a capital case; but he had been an Assistant State Attorney from 1983 to 1987 during which time he was a felony division chief. (V2, R295, 307). He tried approximately 30 felony cases and was co-counsel in 4-5 homicides. (V2, R299-300). Approximately three years after Green's trial, Parker destroyed some of his files. (V2, R310).

Parker recalled participating in a suppression hearing where a photographic lineup proceeding was one of the subjects discussed. (V2, R314). During the trial Green insisted there was a second series of lineup photos and that Parker did not have the right photos. (V2, R315). Parker went to great lengths to

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found not guilty in Federal court.(V2, R241).

determine whether there was a second set of photos. (V2, R318).[3] Parker litigated the fact that victim Hallock was given a shoe box full of photos. (V2, R320). Parker thought the photo lineup was suggestive because one of the photos had a blue hue and the other photos were brown. (V2, R319). Notwithstanding, the photo lineup was "the best thing that ever happened to the defense because Hallock described a different person." (V2, R334). Parker was shown a copy of a police report regarding Wilfred Mitchell, who was questioned but had an alibi. (V3, R344). Certain 3 x 5 index cards had names on them and a notation "photo pulled by victim." (V3, R345). Parker may have seen the 3 x 5 cards because he recalled using the photos of other persons. (V3, R347). Collateral counsel claimed the State had filed a public records exemption on the 3 x 5 index cards. (V3, R349). The State objected, and the objection to admitting the cards was sustained. (V3, R350). Collateral counsel stated he wanted to file an amended point to his Rule 3.850 motion alleging a *Brady* claim regarding the index cards. (V3, R352). The motion to amend was denied without prejudice to file once the index cards were authenticated. (V3, R353). Over the

[3] Gregory Hammel was Green's defense attorney for approximately four months. (V5, R829). During the trial, Mr. Parker asked Mr. Hammel to come to the courthouse to look at a photo lineup. (V5, R833-834). Hammel was shown a photo lineup and signed an affidavit that it was the same one used at Green's bond hearing.

evening break, the judge's staff attorney checked to see whether the State had claimed an exemption on the index cards. There was nothing in the court file regarding the cards. (V3, R354-55).

Parker did not depose Sheila Green, Lonnie Hillary or Jerome Murray, but he had their statements. (V3, R363-64). Insofar as requesting co-counsel, Parker believed the County was not allowing co-counsel. (V3, R389). Parker did, however, have assistance from Mr. Bardwell even though he was not appointed. (V3, R390). Mr. Bardwell also helped with the dog track evidence. (V3, R392). Bardwell had successfully litigated a dog-track case. (V3, R434).

Robert Cook was appointed as his investigator. (V2, R305). Parker did not make a motion to have experts appointed for ballistics, dog track, crime scene or social work. (V3, R371).

Parker moved to excuse Juror Guiles because of exposure to pre-trial publicity. The motion was denied. (V3, R375). Parker did not repeat his motion after he learned Guiles' niece was murdered. (V3, R376-77). Parker's paralegal, Brenda Quinn, sat in court during the trial. (V2, R304). Ms. Quinn took "feverish" notes, and Parker discussed each prospective juror with Green. (V3, R379, 381). Even though Parker did not use a peremptory

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(V5, R834).

challenge on Guiles, whether to keep him was discussed "heavily." (V3, R382). In selecting a jury, an attorney has to look ahead to see which jurors would sit if a peremptory is used. Parker was "darn pleased" to have eight women on the jury. (V3, R385). He wanted women because they would see through Kim Hallock's testimony. (V3, R386). It was the defense theory that Hallock shot Chip Flynn. (V3, R394). Her testimony was "unbelievable" in many areas. (V3, R395-96).

Parker presented an alibi defense and had witnesses lined up. (V3, R409-410). However, after Jim Karns had a "meltdown," he did not call the other witnesses. (V3, R410-411). Karns had originally said he had an altercation at Carlene Brothers' house and Green helped to smooth things out. (V3, R412). Yet, when Karns was on the witness stand, he changed the chronology and it became apparent he was not at Brothers' house at the time. (V3, R414). Parker had investigated Karns' phone records and had them before trial. (V3, R413, 416, 419). It was not the phone records that were damning, but the fact the witness stopped in the middle of his testimony and said the events happened differently from what he previously had said. (V3, R417). Both Brothers and Karns said there was an argument in which Green was involved. (R3, R419).

Parker tried to develop the possibility of another suspect,

someone who looked similar to Green. The person described by Ms. Hallock did not resemble Green. (V3, R482). Parker felt very strongly about Green's case and tried to develop other suspects. (V3, R484).

Green told Parker he had been around other people the night of the murder, and Parker tried to develop them as witnesses. (V3, R494). The police did not suspect Green until Tim Curtis pointed to Green as a suspect and Kim Hallock, the surviving victim, identified him. (V3, R495). Subsequent to the murder, Green told Parker he worked as a migrant worker and did not realize he was a suspect. (V3, R497-498). Parker did not have Green testify in his own defense due to his prior felony. (V3, R505). Green told him he was with Lori Rains the night of the murder. They were smoking crack and Green could not remember the time frames. Parker wanted to interview Lori Rains, but could not locate her. (V3, R506).

Parker challenged the dog track evidence. (V3, R425). He moved to suppress the evidence. (TT.2087-2123; V3, R427). He felt the dog track evidence was not reliable because Selestine had dogs that could attract and distract the tracking dog. (V3, R426). Further, the tracking dog reacted to nothing at the orange grove. (V3, R426). Parker had received two sets of records on Czar, the tracking dog. (V3, R499).

When Parker was notified by Green's appellate attorney that Sheila had prepared an affidavit recanting her trial testimony, he filed a motion in the trial court. (V3, R438). The trial court did not have jurisdiction, but Parker called the Florida Supreme Court every three or four days to see whether the Court had rendered an opinion. (V3, R438). He was angry about the recantation and wanted something done about the conviction. (V3, R439). He even called Sheila in Kentucky. (V3, R439).

Parker considered Sheila's trial testimony devastating. (V3, R442, 448). Parker and Green made a strategic decision not to depose Sheila. (V3, R447). Green did not want to depose Sheila because he believed "she would fold in court." Green was confident his sister would not testify against him. (V3, R484, 485). Parker called Selestine Peterkin at trial to rebut Sheila Green's testimony after she testified against Green. (V3, R425).

Parker presented two witnesses at the penalty phase three weeks after the conviction. (V3, R472). Parker told Green they needed to "dissect your background." Green gave Parker a few names. (V3, R475). Selestine laughed too hard to present her as a witness. (V2, R476). The teacher, whose name Green gave him, refused to get involved. (V3, R476). A coach also refused to talk to Parker. (V3, R478). No one was willing to come forward for Green. (V3, R476). "In essence, I couldn't find anybody that

would say anything good about Mr. Green." (V3, R477).

Parker did not challenge the State's introduction of a prior New York conviction "based on the nature of the offense, my conversations with Crosley, where he admitted to me he did those acts." (V3, R467). Parker was aware Green was not a juvenile when he committed the robbery in New York. (V3, R502). The law at the time of Green's conviction was that a juvenile conviction qualified as a prior violent felony. (V3, R503).

Parker sought to have Dr. Greenblum evaluate Green. Green was diagnosed as a sociopath, and "had no remorse for this event." (V3, R507). In addition, Green did not want DNA testing done on two "negroid hairs" found in the victim's truck. (V3, R509). Parker and Green discussed every aspect of the trial. (V3, R509).

The evidentiary hearing continued on February 24, 2004. The trial court denied Green's motion *in limine* regarding DNA results and ruled the results admissible. (V4, R536-537). An order had been entered on March 26, 2003. (V4, R537).

Hamp Green, Green's younger brother, testified that Green grew up in the projects with his eight brothers and sisters. (V4, R548). He did not recall his mother cooking meals for them, although one of his sisters did. On occasion, they had to scrounge for food. (V4, R548-549). His sisters took on the

responsibility of taking care of the family. (V4, R549). While his father was the primary financial provider for the family, his mother worked in a nightclub and the children worked in the orange groves. (V4, R554). They worked together as a family. (V5, R555). Hamp played football, and his Mom came to his games when she had time. (V4, R557). He knew his parents loved him. (V4, R558). Christmas and Thanksgiving were big events in the family. (V4, R559). His parents argued about money and his father always having to work. (V4, R560). His father had a problem with alcohol which contributed to the arguments within the family. (V4, R562). Ultimately, his father killed his mother and then committed suicide. (V4, R565).

Hamp's mother handled the discipline by using "switches, extension cords, water hoses, stuff like that, put us in the closet" and left welts and bruises. (V4, R562). After his parents died, the children went to live with their sister, Tina, (Selestine) in a two bedroom apartment. (V4, R567). Hamp was in jail in Ft. Pierce at the time of Green's trial, but he would have provided mitigation information had he been asked. (V4, R574).

On cross-examination, Hamp clarified that Shirley Green was 13-14 years older than him, and Green was 6-7 years older than him. (V4, R575). Green was in a New York prison at the time of

their parents' deaths in 1977, and had been there approximately two years. (V4, R576). When Green left home, Hamp was 10-11 years old. (V4, R577). Hamp spent a significant amount of time in prison and was there at the time Green murdered Flynn. (V4, R579).

Shirley Green White, Green's older sister by seven years, testified that, at one point in time, there were fifteen people living at their father's house. (V4, R595). In the summer, the children played together and went fishing with their great-grandmother. They had fun times. (V4, R572). After a house fire, they moved to a big house and everyone had their own bed. (V4, R596). Eventually, they went to live in a smaller house where some of the children had to sleep on the floor. (V4, R597). The Housing Authority then provided a four-bedroom house. (V4, R597). Shirley's dad worked all the time, and she watched the younger siblings. (V4, R599). Shirley moved out after getting married at the age of sixteen. (V4, R598). Although they did not have a stove or refrigerator, their grandmother would cook food for them. (V4, R600). On occasion, Shirley would fix her brothers and sisters some food. She also made sure they had clothes to wear. (V4, R604). Shirley and Crosley would take the clothes to a neighbor's house to wash. (V4, R601). Crosley's mother, Connie, would go off with other men after their father

left for work. (V4, R605). Sometimes there would be men at the house and Shirley would hide them from their father. (V4, R606). Shirley would take the children off to play whenever Connie had men over. (V4, R606). The brothers and sisters all loved each other and had good times. (V4, R608).

Their mother was not affectionate with either Shirley or Crosley. She favored the other children. (V4, R609). Their father had a drinking problem. (V4, R617). Crosley was very close to his father and was often worried when his father came home drunk and passed out on the floor. (V4, R617). Rosemary, Crosley's sister, was retarded. Green spent a lot of time with her. (V4, R626).

Shirley described her brother as "lonely, quiet." "He didn't ever socialize that much, but he would always try to keep us together." (V4, R627). Shirley testified at Green's trial, but said that Parker never talked to her until Green was convicted, and then only for five minutes. (V4, R637). Parker also asked Shirley to talk to Green about a plea offer the State made. (V4, R637). Parker never spoke to her regarding the family's background, only the fact that her father murdered her stepmother. (V4, 638-639).

On cross-examination, Shirley admitted giving a deposition on November 13, 2002, and stated that family life was "very

good" and that her parents had been good parents. (V4, R640-41). She had stated that Crosley was not abused. (V4, R641). When Shirley testified at the penalty phase, she testified that Green was a loving and caring father in addition to the circumstances of his mother's death. (V4, R642). When Shirley gave her deposition, she admitted she did not "open up" and talk about Crosley's background. (V4, R649).

Selestine Peterkin ("Tina") is a year older than her brother, Crosley. (V4, R654). Tina recounted five residence moves as the children grew up. (V4, R656). The children got new clothes that included hand-me-downs and clothes from the thrift shop. (V4, R658). Tina was close to her mother. They went to the park and played various games. Her mom played with all the children. (V4, R659). In addition, her grandmother would take her shopping and buy her clothes. (V4, R660). She recalled her parents fighting when she and Crosley were young and one time when her mother had to go to the hospital. (V4, R661). Most of the time, though, they would just "fuss." (V4, R661). Their father only drank on the weekends. He worked seven days a week. (V4, R662). Their mother was the disciplinarian, sometimes doling out spankings "by using extension cords or a paddle." (V4, R665). After their parents' deaths, the children remaining at home moved in with Tina and her husband. (V4, R663). Peterkin

spoke with Green's trial attorney, John Parker, prior to the trial. (V4, R666). Tina was unable to control her emotions at the time. She was not laughing as Mr. Parker testified, she was crying. (V4, R666).

Marjorie Hammock was qualified over the State's objection as an expert in social work and conducting bio-physical assessments, ("BPA"). (V4, R679, 682, 683).[4] In her opinion, there was a pattern of exposure to violence and poverty, both in the home and the community. (V4, R686). It is difficult to conduct a BPA because families keep their business to themselves and do not trust strangers. (V4, R686). Green's development was "corrupted" by rejection, violence and isolation. (V4, R689). Green assumed the role of protector and peacemaker for both the adults in the family, as well as for his sisters. (V4, R691). Green's father abused his mother. (V4, R691). Green's school records showed his early years were "pretty good" until he was relocated to a desegregated school where the environment was "openly hostile." (V4, R692). Green referenced his "keen memory of racial conflict." (V4, R693). Although Green was not at home when his father killed his mother and then himself, he still

[4] She reviewed Green's correctional and school records, health and medical records, New York State incarceration records, and records that related to Green's siblings. (V4, R683). She also received a detailed explanation of the murder and suicide of Green's parents. (V4, R684). She conducted interviews with Green, his siblings, and family members in Georgia and South

experienced the trauma because he was the self-appointed protector. (V4, R693). The Green family had a "bad name in the community" due to hostility among family members. The feeling was "them Greens was just a bad bunch." (V4, R697). Crosley saw his mission as being really important in contributing to the income of the family. (V4, R698). Hammock found all of the Green children to be "polite individuals" who had been taught to behave in an appropriate way. (V4, R704).

Green told Hammock he was involved with alcohol at the age of twelve.[5] He expanded his substance abuse to include marijuana, cocaine, and LSD. (V4, R709). Various members of the Green family described their father as "being violent only when he was drinking." (V4, R711). Hammock received copies of family members' depositions from 2002. (V4, R720). She was aware Shirley described family life as "very good" both in her deposition and at the evidentiary hearing. (V4, R720, 721). Hammock agreed that family members give conflicting information. (V4, R723). For example, Crosley's sister, Degra, testified in her deposition that the parents had a "good relationship" and Degra was close in age to Crosley. (V4, R725). Degra also said there was no physical violence between the parents. (V4, R726).

Carolina. (V4, R684).

[5] He told the Probation and Parole Officer who prepared the pre-sentence investigation that "he does not drink alcohol at all." (Exhibits, R5919).

Hammock explained Green's maternal lineage and prepared a chart indicating all family members. (V8, R1258). The State objected to the gene chart as incomplete and irrelevant to the issue of who might share Crosley's mitochondrial DNA sequence. (V8, R1272-73). The objection was overruled and the chart entered into evidence. (V8, R1274). (Defense Exhibit 1).

Odell Keiser, now retired, was the dog handler for Czar, the dog that performed the track to Green's sister's house after Flynn's murder. Keiser and Czar responded to the murder scene and were directed toward shoe prints found by other police personnel. (V5, R777). The shoe had a "tread" design. (V5, R778). Keiser and Czar followed the path of the shoeprints from the sandy area of the murder scene, through a grassy area, up a sidewalk. (V5, R779). There were no visible tracks on the grass or the sidewalk. (V5, R780). The dog led him to the first house on the block. There were dogs at the house that started to bark. (V5, R781). Keiser stopped Czar's track at the carport because he was not sure whether the other dogs were aggressive. (V5, R802). Keiser was not familiar with the term "VST" for "variable scent tracking." (V5, R787-788). Keiser was trained on different surfaces, he just never heard that term used. (V5, R788). The dog did not pick up a scent at the orange grove where Flynn's body was found. Several hours had passed and there were several

emergency vehicles in the area that could have disturbed any kind of scent. (V5, R799). Dew on the ground makes it easier to track. (V5, R799). The trial judge viewed a videotape of the crime scene. (V5, R807, State Exhibit 43).

Dr. Warren Woodford, a self-employed chemist, had patents for training aids for drug dogs. (V5, R914-915). He had been studying how to synthesize odors for approximately ten years. (V5, 915-916). He participated in training tracking dogs within the American Kennel Club. (V5, R918). Dr. Woodford explained dog scenting procedures. (V6, R935-936). In his opinion, it is very easy to track in grass but a "nightmare" to track in the sand. (V6, R936). Sand is full of "stinky, little bacteria" and "crawly insects" that mixes with decaying matter when you step on it. (V6, R936). It would be very difficult for a dog to track from grass to a sidewalk. (V6, R937). It is very difficult to track in sand. (V6, R940). German shepherds are "really good" at tracking, and "that's where the police dog really came from." (V6, R938).

A dog will latch onto "the most potent odor and think that's it." (V6, R940). The dog tracking method that occurred in this case was a "blind track" not a "scented track." (V6, R943). Woodford believed that Czar was an old dog and on his "last leg." (V6, R944). Czar was 8½ years old in April 1989. (V6,

R949). On November 3, 1988, Czar tracked a suspect but the victim could not identify him so the suspect was released. (V6, R956). Nevertheless, the dog received a grade of "satisfactory." (V6, R957). Czar's tracking and training record for 1988 and 1989 was admitted. (V6, R961, Defense Exhibit 1).

In Woodford's opinion, Czar was only trained as a service dog, not a "tracking dog." (V6, R946, 950). In Woodford's opinion, it was hard to tell what Czar was tracking on April 4, 1989. (V6, R964). It could have been Selestine's dogs. (V6, R965).

The only dogs Woodford had trained were his own dogs. (V6, R969). He does not train dogs for police work only for "experiments." (V6, R969). Woodford was not certified in any type of dog training. (V6, R969). Woodford was aware a track was laid at approximately midnight on April 4, 1989, and Czar was put on the trail at approximately 6:00 in the morning. (V6, R972). It was a cool night, very little wind, dew on the ground, and very few people would have been in that area during those hours. (V6, R973). In Woodford's opinion, dew on the ground "is the worst kind of thing you want, because it interferes with surface tracking." (V6, R973). Woodford felt Czar was trained to a "minimum standard in the tracking category." (V6, R1001). There was no way of knowing whether Czar followed the foot

impressions the officers wanted him to follow or the scent of the person who left those impressions. (V6, R1002). Woodford agreed that the weight of Czar's certificates was a jury question. (V6, R1002).

Thomas Fair was the supervisor of the homicide squad that investigated the murder of Mr. Flynn in 1989. (V5, R837). The 3 x 5 index cards were notations that Fair made as Ms. Hallock went through loose photos that were kept in a box. Hallock would pick a feature from the photos that resembled the shooter. The notations on the cards were to assist the artist in preparing a composite. (V5, R840).[6] The first mention of Crosley Green as a suspect came from a confidential informant, Wilfred Mitchell, who told Agent Stamp the composite looked like Crosley Green. (V5, R841). Mitchell was not a suspect. (V5, R841). Further, once the facial likeness was reconstructed, "the first name that came in was Crosley Green." (V5, R850). Hallock subsequently identified Green. (V5, R851). Parker said he was aware that the surviving victim had looked at approximately sixty photos of proposed perpetrators. (V3, R481).

The index cards were Fair's work product and were never forwarded to the State Attorney's Office. (V5, R856). Fair

[6] At the time of the murder, Fair could not find a photograph of Green, so he sent a pilot up to DOC to get a recent photograph. The inmate photograph used to identify Green was made three weeks before the murder when Green was released from prison.

testified that the notes on the index cards were “field notes.” (V5, R864). Notes are not provided to the State Attorney’s Office. (V5, R864). Fair testified in a pre-trial deposition about Hallock retrieving photos from a box. (V5, R865).

Rick Jancha, Assistant U.S. Attorney, Middle District of Florida, was the lead prosecutor on the Federal case involving O’Connor and Sheila Green, Terry Spruill, and Lonnie Hillary. (V5, R870). Both Hillary and Sheila Green were represented by counsel. (V5, R871). Hillary’s attorney approached the government about a plea agreement. (V5, R872). The four defendants went to trial in Federal court. Hillary was not convicted, but Sheila was. Sheila’s attorney, Jeffrey Dees, contacted Jancha and advised that she was interested in providing information at the federal sentencing of her brother, O’Connor, and at the murder prosecution of her brother, Crosley. (V5, R878). Dees sent Jancha a letter dated July 11, 1990, confirming the agreement. (V5, R879, State Exhibit 4). On July 13, 1990, prosecutors Jancha, Chris White, and Phil Williams met with Sheila at the Seminole County jail. (V5, R881). Jancha took notes of the conversations. (V5, R882, State Exhibit 5). Sheila also testified against O’Connor and Spruill. (V5, R881). She had been facing a sentence of 120-122 months but her cooperation with law enforcement was brought to the attention of the Federal

sentencing judge and she got 97 months. (V5, R884).

Phillip Williams, formerly an Assistant State Attorney, assisted in prosecuting Green. At the time of the evidentiary hearing, he was the elected Sheriff for Brevard County. (V5, 888). He took a sworn statement from Sheila at the time of Green's trial. (V5, R890). He did not make any threats to Hillary or Sheila to get them to cooperate. (V5, R891). He appeared at Sheila's sentencing in Federal court to describe her cooperation. (V5, 892). He testified that he believed her testimony to be truthful and that she was afraid Selestine would take revenge on her children because of her testimony. (V5, R893). Williams said Sheila expressed concern for her children's welfare should she be incarcerated for a long period of time. (V5, R895).

The evidentiary hearing resumed on June 24, 2004. The State presented the testimony of seven witnesses, and the defense presented two.

The trial judge took judicial notice of State Exhibit 74 from trial - debris sweepings. There were two Negroid hairs in the debris which were tested by LabCorp for DNA. (V7, R1015). Green had requested a *Frye*[7] hearing on mitochondrial DNA ("mtDNA"). (V7, R1016). A recent DCA case had recognized mtDNA

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

testing as admissible. *Magaletti v. State*, 847 So. 2d 523 (Fla. 2nd DCA 2003). (V7, R1016). Green also moved to exclude the DNA evidence. (V7, R1015).

The State established the chain of custody for the mtDNA testing,[8] and the LabCorp reports were admitted into evidence

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[8] The chain included: Leslie Lewis, deputy clerk, Brevard County Clerk's Office, was custodian of evidence. (V7, R1020). In 1999, she was asked to release exhibit 74 per a stipulation between the State and the defense. (V7, R1021). She released it to FDLE Agent King. (V7, R1021-1022).

Agent King, Special Agent Supervisor for FDLE, met with Leslie Lewis on December 6, 1999, to retrieve evidence for testing. (V7, R1033). He packaged the evidence and hand-delivered it to the Orlando Regional Crime Lab. (V7, R1037).

Nancy Rathman, Senior Crime Laboratory Analyst, Orlando Regional Crime Laboratory, conducted an inventory of State exhibit 74 to find some Negroid body hairs that had been identified by Yvette McNabb in 1989. (V7, R1045). She found two paper folds, which is typically how debris is packaged. (V7, R1046). She sealed the evidence. (V7, R1047).

In 1989-90, Don Ladner was an investigator for FDLE and coordinated the pick-up of evidence from the Brevard Clerk's Office. (V7, R1050). He transported Exhibit 74 from Orlando to the FBI lab for microanalysis to identify Negroid hairs in the debris. (V7, R1051). Ladner was notified by the FBI that "hairs of Negroid classification," identified as Q-3.1 and Q-3.2, might be suitable for further DNA testing. (V7, R1054). Ladner was notified that LabCorp had extracted mtDNA from Q-3.1 and Q-3.2, and needed a known standard from the Defendant for DNA comparison. (V7, R1057). Green signed a waiver of voluntary consent of blood samples. (V7, R1058). Ladner personally observed the blood draw, and delivered the samples to LabCorp. (V7, R1059-1061). He later retrieved the samples from LabCorp and returned them to FDLE for further DNA comparisons against other evidence. (V7, R1061).

Karen Korsberg, hair and fiber analyst for the FBI, received a total of 10 debris packets which she examined for Negroid hairs. (V7, R1078-79). She observed two Negroid hairs. (V7, R1079, 1084).

(Exhibits, R6008-6014). Shawn Weiss, Associate Technical Director of the Forensic Identity Department at LabCorp explained that mtDNA is maternally inherited and not unique to an individual. (V7, R1096). mtDNA testing has been used by the FBI since 1996, and LabCorp "went on-line" in 1998. (V7, R1097). mtDNA testing procedures are generally accepted in the scientific community. (V7, R1099). Articles in forensic science journals have been published since 1999 in accepting reliability of mtDNA. (V7, R1100, 1127).

Weiss testified that hair is a good example of evidence which can be tested for DNA. (V7, R1102). Weiss received two hairs: Q-3.1 and Q-3.2. (V7, R1107). The hairs were suitable for mtDNA testing, but, because of the limited sample, testing consumed the entire hair. (V7, R1108, 1138). The two hairs came from the same source. (V7, R1111). mtDNA was extracted from Green's blood sample and compared to the hairs in evidence. LabCorp was "able to obtain a sequence." Green's mtDNA had the same differences as the two hair samples. (V7, R1113). (State Exhibit 5) Two reviewers reached the same conclusions as Weiss. (V7, R1120). Using the mtDNA database accepted in the scientific community, the likelihood of another person having the same mtDNA sequence as Green was .42%. Therefore, 99.585 of the population could be excluded. (V7, R1125). MtDNA is less

probative of identity than nuclear DNA, but it can determine who can be excluded as a contributor. (V7, R1128). Green and his maternal relatives could not be excluded as a source of the Negroid hairs. (V7, R1128, 1153).

Martin Tracey, biology professor at Florida International University, Miami, Florida, primarily focuses on genetic population research. (V7, R1174). He reviewed the mtDNA reports in this case and conducted a statistical analysis. (V7, R1187). His analysis indicated that 1 out of 376 people, or less than 1%, would have the same DNA sequence as Crosley Green. (V7, R1189-1190).

Defense expert William Shields, biology professor at Syracuse University, testified there were potential problems in the testing statistics in this case. (V8, R1219). The results did not produce a "complete sequence" on one of the hairs. (V8, R1219). In addition, one of the potential risks associated with mtDNA testing is contamination. (V8, R1220). Shields agreed Green could not be "excluded," but he felt the results were not reliable. (V8, R1225). Further, in Shields' opinion, the statistical tests run by Weiss and Dr. Tracey were faulty. (V8, R1226). Shields admitted he used LabCorp for testing and believed it to be "a well-designed lab" with "better than standard" quality control procedures. (V8, R1237-38).

On cross-examination, Dr. Shields conceded he is not a forensic scientist and has not performed mtDNA sequence testing himself. (V8, R1241). The results of the hair analysis done in this case were not unreasonable. Shields would have reached the same conclusions LabCorp did. (V8, R1242).

At the continuation of the evidentiary hearing on October 4, 2004, Green presented one witness and the State presented two.

David Dow, a law professor at the University of Houston and Co-Director of the Texas Innocence Network, represents death row inmates. (V9, R1296, 1356). The State moved to preclude Dow as an expert witness on effective assistance of counsel claims. (V9, R1285-1292). The motion was denied. (V9, R1293). His testimony consisted of criticizing Mr. Parker's trial performance.[9]

[9]Dow had never tried a capital case and had worked with a lawyer on one Florida post-conviction case. (V9, R1302). He was second chair on that case. (V9, R1303). According to ABA guidelines, there should be at least two attorneys assigned to a death penalty case. (V9, R1312). It is important to have two lawyers because murder cases are so complicated, and punishment phase investigation must start early, and punishment phase requires a "specialty" attorney. (V9, R1313-14). The ABA specifies lawyer qualifications for capital cases. (V9, R1317-18). Greens' trial attorney had not attended continued education programs. (V9, R1319). In Dow's opinion, the time that Mr. Parker spent on the penalty phase was "grossly inadequate." (V9, R1331). Parker should have contacted Green within 24 hours of appointment, but he waited several weeks. (V9, R1321). Dow likes to spend 10-12 hours with the Defendant at the initial interview. Parker only spent two. (V9, R1322). He did not start obtaining records for the penalty phase until the conclusion of the guilt phase. (V9, R1324). Dow had published several

Bobby Mutter, former Commander with the Rockledge Police Department ("PD"), trained police dogs for Titusville PD,

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articles, including: "The Extraordinary Execution of Billy Vickers," "The Finality of Death and the Demise of Post Conviction Review," "America's Death Machine," among others. (V9, R1304-05). Texas death penalty law and procedure is different from Florida's. (V9, R1307).

Dow felt the minimum amount of time spent on the penalty phase should be 250-300 hours. (V9, R 1332). He had seen some mitigation investigations of over 1,000 hours. (V9, R1332). A prudent lawyer would always conduct a mental health exam. (V9, R1335). The time Parker spent consulting a mental health expert was "grossly deficient." (V9, R1335). Dow said it is important for capital lawyers to form a relationship with family members because their testimony is critical at the punishment phase. (V9, R1345). It takes time for family members to be forthcoming with any information regarding abuse or neglect. (V9, R1346). ABA guidelines call for a mitigation expert which Parker did not hire. (V9, R1348). Parker did, however, request an investigator. (V9, R1349). In Dow's opinion, Parker should have used a peremptory challenge on Juror Giles. (V9, R1360).

Parker's billing records indicate he spent time researching the legal admissibility of the dog track testimony; however, he did no investigation on the reliability of the evidence. (V9, R1363-64). ABA guidelines require a lawyer to hire experts on issues on which an attorney is not familiar. Parker did not hire a dog track expert. (V9, R1365).

At the time of Green's trial in 1990, Dow said, "nobody was using DNA in a case like this." (V9, R1365). In Dow's opinion, Parker did not effectively cross-examine witness Jerome Murray regarding his felony convictions. (V9, R1369). Because Parker did not have certified copies of Murray's convictions, he was unable to impeach Murray. (V9, R1370-71). There would never be a strategic reason for not investigating a client's criminal background. (V9, R1374).

Dow admitted he did not know how many peremptory challenges Parker had left, (V9, R1375), that Parker spent hours traveling with the investigator to investigate, (V9, R1377), that he really had no idea how much time Parker spent on the case aside from the billing records, (V9, R1377), that although Parker prosecuted murder cases, he did not qualify under ABA guidelines because he had not defended, (V9, R1378), and that Parker attended a death penalty seminar in West Palm Beach. (V9, R1379).

Brevard County Sheriff, Rockledge PD, Coca Beach PD, Colorado Springs PD, Cobb County PD, and Cobb County Sheriff's Office. He had trained hundreds of dogs for animal trailing[10] and had testified as an expert in Florida, Texas, South Carolina, North Carolina, Virginia, Utah, and New Jersey. (V9, R1386-87). Mutter had been training director two times for the Brevard County Dog Training Club, the local AKC club. (V9, R1388-89). Mutter was State Coordinator for the American Police Work Dog Association for seven years and was the founder and president of the Florida Police Work Dog Association. (V9, R1389). In Florida, FDLE is the main organization to certify police training dogs. (V9, R1389).

Mutter assisted Deputy Keiser in training Czar. (V9, R1391). He saw Keiser and Czar work together "quite often." In 1989, Czar was 8½ years old. Mutter "would want an older dog" on this type of trail because he is "going to go slower. He is going to be more methodical. He's experienced. He knows what he's doing." (V9, R1394). A trail six hours old is not a particularly old trail for a dog. (V9, R1393). Training an AKC dog is "totally different" from training a search dog or law enforcement dog. (V9, R1395).

Part of a dog's training to become certified includes having

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[10] Police dogs do "trailing" but the Public generally refers to it

other people or animals walking across a track scent. (V9, R1396). Czar was trained in Germany, and had very strict training. He would not be distracted by scents other than the one he was told to follow. (V9, R1396). All police dogs do surface tracking. (V9, R1397). Czar was a Schutzhund3FH, the highest rank possible in a trailing dog. (V9, R1398). The fact that the victim did not identify a suspect that Czar trailed has nothing to do with the accuracy of the trial. (V9, R1401).

The weather conditions the night of the murder were "the best working condition" for a tracking dog. Dew on the ground rejuvenates and holds scent. (V9, R1407). With the conditions under which Czar tracked down Crosley Green, Mutter could "start a puppy." These conditions were "kindergarten to a dog like Czar." (V9, R1407).

Layman Lane was an acquaintance of O'Connor Green in 1989. (V9, R1429). He knew all the Greens. (V9, R1430). Lane did not speak to police when Crosley Green was arrested, but he spoke to Officer Gilford approximately ten years later. (V9, R1430-31). Lane told Gilford he was working on a car and Crosley Green told him that "he just shot somebody" and was looking for his sister, Tina. (V9, R1433). Tina lived next to Holder Park. (V9, R1433).

SUMMARY OF ARGUMENT

The trial judge made detailed, specific findings on each issue, and his findings are supported by substantial competent evidence on all claims. Although the trial court did not make findings of procedural bar, the State continues to assert this bar.

Claims I and II: Claim 1 is procedurally barred. The New York conviction is a prior violent felony. The State did not violate *Brady* or *Giglio* because the conviction *is* a prior violent felony.

Claim III: Trial counsel was not ineffective. Witnesses were not willing, or were unable, to testify for Green. The testimony presented at the evidentiary hearing was cumulative or negative.

Claim IV: Testimony of recanting witnesses must be viewed with suspicion. This testimony would not produce an acquittal. The trial judge findings on credibility are entitled to great weight.

Claim V: This issue was not raised in the Rule 3.851 motion. There was no material, exculpatory evidence the State failed to disclose. Counsel deposed the officers. It is not clear whether he was aware of the index cards. This claim is speculative.

Claim VI: Green has shown no prejudice or deficient performance because Mr. Parker did not maintain his file. Mr.

Parker's investigation was adequate. The claim regarding impeachment of Jerome Murray was not raised below.

Claim VII: The trial judge made detailed findings and attached record portions supporting his summary denial.

Claim VIII: This claim is procedurally barred. Mr. Parker was not ineffective in his impeachment of the dog trailing evidence. There was no *Brady/Giglio* error. Czar is a highly qualified dog, and the trail was "kindergarten."

Claim IX and X: These claims are procedurally barred. Counsel made a strategic choice to keep Juror Guiles. Whether Juror Guiles made a "gesture" at trial was explored at trial and has no merit.

Claim XI: The juror interview claim is procedurally barred and has no merit.

Claim XII: Green's death sentence does not violated *Ring v. Arizona*. Green's sentence is supported by the aggravating circumstances of during-a-felony and prior-violent-felony.

Claim XIII: The burden-shifting claim in procedurally barred and has no merit.

Claim I on cross-appeal: The trial judge erred by holding that the penalty phase jury believed Green was convicted of armed robbery. The record shows that the only reference to armed robbery was subsequently explained. Green was arrested

for armed robbery but pled to robbery. All parties referred to the prior conviction as "robbery." The State Exhibit supporting the conviction stated "robbery." The trial judge used the term "armed robbery" one time and "robbery" another time in his sentencing order. This does not establish that the jury and judge were laboring under a misunderstanding. There is no "additional mitigation" that would have been discovered through knowledge of the New York conviction. Defense counsel informed the judge and jury that Green was young when he committed the New York offense. He was treated as a Youthful Offender, and this term was used repeatedly. The judge's finding that Green may not be guilty of the prior crime is pure speculation. Green pled and was convicted of robbery. That conviction still stands. The New York conviction has never been challenged in New York which is the proper forum to litigate whether the conviction is valid. *Rompilla* is distinguishable.

CLAIMS I AND II[11]

GREEN'S ROBBERY CONVICTION IS A PRIOR VIOLENT FELONY; THERE WAS NO *BRADY* OR *GIGLIO* ERROR

Green argues that the New York robbery conviction does not qualify as a prior violent felony because Green qualified as a

[11] Claims I and II are closely associated with the cross-appeal issue. Claims I and II are briefed together since they are so closely related.

Youthful Offender in New York. This issue is procedurally barred and should have been raised on direct appeal. *Johnson v. State*, 593 So. 2d 206, 208 (Fla. 1992) ("Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack."). At the sentencing hearing in this case, a New York police officer and a New York parole officer testified regarding the New York conviction (TT2194, 2217)[12]. The police officer testified Green pled as a Youthful Offender (TT2217). The pre-sentence investigation states that Green was convicted as a Youthful Offender in New York (V24, R4066, Exhibits, R5920). Defense counsel argued against the Youthful Offender conviction being used as a prior violent felony:

> I would argue that the previous felony involving violence because it was youthful offender status should not be considered in this circumstance. However, I make that argument knowing full well that the *Campbell* case says that there is no reason why you can't consider a juvenile conviction for a violent crime as an aggravating circumstance.

(TT2251-52).

The "*Campbell*" case defense counsel acknowledged as adverse authority was *Campbell v. State*, 571 So. 2d 415, 418 (Fla. 1990), in which this Court upheld the "prior violent felony"

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[12] "TT" refers to the original trial transcript on direct appeal. Case No. 77402. *Green v. State*, 641 So. 2d 391 (Fla. 1994).

aggravator based on a juvenile conviction. Mr. Parker properly acknowledged the adverse authority, but preserved this issue, even analogizing Youthful Offender status to juvenile status. Parker argued in the penalty phase closing argument that the prior robbery conviction should not be given weight because Green received "youthful offender treatment, a 15-16-year old boy." (TT2314). The prosecutor also talked to the jury about "the robbery in New York" for which Green was "sentenced to prison as a youthful offender." (TT2284).

The issue was also addressed at the "*Spencer*"[13] hearing (TT2407). The prosecutor referred to the New York offense as a "robbery" (TT2378), stated that Green was arrested for "robbery" in New York, and was convicted of "robbery" in New York, and that they are "talking about robbery". (TT2379). The prosecutor also stated that he believed Green was 17 or 18 at the time of the New York offense. (TT2380). Mr. Parker argued that the State did not file any judgment and sentence of the New York offense, and there was insufficient proof. (TT2405). He also argued that Green was very young at the time of the New York offense and received Youthful Offender treatment (TT2407).

[13] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), had not been decided at the time of Green's sentencing procedure; however, the trial judge used a comparable procedure by having oral arguments on the aggravating/mitigation circumstances on November 7, 1990. (TT2339-2420). Sentencing was February 8,

Further, the New York offense was remote and should be given little weight (TT2407). This issue could have been raised on direct appeal and is procedurally barred.

Furthermore, Green does not advise this Court how he can collaterally attack the validity of a New York conviction in a Rule 3.851 motion in Florida. Although he argues the New York conviction was "vacated," case law and New York statutes show this is a term indigenous to New York youthful offender status and is not the functional equivalent of a conviction being "vacated" pursuant to Florida Rule 3.851.

Green also claims (Claim II) the State violated *Brady* and *Giglio* because, when the prosecutor was trying to obtain a copy of the robbery conviction, a New York prosecutor sent a copy of the New York statute to the Florida prosecutor and explained that under New York law the youthful offender adjudication is sealed and not considered a "conviction." (Initial Brief at 33). Therefore, Green reasons, since the State had a copy of the New York statute which states youthful offender adjudication is not a "conviction," they had a duty to provide it to defense counsel. First, this argument assumes Green was not "convicted" of a prior violent felony in New York. Second, defense counsel was fully aware of Green's New York Youthful Offender status.

1991. (TT2442-2459).

Third, the letters between the New York and Florida prosecutors were regarding Florida and New York law and contained nothing that could not be discovered with due diligence. Defense counsel argued that the State was required to admit the judgment and sentence, and this argument was overruled. There can be no violation of *Brady v. Maryland*, 373 U.S. 83 (1963), or *Giglio v. United States*, 405 U.S. 150 (1972), since the evidence which was supposedly undisclosed was known by all parties and was litigated in the lower court.

To establish a *Brady* violation, the Defendant must show (1) that the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and

(3) that the suppression resulted in prejudice. *Sochor v. State,* 883 So. 2d 766, 785 (Fla. 2004); *Rogers v. State*, 782 So. 2d 373, 378 (Fla. 2001). Green has failed to establish these factors.

A *Giglio* violation is established when a petitioner shows that

(1) a witness gave false testimony; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *Sochor, supra*; *Guzman v. State,* 868 So. 2d 498, 505 (Fla. 2003) (citing

Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001)). Green has failed to establish these factors. Green cites to the prosecutor's closing argument as the false evidence. First, this is not a witness' testimony but closing argument, which the trial judge instructs is not evidence. Second, the prosecutor clearly states Green was adjudicated as a youthful offender for robbery in New York. This is a true statement.

Everyone involved in Green's sentencing knew Green was adjudicated a youthful offender in New York. The trial judge in his final order, addressed the fact that Green " . . . was eighteen years old at the time he committed the crime of robbery in the State of New York . . . The defendant also established that he was treated as a youthful offender by the State of New York." (TT2845). Green now argues that the fact New York statutes provide that a youthful offender adjudication involves "vacating" the adult sentence is *Brady/Giglio* material. He does not explain how a statute can be in the exclusive possession of the State. As a backstop to the fact there is no *Brady* violation, Green argues that counsel was ineffective for failing to pull the New York statute and discovering the New York "conviction" is not a conviction at all[14]. This claim assumes too much.

[14] This issue is the subject of the cross-appeal and discussed

Green relies on *Merck v. State,* 664 So. 2d 939 (Fla. 1995), a case decided five years after his trial, and compares his case to a juvenile conviction. First the prevailing authority at the time of Green=s trial was *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), which Mr. Parker acknowledged. Second, Parker did argue that the judge not consider the New York conviction because he had youthful offender status. Third, Green's assumption that a New York "vacation" of adult sentence in favor of a youthful offender sentence means that the conviction disappears for all purposes.

Recent New York case law shows that a Youthful Offender conviction in New York is an adult conviction; however, once the person qualifies as an "eligible youth," a "youthful offender finding is substituted for the conviction" and a youthful offender sentence is imposed. NY CLS CPL § 720.10 (2003). A youthful offender sentence for a felony is the same as that imposed for a class E felony NY CLS CPL § 60.02(2). The sentence on a Class E felony may not exceed four years. NY CLS CPL § 70.00(2)(e). This classification scheme is comparable to Florida's in which a qualifying offender is classified as a youthful offender and his sentence is limited to six years. Fla. Stat. §948.04 (2003). New York federal courts have held

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more fully therein.

that a youthful offender conviction counts as an adult conviction for sentencing purposes. *United States v. Cuello,* 357 F.3d 162 (2d Cir. 2004); *United States v. Matthews*, 205 F.3d 544 (2d Cir. 2000)(YO sentence can be counted as criminal history); *United States v. Driskell*, 277 F.3d 150 (2d Cir. 2002)(YO sentence is "adult conviction" for purposes of assessing criminal history points). In *United States v. Sampson,* 385 F.3d 183 (2d Cir. 2004), the Court held that a youthful offender adjudication was a prior conviction for a felony drug offense which could be used to enhance his sentence. The Court noted that Sampson was tried and convicted in an adult court of an adult offense punishable by imprisonment for more than one year. *Id*. at 195.

A Youthful Offender conviction is an adult conviction, distinguishable from the juvenile conviction in *Merck*. In fact, in *Merck*, the Florida Supreme Court cites to Section 39.053, Florida Statutes, which holds that a juvenile adjudication is not a Aconviction.@ *Merck*, 664 So. 2d at 944. The current juvenile section, '985.233(4)(b) likewise states that a juvenile adjudication is not a conviction. On the contrary, Florida case law holds that a Youthful Offender conviction is an adult sanction, not a juvenile sanction. *State v. Richardson*, 766 So.

2d 1111 (Fla. 2000). Thus, *Merck* does not apply. Furthermore, in *Merck,* the Court carefully distinguishes between an Aadjudication of delinquency@ which cannot be considered a Aconviction@ under '921.141(5)(b) and Ajuvenile convictions@ which, pursuant to *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), may be considered. The Supreme Court did not overrule *Campbell* in *Merck* but made a careful distinction between a juvenile adjudication and a juvenile who is convicted as an adult. Green was convicted of an adult sanction at the age of 18 and sentenced to the Department of Corrections.

The validity of Green's Youthful Offender adjudication was never challenged in New York and the conviction never reversed. The language that the conviction is "deemed vacated" does not mean the conviction is reversed or is void. It simply means Youthful Offender sentence replaces the adult sentence. *United States v. Cuello,* 357 F.2d 162, 165 (2d Cir. 2004). Therefore, counsel cannot be ineffective and Green cannot show prejudice under either *Brady* or *Giglio.*

Regarding the validity of the conviction, the trial court held:

> In the subject case, the New York offense was an adult conviction, not an adjudication of delinquency. Article 720 of the New York State Criminal Procedure Law establishes a youthful offender statutory scheme. Individuals between the ages of sixteen and nineteen charged with a criminal offense (excluding certain

enumerated felonies) who meet certain specified conditions, including having no prior felony convictions and no prior youthful adjudications, are deemed "eligible youths." N.Y. Crim. Proc. Law § 720.10(1)-(2). Then, upon conviction of an eligible youth in a New York court, the New York court orders a pre-sentence investigation to determine if the eligible youth is a "youthful offender," based on certain enumerated factors. N.Y. Crim. Proc. Law § 720.20(1). If the court finds the eligible youth to be a youthful offender, "the court must direct that the conviction be deemed vacated and replaced by a youthful offender finding; and the court must sentence the Defendant pursuant to section 60.02 of the penal law." N.Y. Crim. Proc. Law § 720.20(3). The youthful offender finding and resulting sentence together constitute a "youthful offender adjudication." N.Y. Crim. Proc. Law § 720.10(6).

New York federal courts have held that a youthful offender conviction counts as an adult conviction for sentencing purposes. United States v. Cuello, 357 F.3d 162 (2d Cir. 2004) (holding a youthful offender adjudication counted as a prior adult felony conviction); United States v. Driskell, 277 F.3d 150 (2d Cir. 2002) (holding a district court could consider a New York youthful offender adjudication in calculating a defendant's criminal history under federal guidelines, even though that conviction had been vacated under New York law). Additionally, a Virginia federal district court has held that New York state offenses, for which the Defendant had received "youthful offender status" should be counted as prior felony convictions for purposes of determining whether the Defendant was a career offender. United States v. Greene, 187 F. Supp.2d 595 (E.D. Va. 2002). The New York federal district court has explained that New York's youthful offender law evinced an intent only to "set aside" a conviction for the purposes of avoiding stigma, rather than to erase all record of the conviction or to preclude its future use by courts. United States v. Matthews, 205 F.3d 544, 548-49 (2d Cir. 2000). Florida case law holds that a youthful offender conviction is an adult sanction, not a juvenile sanction. State v. Richardson, 766 So. 2d 1111 (Fla. 2000). Therefore, Merck does not apply. The

Florida Supreme Court did not overrule Campbell v. State, 571 So. 2d 415 (Fla. 1990) in Merck, but made a distinction between a juvenile adjudication and a juvenile who is convicted as an adult. The Defendant was convicted of an adult sanction at the age of eighteen and sentenced to the Department of Corrections.

The Defendant's claim that his New York conviction was vacated and cannot be considered as a prior violent felony has no merit. Johnson v. Mississippi, 486 U.S. 578 (1988) does not apply because in that case, the conviction had been reversed, as opposed to this case where the New York robbery adjudication and conviction was never reversed. The language employed in New York that the conviction is deemed "vacated" does not mean that the conviction is reversed or is void, it simply means that the youthful offender sentence replaces the adult sentence. United States v. Cuello, 357 F.2d 162, 165 (2d Cir. 2004).

The Defendant asserts that even if the evidence of the New York case would have been admissible, and even if its disposition would have supported the prior violent felony aggravator, prejudice is still manifest because the jury was told and the judge found that the Defendant had been convicted and sent to prison for armed robbery, instead of robbery. The New York documents show that the Defendant plead to and was convicted of robbery in the third degree. The New York statutes define "robbery" as "forcible stealing" and that:

A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or the retention thereof immediately after the taking; or

2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

> N.Y. Penal Law *§* 160.00. After defining "robbery," the New York statutes then define robbery in the third degree, second degree, and first degree. N.Y. Penal Law *§*~ 160.05-160.15. Section 160.05 of the New York statutes provides that a "person is guilty of robbery in the third degree when he forcibly steals property." By its statutory definition of third degree robbery in New York, this meets the aggravating factor in section 921.141(5)(b) that the Defendant was convicted of "a felony involving the use or threat of violence." Moreover, the Florida Supreme Court has held that for purposes of section 921.141(5)(b) that *any* robbery conviction is as a matter of law a felony involving the use or threat of violence. Simmons v. State, 419 So. 2d 316, 319 (Fla. 1982). Therefore, the Court finds that the Defendant was convicted of a prior violent felony for purposes of section 921.141(5)(b). See generally Donaldson v. State, 722 So. 2d 177, 184 (Fla. 1998) (explaining that section 921.141(5)(b) specifically "limits the evidence to that of a violent crime for which the Defendant is actually convicted.")[15]

(V24, R4072-4075). Although the trial judge should have also found the issue procedurally barred, his findings on the merits are supported by competent, substantial evidence.

Regarding the *Brady/Giglio* claim, the trial court held:

> The Defendant alleges that the State committed a Brady violation as to the New York offense and the related documents from New York. However, the Court finds that the Defendant failed to prove that the State either willfully or inadvertently suppressed the evidence concerning the New York offense. As shown by the correspondence introduced at the evidentiary hearing, the State tried to obtain all information concerning the New York offense; however, New York officials refused to release the documents under New York law because the Defendant was adjudicated as a youthful offender. (See Exhibit "00," New York Offense Composite.) As far as the correspondence from Mr.

> White to New York officials seeking certified copies of the charging document and any sentencing document for the New York offense, the record shows that Mr. Parker was aware that the Defendant was adjudicated a youthful offender on January 25, 1977, and Mr. Parker argued to the trial judge that the youthful offender status of this offense should not be considered a juvenile conviction for purposes of the section 921.141(5)(b) aggravator. (See Exhibit "C," pgs. 79-80). Therefore, this Court finds no Brady or Giglio error occurred.

(V24, R4068-4069). These findings are supported by competent, substantial evidence.

CLAIM III

COUNSEL WAS NOT INEFFECTIVE IN THE PENALTY PHASE

Green alleges that trial counsel was ineffective at the penalty phase for failing to challenge the prior violent felony aggravator. (Initial Brief at 39). Mr. Parker not only attacked Green's Florida prior violent felony as "doubling" with other aggravators (*See* sentencing order, TT2840), he also attacked the New York conviction as remote, not applicable because it was a youthful offender adjudication, and the State presented insufficient evidence. (TT2251-52, 2405, 2407). The trial judge overruled each of these arguments and found this aggravator was established.

Green next generalizes about death penalty litigation, citing to testimony from David Dow, co-director of the Texas

Innocence Network who has never tried a capital case in Florida. (Initial Brief at 39-44). Dow is hardly a credible or unbiased witness. The State objected to Dow testifying as an expert on effective assistance of counsel, since this invades the province of the fact-finder, in this case Judge Jacobus, who does not require expert testimony to assist in his understanding of the issue.

Last, Green delineates the evidence presented at the evidentiary hearing: that Green was born in 1957 and was exposed to violence, that his father physically abused his mother and ultimately killed her and then himself, that Green was in prison in New York when the murder/suicide happened, that he was close to his retarded sister, Rosemary; that he was punished with a belt or switch, extension cord, water hose, or confinement in a closet; that the father was out of control when he drank, that Green lived in poverty and the father worked all day, every day of the week; that the children wore hand-me-down clothing and worked in the groves together, that the parents had extramarital relationships and neglected their children, and that Green abused alcohol and drugs. (Initial Brief at 44-48). This testimony was either cumulative to that presented or negative (such as Green being in prison in New York when his father killed his mother). Brother Hamp was in prison at the

time of trial, hardly a plus for Crosley. Selestine was unfit to testify because she laughed nervously. Shirley Green did testify. Green has pointed to nothing that was deficient or which prejudiced him. Making conclusory allegations without specifics does not establish grounds for relief. *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990).

At the beginning of the penalty phase hearing on September 27, 1990, Mr. Parker asked for a brief recess because he had scheduled an office conference the day before with several witnesses he expected to call in the penalty phase. However, no one showed up (TT2182). Mr. Parker spoke to several people about the penalty phase, including Selestine Peterkin. (V3, R475). He sat down with Green and told him Awe need to dissect your background.@ He told Green he needed people who could say good things about him. He asked Green to give him names. (V3, R475). One of the people was a retired school teacher who refused to get involved. (V3, R476). When Mr. Parker called Ms. Peterkin to the stand, she started laughing. He asked her to calm down, but she continued to laugh. She could not control her laughter. He did not call Ms. Peterkin, even though he had spent two hours conferring with her. (V3, R475, 476). Of the people whose names Green gave Mr. Parker, no one would come forward and say anything good about Green. (V3, R475). He also

tried to speak with Mr. Fields and Mr. Vickers, who told him Ahere is what it is@ and hung up. (V3, R477).

Mr. Parker was able to present the testimony of Shirley Green, who discussed the circumstances surrounding the day Green=s father killed their mother, then shot himself (TT2221). Green was 17 or 18 when their parents died (TT2221). Green=s sister, Dee Dee, found the parents. There were 11 children in the family. They could not talk about the deaths because it hurt too much (TT2222). At the time of the deaths, Green was living with his grandfather, but all the brothers and sisters were in Florida (TT2225). Green was affected by the deaths. He would say AI wish daddy and mama was living. Things wouldn=t be like this.@ (TT2223). Green had a son named Gaston who was 6 years old. They had a father/son relationship and Green would take Gaston to the park or spend the night with the family. It was a loving father and son relationship (TT2223).

Damon Jones also testified at the penalty phase hearing. He had known Green all his life. One time Damon was out swimming and almost drowned. Green saved his life (TT2227). Jones was aware of the deaths of Green=s parents (TT2229).

Parker also consulted a mental health expert, Dr. Greenblum, to no avail.

Green has failed to show that Parker’s investigation was

unreasonable under the circumstances. Hamp was in prison at the time of Crosley's trial. (V4, R579). Shirley did testify but said that family life was "very good" and that her parents had been "good parents." (V4, R640-41). She also testified that her brother, Crosley, had not been abused. (V4, R641). Even the social worker, Hammock, admitted she was aware Shirley said at trial that Crosley was not abused and was treated "okay" by their father and mother. (V4, R721). However, in Hammock's opinion, an attorney needs to "develop a relationship with someone who is, in fact, cautious about sharing information." (V4, R722). In other words, if a family member describes family life as good or deny child abuse the attorney should doubt them. Ironically, Crosley's sister, Degra, also testified in her 2002 deposition that the children were not abused. (V4, R725, 726).

Green has shown neither deficient performance nor prejudice under *Strickland v. Washington*, 468 U.S. 668 (1984). Trial counsel did contact the witnesses and presented the evidence that was available. The fact that the witnesses changed their testimony after 14 years does not make counsel ineffective. The testimony presented at the evidentiary hearing was cumulative. The jury knew of the poverty, the eleven children, the murder/suicide, Crosley's son, that he was a loving brother, and that he saved a man's life. The fact that witnesses have now

provided more detail, contradicted their prior testimony, or presented negative factors, does not mean Green can meet his burden of showing counsel's performance was unreasonable and that deficiency changed the outcome. See *Gudinas v. State*, 816 So. 2d 1095, 1106 (Fla. 2002) (finding that trial counsel was not ineffective for failing to present evidence in mitigation that was cumulative to evidence already presented in mitigation); *Henyard v. State,* 883 So. 2d 753 (Fla. 2004).

Furthermore, the witnesses at the evidentiary hearing were exposed to cross-examination with their prior inconsistent statements and evidence which painted Green in a negative light. An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword. *See, Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004)*, Freeman v. State*, 852 So. 2d 216, 224 (Fla. 2003), *Carroll v. State*, 815 So. 2d 601, 614-15 & n. 15 (Fla. 2002); *Asay v. State*, 769 So. 2d 974, 988 (Fla. 2000). Trial counsel was presented with a situation in which there was simply no one willing to testify for the defendant.

The trial judge held:

> Under claim seven, the Defendant alleges that counsel was ineffective for failing to investigate and prepare for the penalty phase. The Defendant alleges in his post-conviction motion that counsel should have called in mitigation Selestine Peterkin, Gail Dublin Graham, Rosemary Green, and Shirley Green. An evidentiary

hearing was held on claim seven. At the evidentiary hearing, the witnesses who appeared to present mitigation at the evidentiary hearing regarding this claim were Hamp Green, Shirley Green White, Selestine Peterkin, and Marjorie Britain Hammock. Neither Gail Dublin Graham, nor Rosemary Green testified at the evidentiary hearing.

At the penalty phase proceeding held on September 27, 1990, the Defendant presented testimony from his sister, Shirley Green, and from his friend, Damon Jones. Shirley Green testified that on April 15, 1977, when the Defendant was seventeen or eighteen years old, the Defendant's father killed his mother, then committed suicide. The Defendant's sister, Dee Dee, found the bodies. According to Shirley Green, there were eleven children in the Green family. Shirley Green testified that they did not talk about the deaths because it hurt too much. Shirley also testified that the Defendant was affected by the deaths of his parents, and he would say that he wished his mother and father were still living, because things wouldn't be like this. Shirley Green also testified that the Defendant had a son, Gaston, who was five or six years old at the time of the penalty phase hearing, and that the Defendant was a loving father, as exemplified by the fact that the Defendant would take his son to the park to play. (See Exhibit "C," pgs. 47-52). Damon Jones, a roofer and minister, testified that the Defendant saved him from drowning on one occasion while he was swimming. (See Exhibit "C," pgs. 54-57).

At the evidentiary hearing, Mr. Parker testified that he spoke with several people regarding mitigation testimony. Mr. Parker testified that he discussed with the Defendant the penalty phase, and asked him to give names of persons to whom he could talk to. The Defendant named a retired school teacher and a coach at a local school. Mr. Parker testified that the retired school teacher flatly refused to get involved in the case, and the coach informed, "There is nothing good I can say about that boy." Mr. Parker testified that he could not find anybody who would say good things about the Defendant. (See Exhibit "DD," pgs. 331-337). Mr. Parker testified that the reason why he did not call Selestine Peterkin to testify at the

penalty phase was because when he attempted to call her to the stand, she began inappropriately laughing. Mr. Parker testified that he told her to calm down, but she could not control her laughter. Mr. Parker testified that he determined that based on Ms. Peterkin's inappropriate behavior, he was not going to call her to testify at the penalty phase. (See Exhibit "DD," p. 335).

Hamp Green, the Defendant's youngest brother, who was incarcerated at the Brevard County Detention Center at the time of the evidentiary hearing, testified at the Defendant's evidentiary hearing. Hamp 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. (See Exhibit "FE," pgs. 18-56).

Shirley Green is the Defendant's older sister, by approximately seven years. Shirley Green and the Defendant have the same biological father, Booker T. Green, but different biological mothers. Shirley's biological mother is Luna Mae Green; whereas, the Defendant's biological mother is Constance "Connie"

Tomasina Green. As did Hamp Green, 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. (See Exhibit "FE," pgs. 58-106).

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. On cross-examination, Shirley said she remembered giving a deposition on November 13, 2002, and recalled stating that her family life was "very good" and that her parents had been "good parents." In that deposition, Shirley had also testified that the Defendant had not been abused. In addition, Shirley remembered testifying at the Defendant's penalty phase that he was a loving and caring father. (See Exhibit "EE," pgs. 98, 108, 111-113).

Selestine Peterkin testified at the Defendant's evidentiary hearing that the Defendant is one year younger than her. Selestine remembered receiving new clothes as a child in addition to "hand-me downs" and

clothes from the thrift store. Selestine was the child emotionally closest to the Defendant's mother, and as a result, the mother made special trips to the park with Selestine and played various games with her. Selestine also remembered her grandmother taking just her shopping because Selestine was her grandmother's namesake. 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. After the death of the Defendant's parents, all of the remaining children at home moved in with Selestine and her husband. On cross-examination, Selestine testified that she spoke with Mr. Parker prior to the Defendant's trial. (See Exhibit "EE," pgs. 124-139).

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 biopsychosocial 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. (See Exhibit "EE," pgs. 139-155, 159).

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." (See Exhibit "EE," pgs. 157-1 62).

In conducting the interviews, the family members discussed with Ms. Hammock violence in the Green home to varying degrees. (See Exhibit "FE," p. 167). The family had a "bad name in the community." (See Exhibit "EE," p. 168). The males "got into a lot of trouble early on, but the women carried the label too." (See Exhibit "EE," p. 168). According to Ms. Hammock, the Defendant "saw his role and mission as being really important in contributing to the income of the family." (See Exhibit "FE," p. 169). 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. (See Exhibit "FE," pgs. 178-179).

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. (See Exhibit "FE," p. 180). Ms. Hammock testified that various members of the Green family described their father as "being violent only when he was drinking." (See Exhibit "FE," p. 182). 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. (See Exhibit “FE,” pgs. 157-190).

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. Among the depositions that she read included Shirley Green White’s deposition in which she testified that her family life was “very good” and that of the Defendant’s other sister Degra in which she testified that the children were not abused. Although Ms. Hammock agreed that no child ever had a perfect life growing up, she testified, “you would not find high levels of abuse and neglect.. .present in everybody’s existence.. .when you couple that with other extreme forms of violence, neglect, abuse.. .it impacts on how the child develops.” (See Exhibit “FE,” pgs. 190-210).

On re-direct examination, Ms. Hammock explained that Degra Green was one of the more “favored siblings” in the family and was not subjected to the “tyranny of the mother and father.” 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. (See Exhibit “EE,” pgs. 210-219).

The Court finds that the Defendant has failed to fulfill both prongs of the Strickland standard. Defense counsel did contact witnesses and presented evidence and testimony that was available in 1990. As to Selestine Peterkin, Mr. Parker made a reasonable strategic decision not to call her to testify at the penalty phase because she was laughing inappropriately and could or would not control her laughter. The fact that the witnesses now changed their testimony from a good and non-abusive home life after fourteen years does not make counsel ineffective. Moreover, the evidence that the Defendant’s father killed his mother and then himself, was cumulative. 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. An ineffective assistance of counsel claim does not arise from the failure to

> present mitigation evidence where the evidence presents a double-edged sword. See Reed v. State, 875 So. 2d 415, 437 (Fla. 2004); Freeman v. State, 852 So. 2d 216, 224 (Fla. 2003); Carroll v. State, 815 So. 2d 601, 614-615, n. 15 (FIa. 2002); Asay v. State, 769 So. 2d 974, 988 (Fla. 2000). The Court further finds that the Defendant has failed to show that the outcome of the penalty phase would have been different had these witnesses testified as this mitigating evidence would not have outweighed the aggravating factors found in this case.

(Vol. 24, R4077-4085). These findings are supported by substantial competent evidence.

CLAIM IV

THERE IS NO NEWLY DISCOVERED EVIDENCE THAT WOULD RENDER THE CONVICTIONS UNRELIABLE

Green next argues that the recanted testimony of Sheila Green, Lonnie Hillary and Jerome Murray require a new guilt phase. (Initial Brief at 51). This claim was alleged in the Rule 3.851 motion as including Tim Curtis. Neither Curtis nor Murray testified at the evidentiary hearing, and those portions of the claim are not supported by any evidence. Green admits that the testimony at the evidentiary hearing was conflicting.

Absent an abuse of discretion, a trial court's decision on a motion based on newly discovered evidence will not be overturned on appeal. *See Woods v. State*, 733 So. 2d 980 (Fla. 1999); *State v. Spaziano*, 692 So. 2d 174 (Fla. 1997); *Parker v. State*, 641 So. 2d 369 (Fla. 1994). In order to obtain relief on a claim of

newly discovered evidence, a claimant must show, first, that the newly discovered evidence was unknown to the defendant or defendant's counsel at the time of trial and could not have been discovered through due diligence and, second, that the evidence is of such a character that it would probably produce an acquittal on retrial. *See Jones v. State*, 709 So. 2d 512 (Fla. 1998).

The trial court held, in relevant part:

> **Sheila Green**
> n. Sheila Green is the sister of the Defendant. At the Defendant's trial in 1990, Sheila Green testified that the day after the homicide, she confronted the Defendant about rumors she had heard, and the Defendant admitted to her his involvement in the shooting. Sheila had been convicted in federal court for drug offenses. Sheila and her co-defendant, Lonnie Hillery, had testified against the Defendant in his trial in return for consideration in the future sentencing of Sheila. (See Exhibit "B," pgs. 854-861).
>
> At the evidentiary hearing, Sheila Green testified that her testimony at the trial in 1990 was not true. (See Exhibit "DD," pgs. 18-19, 70). Sheila further testified that the Defendant never confessed to her that he murdered Chip Flynn. (See Exhibit "DD," p. 19). Sheila also testified at the evidentiary hearing that she never came in contact with the Defendant. (See Exhibit "DD," p. 19). Sheila contended that she was first approached by the State Attorney's Office (Chris White and Phil Williams) to provide testimony against the Defendant. (See Exhibit "DD," pgs. 16-18, 21, 33-35). On direct examination at the post-conviction evidentiary hearing, Sheila testified that the reason why she presented alleged perjured testimony at her brother's trial was because she feared that she would never see her children again as she was in prison and she was on suicide watch. (See Exhibit "DD," pgs. 20-21). On cross-examination,

Sheila did not recall giving sworn statements at the Seminole County Jail regarding this case in 1990, and at first, told this Court that she did not remember testifying in the Defendant's case. (See Exhibit "DD," pgs. 38-40). Incredibly, after being shown the trial transcript of her testimony at the Defendant's trial, Sheila told this Court under oath that her memory was not refreshed. (See Exhibit "DD," pgs. 46-47). She further stated that she did not recall being asked to tell the truth in her brother's trial. (See Exhibit "DO," p. 47). It was obvious to this Court that based upon her responses, demeanor, and body language, Sheila Green was not being forthright at the evidentiary hearing regarding the alleged falsification of her trial testimony. This Court does not find Sheila Green's testimony at the evidentiary hearing to be credible at all. It was obvious to this Court that Sheila Green was presenting this unbelievable testimony at the evidentiary hearing in an effort now to please her brother (the Defendant) and her family.

The evidence presented by the State at the evidentiary hearing further supports this Court's finding that Sheila Green's recantation is not credible. Assistant United States Attorney Rich Jancha and former Assistant State Attorney Phil Williams testified that Sheila Green did in fact first initiate contact to testify at the Defendant's trial through her attorney. (See Exhibit "FE," pgs. 341-345, 349-351). A copy of the letter from Sheila Green's attorney to the authorities was introduced into evidence.[12] It is also clear from the testimony at the evidentiary hearing, and the trial transcript that the authorities have only insisted that Sheila testify truthfully. (See Exhibit "FE," pgs. 362-365 and Exhibit "B," p. 861).

Lonnie Hillery

o. Lonnie Hillery is the father of Sheila Green's child, and was her boyfriend at the time of the Defendant's trial. Hillery testified at the Defendant's trial in 1990 that the Defendant told him that "some people came through and was trying to buy something from him and they tried to get him, and he said he just fucked up." (See Exhibit "B," p. 874). At the evidentiary hearing, Hillery told this Court that he did not have this conversation with the Defendant.

> Hillery explained the reason he made up the story was "I wanted to help my child's mother at the time." (See Exhibit "DD," p. 79).
>
> First, the Court finds that the Lonnie Hillety's testimony at the post-conviction hearing was not credible. Moreover, the Court finds the outcome of the trial would not have been different if Lonnie Hillery had not testified. Kim Hallock, the surviving victim, identified the Defendant as the person who robbed, abducted, and shot Chip Flynn. (See Exhibit "B," pgs. 577-625). Willie Hampton and Dale Carlile testified that they saw the Defendant earlier in the evening at Holder Park, the location where the abduction occurred. (See Exhibit "B," pgs. 1262-1270, 1283-1289). Sheila Green testified that the Defendant admitted to the shooting. (See Exhibit "B," pgs. 854, 858-859). Jerome Murray testified that the Defendant told him that he killed somebody and was going to disappear. (See Exhibit "B," pgs. 1229-1238). The Court finds that the recanted testimony of Lonnie Hillery is insufficient to require a new trial, as it would not produce an acquittal.
>
> The Court notes that additional evidence and testimony presented by the State during this post-conviction process further supports the finding that upon re-trial the verdict in this case would be no different. Upon re-trial, in addition to the testimony outlined above, the State could also introduce the testimony of Layman Lane that after Chip Flynn was murdered, the Defendant told him that he had just shot someone. (See Exhibit "GG," pgs. 151-154). This testimony, coupled with the post-conviction mitochondrial DNA testing on two Negroid body hairs found in Chip Flynn's truck that did not exclude the Defendant as being a contributor would be additional evidence of the Defendant's guilt. (See Exhibit"FF," p. 118).

(Vol. 24, R4049-4053). These findings are supported by competent substantial evidence.

In addition to the Jones requirements for newly discovered evidence, if the newly discovered evidence is based upon

recanted testimony, the Appellant must also pass the standards established by the Florida Supreme Court in *Armstrong v. State,* 642 So. 2d 730 (Fla. 1994), as follows:

> Recantation by a witness called on behalf of the prosecution does not necessarily entitle a Defendant to a new trial. *Brown v. State,* 381 So. 2d 690 (Fla. 1980), *cert. denied,* 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981); *Bell v. State,* 90 So. 2d 704 (Fla. 1956). In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial. *Bell.* "Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury." *Id.* at 705 (quoting *Henderson v. State,* 135 Fla. 548, 561, 185 So. 625, 630 (1938) (Brown, J., concurring specially)). Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted. *Id.*

A third consideration for the Court in evaluating the “newly discovered evidence” is the fact that the original testimony of Sheila Green and Lonnie Hillary is admissible upon a retrial as substantive evidence based upon Florida Evidence Code [Section 90.801(2)(a), if the witnesses are available to testify, and Section 90.804(2), if the witnesses are ruled unavailable]. The recanted testimony would only become impeachment to the original testimony presented by Sheila Green and Lonnie Hillary.

Sheila Green provided credible testimony at the trial in

1990. Reviewing her trial testimony, she is the sister of Green (TT854); she saw him the day after the homicide (TT855); she confronted him about rumors she had heard (TT857); Green gave her an explanation minimizing his culpability, but acknowledging his involvement in the shooting (TT857-58); she advised that she contacted the authorities through her attorney to provide the testimony (TT863-64); and that the authorities' only condition for her testimony was that she be truthful. (TT861).

The trial judge made findings on credibility. He had the opportunity to observe the witnesses' testimony. This Court is highly deferential to a trial court's judgment on the issue of credibility. *Johnson*, 769 So. 2d at 1000 ("This Court will not substitute its judgment for that of the trial court on issues of credibility."); *Robinson v. State*, 865 So. 2d 1259, 1262 (Fla. 2004) ("The trial court has made a fact-based determination that the recantation is not credible. In light of conflicting evidence we must give deference to that determination."). As this Court observed in *Spaziano:*

> The trial judge is there and has a superior vantage point to see and hear the witnesses presenting the conflicting testimony. The cold record on appeal does not give appellate judges that type of perspective.

Spaziano, 692 So. 2d at 178. Thus, a trial court's determination of a recantation's credibility will be affirmed as long as it is

supported by competent, substantial evidence. *Marquard v. State*, 850 So. 2d 417, 424 (Fla. 2002). *See also Archer v. State,* 31 Fla. L. Weekly S443 (Fla. June 29, 2006).

The recanted testimony is insufficient to require a new trial. At retrial, the following admissible evidence would be presented to the jury:

1. The trial testimony of the surviving victim identifying Green as being the person who robbed, abducted, and shot Chip Flynn;

2. The trial testimony of the two witnesses (Dale Carlile and Willie Hampton) who saw Green earlier in the evening at Holder Park, the location where the abduction occurred;

3. The trial testimony of Deputy Keiser tracking the scent from the abduction scene to Green's sister's residence near Holder Park;

4. The trial testimony of Sheila Green of Green admitting to the shooting, which is admissible upon retrial as substantive evidence;

5. The trial testimony of Lonnie Hillery of Green admitting to being involved in an altercation, which is admissible upon retrial as substantive evidence;

6. The trial testimony of Jerome Murray that Green killed somebody and was going to disappear;

7. The testimony of Layman Lane that Green said he just killed somebody and was looking for his sister "Tina", the sister who lived by near Holder Park; and

8. The mtDNA evidence matching Green to both Negroid body hairs found in the truck involved in the abduction to greater than a 99.5% certainty.

Green claims the trial court erred in considering the testimony of Layman Lane and the mtDNA test results. Green's theory is that only the defendant can present evidence at an evidentiary hearing, and the State has no right to present new evidence that would be admissible in a new trial. Therefore, if DNA test results exonerate a defendant, they are admissible; but if the DNA results implicate a defendant, they are not admissible. This slanted view of postconviction proceedings defies logic. Green does not explain how a trial judge can realistically assess whether new evidence requires a new trial if he does not consider all the admissible evidence. This situation is analogous to a resentencing proceeding in which both parties can present new evidence.[16] Likewise, a trial is a completely new proceeding and the trial judge should consider all relevant evidence. The trial judge did not abuse its discretion in considering all the admissible evidence and finding Green's family members' recantations would not change the outcome.

CLAIM V

THERE WAS NO *BRADY* VIOLATION REGARDING 3" X 5" INDEX CARDS OR POLICE RECORDS; THIS ISSUE WAS NOT PLED IN THE RULE 3.851 MOTION

[16] A resentencing is a completely new proceeding. Lucas v. State, 841 So. 2d 380, 387 (Fla. 2003); Way v. State, 760 So. 2d 903, 917 (Fla. 2000).

None of the alleged *Brady* issues on appeal were pled in the Rule 3.851 motion. (*see* V13, R1851-1854 for *Brady* issues raised). Although counsel stated at the hearing that he would file an amended motion on the 3" x 5" cards, he did not. Even though the trial court liberally allowed a hearing and made rulings on the issue of the 3" x 5" cards, this issue is procedurally barred.

Green alleges that law enforcement violated *Brady v. Maryland*, 373 U.S. 83 (1963), when they failed to provide defense counsel with index cards they used to make investigative notes. In *Geralds v. State*, 601 So. 2d 1157 (Fla. 1992), this Court held that field notes by a crime laboratory analyst and crime scene coordinator are exempt from disclosure as notes from which a police or investigative report was compiled and are not subject to disclosure as statements of an expert in connection with a case. 601 So. 2d at 1159-61. *See also Terry v. State*, 668 So. 2d 954, 959-960 (Fla. 1996). The exhibits introduced at the evidentiary hearing to support this claim are Exhibit 3, Green's booking photo (Exhibits, R5933), and photocopies of index cards that list names of seven persons followed by identifying information and notes. (Exhibits, R5936-5937). The other exhibits consist of (1) data on one of the persons in the

photo; (2) blank sheets made out with the photo and data on the person who the victim identified as a suspect; (3) follow-up investigative notes on one “possible suspect.” (Exhibits, R5958-5952). Green has failed to show how these index cards are exculpatory or material, much less discoverable.

Officers testified at trial that Hallock pulled photographs from a box to identify facial similarities to the murderer so that a composite drawing could be made. (TT779-81, 2087, 2102, 2123). Green was subsequently identified from the composite by Tim Curtis, and from a DOC photo by Hallock. Green claims the officers lied at trial and at the evidentiary hearing. (Initial Brief at 66). He claims that the notation “source of Stamp” does not mean Agent Stamp was the source because Agent Stamp said in a deposition he had a female source and the card was noted “B/M” for black male (Initial Brief at 67). Green argues that Ofc. Fair’s interpretation of his own notes is false (Initial Brief at 67-68). Green’s conclusion is that the police had Green’s 1986 photo, showed it to Hallock, and she did not identify him. (Initial Brief at 69). As the trial judge found, this is speculation built on more speculation, or, as Green phrases it, a series of “inferences.” (Initial Brief at 70). Even if these allegations had a scintilla of truth, Green does not explain how the State is supposed to disclose that officers

are lying.

Green also faults the sheriff's office for flying a photographer to DOC to obtain a current photograph of Green when a 1986 photo was available. (Initial Brief at 71). Although he argues how important it is that an eyewitness identification be accurate, he complains that law enforcement want a current photo. If a current photo had not been obtained, then Green would certainly have argued that the identification was flawed because an old photo was used.

Green states that Mr. Parker said he had never seen the 3" x 5" cards. (Initial Brief at 71). What Parker actually said was:

> My recollection is, I did not receive these, but I will tell you this, there was, and I believe it may be Mr. Mitchell because of his hair style, and because of the composite, I did have a photograph, and I believe it's of Mr. Mitchell, and I believe there was an attempt on my part to introduce that particular photograph to show that Mr. Mitchell indeed fit the exact description of the person that Ms. Hallick was describing, versus the defendant.
>
> At least I have some recollection of that. So I guess the point is, for some reason I believe I had this photograph, and if that's the case, maybe I did indeed, have these cards. I don't know.

(V3, R347). Neither did Mr. Parker recall having Mr. Denson's photograph (which he used at trial). (TT347). Thus, Green's entire *Brady* claim is based on the possibility Mr. Parker did

not have the 3″ x 5″ cards, a circumstance Mr. Parker simply cannot remember after fourteen years.

The trial record shows the following: Parker questioned Agent Fair about the loose photographs Hallock used to "describe the assailant." The police gathered up photos and identified those characteristics that were like the assailant. (TT2086). A sketch artist then constructed a composite (TT2087). Green's name came up, and Agent Fair tried to locate a photo in archives. When he could not, he dispatched Agent Nyquist to fly to Lake Butler to obtain a booking photo from DOC (TT2088).[17] Hallock was then shown a photo line-up including Green's photo. (TT2089). Parker had deposed Agent Fair prior to trial (TT2091). There had been two photo line-ups prepared to show Hallock. The first one was destroyed because Green's photo showed a darker skin tone than the other photos (TT2094). Agent Nyquist testified similarly (TT2102-2108). Parker also questioned Nyquist about two other suspects that Nyquist had previously talked to Parker about: Eddie Dennison and Wilford Mitchell. (TT2108). Mitchell was originally considered a suspect. Parker showed Nyquist a photo of Mitchell, who was not included in the line-up. (TT2109). Mitchell was interviewed and did not fit the victim's description (TT2116). The investigation focused on

[17] Green had been incarcerated with DOC until approximately six weeks before the Flynn murder (TT2089).

Green after Dale Carlisle told police that Green was at Holder Park wearing the same type of clothing described by Hallock. (TT2113). Nyquist also received a call from Titusville PD that Green was at Colleen Brothers' apartment. (TT2115). Kim Hallock also testified about going through the loose photos. (TT2023-24, 2049-2056). She was shown two photographs of other suspects. (TT2066-68).

The trial court found:

> **3x5 Cards**
>
> k. The Defendant claims that law enforcement officers investigating this case suppressed 3x5 cards and information regarding the individuals pictured on the 3x5 cards in violation of Brady. The Court will address this claim on its merits.
>
> At the Defendant's trial, Sergeant Thomas Fair testified that he showed Kim Hallock a box containing sixty-eight to seventy loose photographs of black males to see if she could make an identification of the perpetrator. (See Exhibit "B," pgs. 778-779). Sergeant Fair testified that Hallock was unable to make an identification from the box, but pulled three photographs aside "and she was very, very specific in saying: 'I'm not saying that this photograph is the person that did this, but there is a characteristic of the man who did this whether it be the chin. It's the same as the guy in this photograph or the hair or the ears and so, forth...." (See Exhibit "B," p. 779). Sergeant Fair testified that Kim Hallock did not select any individual as the perpetrator out of those sixty to seventy photographs. (See Exhibit "B," p. 781). Thereafter, Sergeant Fair testified that he sent Agent Nyquist to obtain the photograph of the Defendant that was later used in the photographic lineup from which Kim Hallock identified the Defendant. (See Exhibit "B," p. 785-787). On cross-examination at the Defendant's trial, Sergeant Fair testified that he did not know where the loose photographs were, as Assistant State Attorney Michael

> Hunt told him there was no need to maintain them. (See Exhibit "B," p. 787).
>
> Post-conviction defense counsel produced a number of photographs and 3x5 cards at the evidentiary hearing and asked Mr. Parker about his knowledge of them. Mr. Parker testified that his recollection was that the 3x5 cards were not turned over to him before, but he was not sure. (See Exhibit "DD," pgs. 205-207). Mr. Parker then modified this testimony and testified that he thought he had the 3x5 cards because he believed he had the photograph of a person named Mr. Mitchell who Mr. Parker thought fit Hallock's description of the suspect. (See Exhibit "DD," p. 206).
>
> Mr. Parker testified at the evidentiary hearing that he was aware that Kim Hallock looked through a box of loose photographs, and he knew that she thought some of the photographs looked similar to the murderer, and that those photos were picked out. Mr. Parker did try to develop another suspect, including trying to place Wilfred Mitchell at the ballpark through the umpire who testified (See Exhibit "DD," p. 340-341).
>
> Sergeant Fair testified later on in the evidentiary hearing that he recognized defense exhibit 3 as 3x5 cards with notes made in his handwriting. Sergeant Fair testified that the 3x5 cards had notations on them that he made as Kim Hallock went through a box of photographs. (See Exhibit "EE," p. 309-310).
>
> The Defendant claims that law enforcement suppressed this evidence. The Defendant alleges that the evidence presented at the post-conviction hearing supports the conclusion that a photograph of the Defendant was included in the box of loose photographs, because post-conviction counsel found an older booking photograph of the Defendant. It is speculation at best as to whether Defendant's photograph was in the box of loose photographs, and speculation that the police lied about this. Speculation does not fulfill the criteria for relief pursuant to Brady.

(Vol. 24, R4044-4046). These findings are supported by competent substantial evidence. Further, Green has failed to

explain how going through each suspect who was considered but cleared by the police would help his case. When the State began to question Agent Fair about clearing Mitchell as a suspect, Mr. Parker objected. (TT2112).

Last, Green raises a *Brady* claim regarding a police report that indicates he did not flee the Titusville area after the murder. (Initial Brief at 73). This claim was not pled in the Rule 3.851 motion and is not properly before this Court. In any case, there was testimony at trial that subsequent to the murder, Agent Nyquist received a call from Titusville Police Department that a confidential informant saw Green was at Colleen Brothers' apartment. (TT2115). Exhibits E and F for identification[18] show that "BlueBoy" called Titusville PD about Crosley Green being with at Palm Terrace Apartments, and has a reference to "Coleen." (Exhibits, R5978, 5979). This evidence was cumulative, not exculpatory, and not material.

CLAIM VI

COUNSEL WAS NOT INEFFECTIVE AT THE GUILT PHASE; THERE ARE NO *BRADY* VIOLATIONS

A. Failure to obtain and maintain file. The trial court held:

Claim 111(A) - Failure to Obtain and Maintain File

[18] These documents were never admitted at the evidentiary hearing. The State objeced as to authenticity and hearsay. (V5, R861-62).

c. In his post-conviction motion, the Defendant alleges that the photographic lineup introduced at trial was not the same lineup that was proffered at the bond hearing and/or copied and provided to predecessor defense counsel, Greg Hammel. The Defendant contends that the existence of a prior inconsistent lineup could have been used to impeach the testimony of Kim Hallock, the police who conducted the lineup, and the investigative methods used in this case generally. The Defendant further alleges that the existence and use of the lineup would have also provided substantive evidence discrediting the identification of the Defendant.

During the trial, the State introduced a photographic lineup which had been shown to Kim Hallock and from which she identified Crosley Green, the Defendant, as the perpetrator. At trial, the following exchange transpired:

> MR. PARKER: Your Honor, I apologize. I would tender a conditional objection at this point in time to the entry of that into evidence, the item, the photographic line-up, and I did so based on the fact that my client has advised me that while incarcerated at Brevard County Detention Center the previous attorney who represented him, Mr. Hammel, handed him a copy, a photostatic copy, of what was purported to be the line-up used in this case and that it's my client's contention that the line-up he just looked at is, in fact, not the line-up that he has a copy of. I believe my client has a copy of the line-up preserved.
>
> Just a moment, Judge. My client would like, before I withdraw my objection, an opportunity to look through the papers that he's got to see if he can find a copy of it.
>
> THE COURT: Well, number one, I'm not suggesting that it's anything that you did, Mr. Parker. I sit up here and get a view of things. The objection is not timely. It's been offered, and it's been received.
>
> Number two, even if he did have a different

> copy, I think it would go to the weight and would be something that you might want to pursue and wouldn't go to the admissibility.
>
> MR. PARKER: Your Honor, believe me. I understand that. I'm tendering the objection for the record, and at such time as we can find that –
>
> THE COURT: If you do find it, outside the presence of the jury if it's a different one I would like to see it, but this is received as Exhibit 20.

(See Exhibit "B," pgs. 790-791).

In his post-conviction motion, the Defendant alleges that to the extent evidence of a prior inconsistent line-up was suppressed by the State, the Defendant is entitled to relief under Brady v. Maryland, 373 U.S. 83 (1963). The Defendant makes the alternative argument that if the prior inconsistent lineup was provided to the defense, then he argues that defense counsel (Messrs. Hammel and Parker) were ineffective for failing to preserve and completely and accurately transfer the file. The Defendant further contends that Mr. Parker was ineffective for failing to maintain parts of his file for preparation of a post-conviction motion. An evidentiary hearing was conducted on this claim.

At the evidentiary hearing, Attorneys Rob Parker and Greg Hammel both testified. It is unclear from their testimony whether Mr. Parker obtained the entire file from the Public Defender's Office. Mr. Parker testified that he did obtain the file from the Public Defender's Office, but he recalled that it was minimal. (See Exhibit "DD," p. 169-170). In his amended post-conviction motion, the Defendant only argued that the effect of Mr. Parker's alleged failure to obtain the entire file was the resolution of whether there was a different lineup at the suppression hearing than the lineup introduced by the State at the Defendant's trial. As quoted above from the trial transcript and testified to by Mr. Parker at the evidentiary hearing, the Defendant told Mr. Parker that the lineup introduced at trial did not look like the same one that he saw during the suppression

> hearing. (See Exhibit "DD," p. 174 and Exhibit "B," pgs. 790-791). Mr. Parker raised this issue during the trial. (See Exhibit "B," pgs. 790-791). The Defendant could not produce the alleged different line-up from his paperwork during trial. (See Exhibit "B," pgs. 954-955). Mr. Parker never had the document, and Mr. Hammel was asked by Mr. Parker to come to the trial to view the lineup placed in evidence to see if it was different from the lineup shown at the suppression hearing. (See Exhibit "DD," p. 177 and Exhibit "B," p. 955). Mr. Hammel advised Mr. Parker that it appeared to him to be the same line-up. (See Exhibit "DD," p. 177). Mr. Hammel also testified at the evidentiary hearing and reported that he was not aware of any different lineup. (See Exhibit "EE," p. 305). The Court finds that the Defendant failed to prove the Brady violation, as the Defendant failed to show that a different line-up was ever in existence, which was suppressed by the State, either willfully or inadvertently. Moreover, the Defendant failed to establish any prejudice as required for relief under Brady. The Court further finds that applying Strickland, counsel was not ineffective for failing to preserve and maintain the Defendant's file, because there was no credible evidence presented that a line-up inconsistent with that presented at the Defendant's trial ever existed.
>
> As to the Defendant's claim that Mr. Parker was ineffective for failing to properly maintain the defense file for post-conviction purposes, this Court finds that the Defendant failed to meet the prejudice prong of the Strickland standard. Mr. Parker testified at the evidentiary hearing that three years after the Defendant's trial, he destroyed a great deal of the Defendant's file by accident. (See Exhibit "DD," p. 169). Other than speculating how the Defendant's trial and ability to seek post-conviction relief were affected by counsel's failure, the Defendant failed to establish any prejudice, and relief cannot be granted based on speculation or possibility. Maharaj v. State, 778 So. 2d 944, 951 (Fla. 2000).

(V24, R4032-4035). These findings are supported by competent substantial evidence.

B. Failure to Investigate and Present Exculpatory and Impeaching Evidence Relating to the Initial Police Investigation

The trial judge held:

> f. Deputy Wade Walker, Sergeant Diane Clark, and Deputy Mark Rixey first responded to Kim Hallock's 911 call to police. (See Exhibit "B," pgs. 515-516). The officers had difficulty finding the scene where Chip Flynn was reported to be located. (See Exhibit "B," p. 517). Deputy Walker met Kim Hallock, then drove her to the orange grove scene and met up with Sergeant Clark and Deputy Rixey. (See Exhibit "B," pgs. 518-519).
>
> According to the Defendant's post-conviction motion, Deputy Walker stated in the 1999 FDLE report that Kim Hallock told him that in the area of Holder Park, earlier in the evening, she and Chip Flynn "were approached by a black male, who offered to sell them some 'drugs." Also in that 1999 report, Deputy Walker allegedly informed that Hallock told him that the perpetrator "made her tie Flynn's hands behind his back with a shoestring." The Defendant contends that Deputy Walker's statement in 1999 to FDLE regarding the "drug transaction scenario," is different than Deputy Walker's written report and deposition that contain no mention of any drug sale attempt by the perpetrator. (See Exhibit "HH," Deputy Walker's Report date and time stamped 4/5/89, at 2:05:50 and Exhibit "L," p. 11). The Defendant first alleges that Mr. Parker was unaware of the drug sale attempt by the perpetrator and the State is guilty of a Brady violation for failure to disclose this information. The Defendant also points out that Deputy Walker acknowledged that he had a notepad or notes in which he had written down what Kim Hallock had told him. (See Exhibit "L," pgs. 5-6, 11-12, 14-15). Deputy Walker stated that the notes were in his locker and pursuant to Mr. Parker's request, Deputy Walker agreed to hold on to the notes. (See Exhibit "L," p. 7). However, according to the Defendant, Mr. Parker failed to follow-up and obtain the notepad or notes, and the current location of those notes is unknown. The Defendant alleges that counsel was ineffective for failing to obtain the notepad or notes.

At the evidentiary hearing, Officer Walker was not called to testify. Consequently, this Court is only left with the allegations made by the Defendant in his post-conviction motion as to what Officer Walker purportedly said in 1999 to FDLE concerning what Kim Hallock told him. There has been no evidence produced to establish the truthfulness that Kim made this statement to Officer Walker. As to counsel's alleged failure to obtain the notepad or notes, an ineffective assistance of counsel claim cannot be based on speculation that such notes might have contained helpful information.

The Defendant also alleges that defense counsel was ineffective for failing to impeach Kim Hallock with Officer Walker's written report that the perpetrator told Kim to tie Chip Flynn's hands behind his back with a shoe string. At trial and in her recorded statements, Kim testified that the Defendant told her to remove the shoe laces, give the shoe laces to him, and then the Defendant tied Chip Flynn's hands with the laces. (See Exhibit "Il," 5/31/1990 Court Proceeding Transcript Composite; Exhibit "JJ," Kim Hallock's Deposition, pgs. 43, 78-82; and Exhibit "B," pgs. 585-589, 707). The Defendant has failed to meet the Strickland standard for post-conviction relief, as counsel cannot be deemed ineffective for failing to present cumulative evidence of inconsistent statements. Maharaj v. State, 778 So. 2d 944, 957 (Fla. 2000). Mr. Parker impeached Kim Hallock at trial with numerous other inconsistent statements. (See Exhibit "B," pgs. 666-677, 682-694, 700-704, 740-744, 1846-1850, 1857-1861). Additionally, Mr. Parker did argue to the jury that Chip's hands were tied for comfort. (See Exhibit "B," p. 1859). Lastly, this claim is without merit because Deputy Walker's written report specifically states Kim Hallock said she "was told to tie Mr. Flynn's hands behind his back with a shoe string." (emphasis supplied). (See Exhibit "HH.") This is far different than reporting that Kim Hallock stated that she tied Chip Flynn's hands.

Next, an evidentiary hearing was granted on the Defendant's allegation that counsel was ineffective for failing to discover evidence that Officer Mike Boyle, a dispatch officer, took a phone call from Jess

> Parrish Hospital that someone called threatening "to come and finish the job" shortly after units had responded to the crime scene orange groves. At the evidentiary hearing, Mr. Parker testified that he did not recall whether or not he was aware of the anonymous phone call made to Jess Parish Hospital. At the evidentiary hearing, Michael Boyle testified that in April 1989 he worked as a dispatcher for the Titusville Police Department. Mr. Boyle testified that on April 4, 1989, he took a call from Jess Parrish Hospital, in which an unknown person at the Hospital reported that the Hospital received an anonymous phone call that whoever committed the shooting was on their way to the Hospital to finish the job. (See Exhibit "EE," pgs. 373-382). Because everything Mr. Boyle had to testify to at the evidentiary hearing was hearsay and inadmissible, no testimony was admitted during hearings in this case as to this issue. Even if this evidence was somehow admissible at trial, the Defendant has failed to show that there is a reasonable probability that the outcome of the trial would have changed. The Defendant's argument that this evidence tends to show that more than one person was involved and the perpetrator knew the victim is pure speculation.

(V24, R4038-4041). These findings are supported by substantial competent evidence. The trial judge attached record portions supporting each finding.

C. <u>Failure to impeach Jerome Murray</u>. This issue was not raised in the Rule 3.851 motion and was not addressed by the trial court. It is not properly before this court on appeal. The exhibits referred to in the Initial Brief were admitted when Jerome Murray testified at the evidentiary hearing. (V2, R251). Murray had made a series of statements recanting his trial testimony, but refused to testify at the evidentiary hearing

(V5, R251). The convictions were offered to show Murray "is familiar with the system." (V5, R255). They were admitted after collateral counsel offered the violation of probation as proof that Murray had something to gain by testifying for the State (V3, R452). However, the issue now raised was never squarely before the lower court or ruled upon.

CLAIM VII

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION BY SUMMARILY DENYING THE CROSS-RACE IDENTIFICATION CLAIM; RECORD PORTIONS WERE ATTACHED TO THE ORDER

In his Rule 3.851 motion, Green claimed Mr. Parker was ineffective for failing to: (1) hire an expert on; (2) request a special instruction on; and (3) cross examine Hallock on cross-race identification. The trial judge summarily denied this issue, attaching record portions to support that denial:

> **B. Failure to Investigate and Develop Issues Relating to Cross-Race Identification**
> The Defendant alleges that counsel was ineffective for failure to investigate and prepare a cross-race identification defense in three respects: (1) failure to retain an expert witness; (2) failure to request a special instruction; and (3) failure to cross-examine and argue.
>
> **(1) Failure to retain an expert witness on cross-race identification**
> The Defendant asserts that Mr. Parker should have retained and presented an expert witness in the field of eyewitness identification and that the defense is now prepared to offer the testimony of expert Dr. John Brigham, a professor in psychology at Florida Statute University, regarding six issues that affect

eyewitness identification.

The Defendant has failed to show that he was prejudiced by counsel's alleged omission because at the time of the trial in 1990, the Supreme Court of Florida in Johnson v. State, 438 So. 2d 774 (Fla. 1983) categorically rejected testimony of an expert witness in the field of eyewitness identification. McMullen v. State, 660 So. 2d 340, 341-342 (Fla. 4th DCA 1995). Therefore, the Defendant has shown no prejudice, where if the claim were raised, it would have been denied based upon Johnson. Moreover, the Defendant has not shown that counsel's omission was deficient when at the time Johnson was mandatory authority for trial courts to follow and was construed as prohibiting this type of expert testimony. Counsel cannot be deemed ineffective for failure to anticipate changes in the law. See Bottoson v. Singletary, 685 So. 2d 1302 (Fla. 1997); Nelms v. State, 596 So. 2d 441 (Fla. 1992).

2) Failure to request a special instruction

The Defendant alleges that counsel was ineffective for failure to request a cautionary, special jury instruction regarding cross-race identification. The Defendant has failed to satisfy both prongs of Strickland.

As support for his contention that a cross-race identification instruction should have been requested, the Defendant asserts that the Florida Supreme Court in Johnson v. State, 438 So. 2d 774 (Fla. 1983) upheld the trial court's decision to not allow expert testimony on eyewitness identification on the basis that special instructions on eyewitness identification were given. However, the language quoted by the Defendant from Johnson does not state that any special instructions on eyewitness identification were given. The Defendant admits that Florida does not have an instruction on cross-race identification and all of the cases cited by the Defendant in support of his proposition are out-of-state or federal cases. Counsel is not ineffective for failure to request an instruction that the Defendant cannot show that anyone in Florida has ever used.

(3) Failure to cross-examine and argue

The Defendant next alleges that counsel was ineffective for failure to cross-examine Kim Hallock or to provide any argument to the jury regarding the factors that the courts and experts have deemed relevant to cross-race identification; specifically, past contacts with African-Americans. The Defendant alleges that Kim Hallock revealed during cross-examination at the motion to suppress hearing that she had virtually no contact with African Americans. At the motion to suppress hearing, Hallock testified:

> Q. Kim, did you and Chip have any black friends, close acquaintances?
> A. Not close, no. I knew black people.
> Q. Would you occasionally socialize with particular black people?
> A. Yes.
> Q.Go to parties?
> A. No.
> Q. You never went to a party with, say a black boy or a. black girl?
> A. No.
> Q. Did you ever have black people into your house?
> A. A long time ago.

(See Exhibit "G," Motion to Suppress Transcript Composite, p. 71). Because Hallock knew black people and occasionally socialized with them, this testimony refutes the Defendant's allegation that such cross-examination would have been fruitful and refutes the Defendant's allegation of ineffective assistance of counsel. Moreover, the prejudice prong cannot be satisfied because such questioning would be merely cumulative evidence attacking the reliability of Hallock's identification of the Defendant. See Maharai v. State, 778 So. 2d 944, 957 (FIa. 2000); Valle v. State, 705 So. 2d 1331, 1334 (Fla. 1997). Defense counsel did not fail to attack Hallock's credibility at trial, he merely failed to cross-examine her specifically about her past contacts with African Americans as she was cross-examined at the motion to suppress hearing. (See Exhibit "B," Vol. IV - pgs. 630-762, Vol. X— pgs. 1847-1 852.).

(Vol. 18, R2883-85). These findings are supported by the record, sections of which the trial judge attached.

CLAIM VIII

THE STATE DID NOT VIOLATE *BRADY* OR *GIGLIO* IN REFERENCE TO THE DOG TRACKING EVIDENCE; COUNSEL WAS NOT INEFFECTIVE.

Green alleges the State violated *Brady* and *Giglio* by failing to disclose evidence that the tracking dog, Czar, was unreliable and by presenting testimony that he was reliable. In the alternative, trial counsel was ineffective for failing to impeach the dog track evidence. The trial court held:

> p. The facts pertaining to the dog evidence introduced at the Defendant's trial are necessary in understanding the overall context of the Defendant's post-conviction claim five. The Court adopts the facts as summarized by the Supreme Court of Florida in its opinion on the direct appeal of the Defendant's judgment and conviction:
>
> Within hours of the murder, a police dog tracked footprints from the dunes area to a house where Green's sister lived. The footprints at the dune area were never identified as Green's, but the trial judge admitted the scent-tracking evidence over defense objection because the character and dependability of the dog were established, the officer who handled the dog was trained, and the evidence was relevant. In addition, there were indicia of reliability: the tracking occurred within hours of the crime and the area had been secured shortly after the crime occurred, both of which greatly reduced the danger of a trail being left after the crime and a mistaken scent, and there was a continuous track to the home of Green's sister. The trial judge found that although the scent tracking was the only evidence that established Green's identity, corroboration included admissions by Green, Green's presence at the crime

scene near the time of the crime, and Green's presence at his sister's house earlier in the day.

Green v. State, 641 So. 2d 391, 394 (Fla. 1994), cert. denied, 513 U.S. 1159 (1995). (See Exhibit "B," pgs. 1304-1482). The Supreme Court of Florida found on direct appeal that the trial court did not err in admitting evidence of dog scent tracking because a proper predicate for the admission of this evidence was established. Id.

A – Ineffective Assistance of Counsel

Under claim five, the Defendant alleges that counsel was ineffective for failure to investigate and obtain police dog Czar's training and certification records. The Defendant alleges in the alternative that if these records were furnished to defense counsel, then defense counsel was ineffective in failing through cross-examination and argument to challenge with these records the dog track evidence presented by the State. Next, the Defendant alleges that counsel was ineffective for failing to obtain expert testimony and assistance relating to dog track evidence. An evidentiary hearing was granted on issues pertaining to ineffective assistance of counsel.

As found by this Court in its Order of July 22, 2002, the records of the dog's training and certification performance available through the Criminal Justice Institute were known to Mr. Parker. (See Exhibit "P," Bob Cook's Deposition, pgs. 26-28 and Exhibit "Q," Supplemental Discovery). The Defendant alleges that Mr. Parker was ineffective for failure to obtain these records after being advised of their existence. To date, the Criminal Justice Institute's records pertaining to Czar have not been introduced in this case. As a result, the Court cannot assess whether the Criminal Justice Institute records contain any impeachment material of value. The Defendant therefore has failed to fulfill the prejudice prong of the Strickland standard.

As the basis for establishing that Mr. Parker failed to undermine the dog's reliability in tracking, post-conviction counsel has relied upon the "Working Dog Training and Utilization Records," created by Deputy

Kiser and supplied to the Defendant early on in the discovery process in this case pursuant to the request of Mr. Hammel, along with the synopsis of those records created by Assistant State Attorney White in preparation for trial. (See Defense Exhibit 1, received at 2/26/2004 Evidentiary Hearing, Exhibit "EE," pgs. 431-432). Since the Court finds that the "Working Dog Training and Utilization Records" were supplied to defense counsel and as such, no Brady violation occurred, the Defendant argues alternatively that counsel was ineffective for failure to use these records in cross-examination of Deputy Keiser and Bobby Mutter and to impeach the dog's reliability as a tracker. The Court finds that the Defendant failed to fulfill the prejudice prong of the Strickland standard. The references to notes by Mr. White and the reports those notes are about indicate that the "mistakes" to which the Defendant refers are different kinds of mistakes than those the Defendant needed to bring to the court's attention at trial. As admitted to on the stand by Deputy Keiser at the evidentiary hearing, the reports note occasions the dog refused to track, lost and regained a track, and missed turns. (See Exhibit "FE," pgs. 259-262, 265-267). However, the records and notes did not indicate that the dog erroneously followed a cross-track or indicated by his behavior that he was tracking a trail of several hundred yards when in fact he was off the trail and just acting like he was tracking. (See Exhibit "FE," pgs. 273-274). The evidence presented was that the handler was sure the dog was tracking on the tennis shoe trail, which was partly a visible trail, that lead to the location of the victim Flynn's truck. (See Exhibit "B," pgs. 1328-1329, 1337-1340). The defense at trial had to show that the handler was mistaken about this and the dog mislead him. The records cited by the defense show that the dog sometimes would not follow a track successfully to its conclusion. The records do not show that the dog would fail to maintain the track, but would go on as if it was still tracking. As testified to by Deputy Keiser and Bobby Mutter, when the dog loses the scent, the dog handler can tell by his behavior, but there was no indication here that the dog lost the scent. Therefore, the Court finds that the evidence complained of would not have been particularly compelling evidence with which to impeach the abilities of Czar.

The Defendant also alleges that trial counsel was ineffective for failure to point out that the track back to Selestine Peterkin's house was not started at the location of the truck. However, a reading of the testimony of Agent Demers (See Exhibit "B," pgs. 902-903) and a review of the videotape (State's Exhibit #42 introduced at trial) of the tracks at Holder Park clearly shows that the visible tracks led from the area where Keiser started the dog (twenty yards off the road) to the area where the truck had been parked. Deputy Keiser scented the dog in a sandy open area where the visible tracks were remote from any other visible tracks and watched the dog follow those continuous tracks backwards, until they could no longer be seen and on to the house where the Defendant stayed. (See Exhibit "B," pgs. 1331-1335).

The Defendant further alleges that counsel was ineffective for failing to consult with an expert on dog evidence; such as, Dr. Warren James Woodford, who testified at the post-conviction evidentiary hearing. The Defendant contends that the expert could have reviewed the dog's training, certification, and track records to assist the defense. The Defendant claims that the expert could have established for the jury that the dog was old and his record showed many vital mistakes in tracking; thus, undermining the dog tracking evidence such that the jury would have disregarded it. At the evidentiary hearing, the defense called Dr. Warren James Woodford and O'Dell Keiser[15], and the State called Bobby Mutter[16].

Dr. Woodford testified at the evidentiary hearing that he is a chemist, and that he has experience working with the American Kennel Club in tracking exercises and with drug detection dogs. (See Exhibit "EE," pgs. 383-386, 389-390). Dr. Woodford testified that he had worked with academies and police departments on finding drugs with dogs. (See Exhibit "FE," p. 389). Dr. Woodford clarified, "I'm not a dog handler, but I'm working very closely with the handlers in setting up the experiments." (See Exhibit "EE," p. 389). Dr. Woodford testified that he has never actually trained a dog to do tracking. (See Exhibit "EE," p. 440). He further testified that the American Kennel Club does not provide police dog training and he has never

worked with any police dog associations. (See Exhibit "EE," p. 440-441). This is Dr. Woodford's first time testifying about tracking dogs. (See Exhibit "FE," p. 446). However, Dr. Woodford has been a defense expert for dog scent work with drug detection in several cases. (See Exhibit "FE," p. 446).

Bobby Mutter is a retired Titusville Police Department Commander who has trained and worked with police trailing dogs for thirty years. (See Exhibit "GG," pgs. 103-106). Mr. Mutter testified that the public uses the terminology of trailing and tracking interchangeably, but technically police dogs "trail;" whereas, American Kennel Club or sports dogs "track." (See Exhibit "GG," p. 105). Mr. Mutter testified that he has trained hundreds of dogs. (See Exhibit "GG," p. 105). Mr. Mutter testified that he has personally used his dogs in over one hundred criminal trails. (See Exhibit "GG," p. 106). Mr. Mutter testified five or six times about trails his dogs have done and he has testified as an expert about trails other dogs have done ten or twelve times both in state and federal courts around the country. (See Exhibit "GG," p. 107). Mr. Mutter has been President and the Director of Training for the Brevard County Dog Training Club, an American Kennel Club, and has been a member of the North American Police Dog Association and the state coordinator for the American Police Work Dog Association for seven years. (See Exhibit "GG," pgs. 108-109). Mr. Mutter also served as President of the Florida Police Work Dog Association for two to three years and he has worked with the Florida Department of Law Enforcement in certifying dogs. (See Exhibit "GG," p. 109). Mr. Mutter has personal knowledge of Deputy Keiser and Czar, having helped them in their initial training and he observed Deputy Keiser working with the dog afterwards. (See Exhibit "GG," pgs. 110-111).

Dr. Woodford criticized Czar and the track that he followed because there was no known scent item. (See Exhibit "EE," pgs. 413-414). However, Dr. Woodford testified that police dogs will sometimes be scented on something, like a pay phone, where a suspect was seen, and the dog can pick up the most recent scent and follow it. (See Exhibit "EE," p. 460-462). Dr. Woodford claimed that here there was not a clear scent of the perpetrator to scent the dog on, so there was

no way to know what the dog was trailing. (See Exhibit "EE," pgs. 413-414). However, in this case, the dog was scented on a visible shoe impression track, which could be observed through a sandy area leading to the road and alongside the road, so Deputy Keiser could see if those impressions were being followed. (See Exhibit "GG," p. 130). This shoe impression track that the dog was scented on was shown in the videotape of the crime scene and the photographs which were introduced at trial. (See Defense Exhibit I introduced at the evidentiary hearing on 2/26/2004). Mr. Mutter testified that because the visible tracks could be seen for about a hundred yards, it was obvious that the dog was on a trail. (See Exhibit "GG," p. 130).

The Defendant alleges that counsel was ineffective for failure to file a pretrial motion to exclude the dog evidence based on the dog's lack of training in variable surface tracking. Dr. Woodford opined that the dog was not trained and certified in variable surface tracking and because this was a blind track with no scenting, "it made tracking impossible really. It [the dog] was guided along a path." (See Exhibit "FE," pgs. 413-414). Later, in his testimony, Dr. Woodford admitted that it was possible for a dog to follow the track that was done in this case. (See Exhibit "FE," p. 460-462, 473-474). Dr. Woodford also testified that dogs track crushed vegetation, bacteria, and insects in sand, and because of this, only purebred dogs certified in variable surface tracking can do this type of tracking. (See Exhibit "EE," pgs. 408-409). Dr. Woodford opined that Czar was unable to do Variable Surface Tracking because of lack of this certification. (See Exhibit "FE," p. 407, 417-419). However, Mr. Mutter testified that an American Kennel Club dog is trained to track more crushed vegetation than human scent, while a police dog is taught to follow human scent. (See Exhibit "GG," p. 11 5). According to Mr. Mutter, the police trailing dog is taught to discriminate between the scent of different humans and to stay on the one scent that he is given, even if another human or animal cross the trail the dog is on. (See Exhibit "GG," p. 11 6). In response to the lack of specific Variable Surface Tracking certification, Mr. Mutter testified: "All police dogs do variable surface tracking. I can't imagine a police dog in Miami tracking only on crushed

vegetation.. .because, in real life, off the sports field, all you have is multi surface." (See Exhibit "GG," p. 117). Mr. Mutter testified that he thought the track in this case was elementary, while Dr. Woodford testified that the track was "the top of the difficulty scale" because of going from grass to sidewalk/pavement/concrete/asphalt. (See Exhibit "FE," p. 410 and Exhibit "GG," p. 145).

Dr. Woodford cited to a treatise from professors at Duke University for the proposition that if there was dew on the ground the morning the track was done, it would greatly inhibit the ability of the dog to follow a track. (See Exhibit "FE," pgs. 444-445). Dr. Woodford's opinion was not based on personal experience, but upon this study on the olfactory discrimination in dogs. (See Exhibit "EE," p. 445). Mr. Mutter disagreed with Dr. Woodford, testifying that dew does not trap human scent, but rejuvenates and holds it. (See Exhibit "GG," p. 127). Mr. Mutter believes that dew on the ground is a positive condition. (See Exhibit "GG," p. 128).

Dr. Woodford opined that the six hour old trail in this case was too old. (See Exhibit "FE," p. 411). Mr. Mutter opined that a six hour old trail is not a very difficult trail. (See Exhibit "GG," pgs. 112-113). Mr. Mutter testified that he has trailed people as long as seven miles, so the length of this trail was not an issue. (See Exhibit "GG," p. 112-113).

Dr. Woodford testified at the evidentiary hearing as to his analysis of the records pertaining to Czar. Dr. Woodford's analysis of the records was predicated on the Working Dog Training and Utilization records created by Deputy Keiser, and Dr. Woodford had a different view of their meaning, than did the author, Deputy Keiser, and Bobby Mutter. At the evidentiary hearing, Dr. Woodford did not realize, until pointed out by the Assistant State Attorney on cross-examination, that the records had a front and back to each document that relates them to each other. (See Exhibit "FE," p. 469-471). The back of the document described the events noted on the front of each document. (See Exhibit "EE," pgs. 469-471).

Mr. Mutter also disagreed with Dr. Woodford's opinion

that Czar received inadequate training based on his review of the records. Mr. Mutter testified that Czar was purchased from Germany with a Schutzhund 3FH ranking – the highest ranking available. (See Exhibit "GG," p. 118). The FH ranking indicates that Czar was a better tracker than most. (See Exhibit "GG," p. 119). Dr. Woodford testified that the dog should have been re-certified after a reported incident on November 3, 1988, but Mr. Mutter disagreed, testifying that in his experience, the failure of the reporting person to identify the person found by the police may only indicate the person did not get a good enough look at the person or refuses for some reason to identify the person. (See Exhibit "GG," pgs. 120-121). Mr. Mutter noted that the report indicated that the person found matched the description originally given. (See Exhibit "GG," p. 121). Reviewing another notation in those records regarding an indication that the dog missed a turn and corrected, Mr. Mutter notes that it may have been due to wind blowing the scent. (See Exhibit "GG," p. 144-145).

Dr. Woodford testified that Czar was elderly when he tracked in 1989 and dogs of that age do not get excited anymore about tracking and just want to take a nap. (See Exhibit "EF," pgs. 415-416). Mr. Mutter testified that Czar, at age 8½ was not too old to be a good trailing dog. (See Exhibit "GG," p. 114). Mr. Mutter testified that often he preferred an older dog because they are slower, more methodical, and more experienced. (See Exhibit "GG," p. 114). Mr. Mutter testified that he believed Czar was capable of following this trail. (See Exhibit "GG," p. 114).

After hearing all of the testimony presented at the evidentiary hearing and reviewing the evidence, the Court finds Mr. Mutter more credible as Mr. Mutter had actual extensive experience with the training of police dogs to do human scent tracking in addition to actual police dog tracking of human scents. The Court accepts Mr. Mutter's testimony in its entirety. The Court finds that the Defendant has failed to fulfill the prejudice prong of the Strickland analysis.

B – Giglio Error

In his post-conviction motion, the Defendant alleges

> that the testimony elicited by Assistant State Attorney White from Deputy Keiser at trial to the effect that the dog, Czar, "had never made a mistake" constitutes a Giglio error. The Court granted an evidentiary hearing on this issue. As this Court finds that false testimony was not presented at trial, the Giglio claim cannot stand. There was no testimony elicited by the State at the Defendant's trial that Czar "never made a mistake." The trial transcript shows that the State only established through the testimony of Deputy Keiser that Czar did not leave the test track and begin tracking a cross-track of a human or animal, while leading his handler to believe that he was on the original trail. (See Exhibit "B," pgs. 1388-1390). The issue raised was whether the dog ever lost the scent and went off on a false cross track, not whether the dog ever failed to follow a test track to conclusion or pick up a scent. Deputy Keiser testified at the Defendant's trial on direct examination that when the dog fails to pick up a track, he acts differently, by "wind scenting," putting his nose in the air. (See Exhibit "B," p. 1328-1329). The handler can tell by this "wind scenting" behavior that the dog has not found a track. (See Exhibit "B," p. 1328-1329). Deputy Keiser testified as to his opinion that the dog was tracking all the way to the front of the house which was later determined to be where the Defendant was living with his sister, Selestine Peterkin. (See Exhibit "B," pgs. 1337, 1340). Mr. Parker attempted to raise the implication that the dog lost the trail at a point where the visible tracks seemed to indicate the person wearing the shoes stopped and waited for a while. (See Exhibit "B," pgs. 1339-1340). Mr. Parker also tried to establish that the dog turned toward Selestine's house because she had dogs there. (See Exhibit "B," p. 1342). Mr. Parker also questioned whether the dog might have lost the track or was following some scent track from some other person or animal. (See Exhibit "B," pgs. 1334-1338).

(Vol. 24, R4053-64).

This issue was raised on direct appeal. Raising the claim under the guise of ineffective assistance of counsel does not

breathe life into this claim. *See Freeman v. State*, 761 So. 2d 1055, 1067 (Fla. 2000) (holding that claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel). On the merits, the trial court rulings are supported by the record. There was no *Brady* evidence and no *Giglio* violation. Mr. Parker did challenge the dog track, and this was an issue on appeal. All that collateral counsel has created by presenting the testimony of a dog expert is an opportunity for the State to present a rebuttal expert. Bobby Mutter is an unimpeachable expert. To allow him to take the stand and explain that the conditions of Green's track were of the type he starts his beginner dogs on, that the track was "kindergarten" to a dog like Czar, and that the physical conditions were the "very best" for a trailing dog, could hardly be productive for the defense.

CLAIMS IX, X

FAILURE TO EXCUSE JUROR GUILES/JUROR MISCONDUCT

Green attempts to raise an issue under the guise of ineffective assistance of counsel that should have been raised on direct appeal. *See Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990). As such, this issue is procedurally barred. Green

alleges counsel was ineffective for failing to excuse Juror Guiles after he indicated his niece was murdered in Naples, Florida. The juror was rehabilitated by the trial judge (TT118-120), and this issue has no merit. Counsel cannot be ineffective for failing to raise a meritless issue. *See Phillips v. State*, 894 So. 2d 28 (Fla. 2004). The trial judge held:

> a. Under claim one in his post-conviction motion, the Defendant alleges that Mr. Parker, defense counsel at trial, was ineffective for failing to seek to have Juror Harold Guiles excused for cause or to peremptorily strike him because of a statement that he made during voir dire that his niece had been murdered three years earlier. The Defendant further alleges that Mr. Parker was ineffective for failing to ask follow-up questions after Juror Guiles stated that his niece had been murdered. An evidentiary hearing was granted on this claim.
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> During voir dire, defense counsel moved that Juror Guiles be excused for cause due to his exposure to pre-trial publicity. (See Exhibit "B," pgs. 88-91). The motion was denied. Later on during voir dire, the following exchange transpired:
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> The Court: Have any of you been the victim of a crime or has any member of your immediate family been the victim of a crime?
> Mr. Guiles: My niece was murdered, but that's not immediate family.
> The Court: How long ago was that?
> Mr. Guiles: Three years ago.
> The Court: Three years ago?
> Mr. Guiles: (Nods head.)
> The Court: Where was it?
> Mr. Guiles: In Naples.
> The Court: Would you be able to set aside that?
> Mr. Guiles: Well, it doesn't seem like it's the same kind of thing.

The Court: Would you be able to set it aside and not let it affect this case?
Mr. Guiles: Yes.
(See Exhibit "B," pgs. 118-120). Neither counsel, nor the Court asked Mr. Guiles any further questions regarding this event. Mr. Parker did not seek to have Mr. Guiles excused for cause on this basis, nor did he use a peremptory challenge to strike him. (See Exhibit "DD," 10/28/2003 Evidentiary Hearing Transcript Composite, pgs. 235-236.)

As to the failure to challenge Mr. Guiles for cause, the Defendant failed to meet both prongs of the Strickland standard. The Defendant failed to show that he was prejudiced by the failure of counsel to move to strike Juror Guiles for cause as the trial court rehabilitated him. (See Exhibit "B," pgs. 118-120). See Phillips v. State, 894 So. 2d 28, 35 (Fla. 2004). Counsel cannot be deemed ineffective for failing to raise a meritless issue. See Fennie v. State, 855 So. 2d 597, 607 (Fla. 2003).

The Defendant also failed to show that counsel was deficient or that the Defendant was prejudiced by the failure of defense counsel to exercise a peremptory challenge to strike Mr. Guiles, or to further question him. At the evidentiary hearing, Mr. Parker testified that he tried to dismiss Mr. Guiles because of pre-trial publicity, but the judge denied that motion. (See Exhibit "DD," p. 234). Mr. Parker testified that he did not exercise a peremptory challenge to strike Mr. Guiles because he was concerned "that by exercising peremptories, that we may, indeed, get people that we wish we didn't have." (See Exhibit "DD," p. 238). Mr. Parker testified that he was quite pleased that there were eight women on the jury, which he believed would be more favorable to the defense, and that he feared that by exercising additional peremptory challenges that more men could end up on the Defendant's jury than women. Mr. Parker testified that he thought that female jurors would not believe Kim Hallock's testimony. Mr. Parker further testified that he discussed "heavily" with the Defendant and his paralegal, Ms. Quinn, whether Juror Guiles should be removed from the jury. Mr. Parker testified that "we were satisfied that Mr. Guiles would be able to follow the law regarding the weighing of the evidence, [and]

> separate himself from the fact that his niece had been killed." (See Exhibit "DD," p.241). When questioned by post-conviction defense counsel as to whether Mr. Parker perhaps "missed" or did not hear the response by Mr. Guiles regarding the murder of his niece, Mr. Parker replied, "It's possible that citizens of the Constellation Beta committed this homicide." (See Exhibit "DD," p. 239). Mr. Parker also testified that Ms. Quinn was "feverishly" taking notes on the jurors' responses, and these notes were compared with his. (See Exhibit "DD," p. 240). Such an action would have further ensured that the comment by Juror Guiles was not inadvertently missed. The Court finds that based upon this testimony by Mr. Parker, that a strategic decision not to challenge Juror Guiles was made, and that this decision does not fall outside the wide range of professionally competent assistance. In addition, the Court finds that the Defendant's claim that counsel should have followed-up with further questions is based on sheer speculation, which does not rise to the level of ineffective assistance of counsel under Strickland. See Johnson v. State, 903 So. 2d 888, 896 (Fla. 2005) (citing to Reaves v. State, 826 So. 2d 932, 939 (Fla. 2002) (holding that an allegation that there would have been a basis for a for-cause challenge if counsel had "followed up" during voir dire with more specific questions was mere conjecture)). Even if the Court were to assume that Mr. Parker's performance was deficient in failing to exercise a peremptory challenge to Juror Guiles, given the trial court's rehabilitation of Juror Guiles, the Defendant has failed to show any prejudice as Juror Guiles told the trial court under oath that he could act impartially in this case. See Phillips v. State, 894 So. 2d 28, 35 (Fla. 2004).

(V24, R4028-4031). These facts are supported by the record.

At the evidentiary hearing, Mr. Parker testified that he moved to excuse Juror Guiles because of exposure to pre-trial publicity. The motion was denied. (V3, R375). Guiles' niece had been murdered. (V3, R376). Parker did not repeat his motion to

excuse Guiles for cause after he learned this. (V3, R377). Parker discussed each prospective juror with Green and Ms. Quinn, his legal assistant who was sitting with him, took "feverish" notes. (V3, R379, 381). Parker used nine of his ten peremptory challenges. (V3, R488). He did not use a peremptory challenge on Guiles. Whether to allow Guiles to remain was discussed "heavily." (V3, R382). In selecting a jury, an attorney has to look ahead to see which jurors would sit if a peremptory is used. Parker was "darn pleased" to have eight women on the jury. (V3, R385). He wanted women because they would see through Kim Hallock's testimony. (V3, R386). It was the defense theory that Hallock shot Chip Flynn. (V3, R394). Her testimony was "unbelievable" in many areas. (V3, R395-96).

Trial counsel made a strategic decision to keep Juror Guiles. A strategic or tactical decision is not a valid basis for an ineffective claim unless a Defendant is able to show that no competent trial counsel would have utilized the tactics employed by trial counsel. ***Windom v. State,*** 866 So. 2d 915, 922 (Fla. 2004); ***See White v. State***, 729 So. 2d 909, 912 (Fla. 1999) (citing ***Provenzano v. Singletary***, 148 F.3d 1327, 1332 (11th Cir.1998)).

Juror Guiles: gesture. This issue should have been raised on direct appeal and is procedurally barred. ***Power v. State,*** 886

So. 2d 952 (Fla. 2004). This issue was litigated at trial in 1990. The issue was whether there was juror misconduct in the parking lot when Juror Guiles made a gesture to Tim Curtis, a State witness. Mr. Parker moved for a mistrial and there was a hearing during the trial. (TT1545-47, 1625-40).

The trial court summarily denied this claim on the merits, finding that Green's allegation that Tim Curtis lied at trial was unfounded and the entire claim was based on speculation. (V18, R2872-17).[19] Even if this claim were not procedurally barred, it has no merit. It has been long established and continuously adhered to that the power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done only in cases of absolute necessity. *Thomas v. State*, 748 So. 2d 970, 980 (Fla. 1999) (citing *Salvatore v. State*, 366 So. 2d 745, 750 (Fla. 1978)). Moreover, addressing allegations of juror misconduct is left to the sound discretion of the trial judge. *Doyle v. State*, 460 So. 2d 353, 357 (Fla. 1984). Here, the trial judge thoroughly investigated the allegations, received the relevant testimony, and determined there was no misconduct. *England v. State*, 31 Fla. L. Weekly S351 (Fla. May 25, 2006).

[19] The July 19, 2002, order summarily denying several claims is attached hereto. Extensive findings are made in that order. Records portions were attached to the summary denial order and

POINT XI

THE RULES REGARDING JUROR INTERVIEWS DO NOT VIOLATE GREEN=S CONSTITUTIONAL RIGHTS

This issue is procedurally barred as it should have been raised on direct appeal. *Phillips v. State*; 894 So. 2d 28 (Fla. 2004). This Court has rejected constitutional challenges to rule 4- 3.5(d)(4) as follows:

> This Court has previously rejected similar constitutional challenges to this rule. *See Johnson v. State*, 804 So. 2d 1218, 1224 (Fla. 2001) (rejecting contention that rule 4-3.5(d)(4) conflicts with defendant's constitutional rights to a fair trial and effective assistance of counsel); *Rose v. State*, 774 So. 2d 629, 637 n. 12 (Fla. 2000) (holding that the claim "attacking the constitutionality of the Florida Bar Rule of Professional Conduct governing interviews of jurors [was] procedurally barred because Rose could have raised this issue on direct appeal"). As a result, the trial court properly summarily denied this claim.

Power v. State, 886 So. 2d 952, 957 (Fla. 2004). *State v. Duncan*, 894 So. 2d 817 (Fla. 2004). The trial court made detailed fact findings. (V24, R4031-32).

POINT XII

GREEN'S DEATH SENTENCE DOES NOT VIOLATE *RING v. ARIZONA*

Green asserts that Florida's capital sentencing scheme violates his Sixth Amendment right and his right to due process under the holding of *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring*

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are included in the record on appeal.

is not retroactive. *Johnson v.* State, 904 So. 2d 400, 406 (Fla. 2005). Furthermore, Green's sentence was supported by aggravating factors of prior violent felony and during the course of a kidnapping. See, e.g., Kimbrough v. State, 886 So. 2d 965 (Fla. 2004); Pietri v. State, 885 So. 2d 245 (Fla. 2004); Sochor v. State, 883 So. 2d 766 (Fla. 2004); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003).

POINT XIII

GREEN'S BURDEN-SHIFTING CLAIM IS PROCEDURALLY BARRED AND HAS NO MERIT.

The "burden-shifting argument" is procedurally barred because it could have been raised on direct appeal. *See Robinson v. State*, 913 So. 2d 514, 524 (Fla. 2005); *Demps v. Dugger*, 714 So. 2d 365, 367-68 (Fla. 1998). On the merits, this Court and the United States Supreme Court have repeatedly found that the standard jury instructions, when taken as a whole, do not shift the burden of proof to the defendant. *See Schoenwetter v. State*, 31 Fla. L. Weekly S261 (Fla. April 27, 2006); *Teffeteller v. Dugger*, 734 So. 2d 1009, 1024 (Fla. 1999); *San Martin v. State*, 705 So. 2d 1337, 1350 (Fla. 1997).

POINT I ON CROSS-APPEAL

THE TRIAL COURT ERRED IN ORDERING A NEW PENALTY PHASE; COUNSEL WAS NOT INEFFECTIVE IN INVESTIGATING THE NEW YORK CONVICTION.

The trial court granted Green a new penalty phase hearing as follows:

> Mr. Parker, the Defendant's penalty phase counsel, testified at the evidentiary hearing that he made no efforts to verify the New York offense by obtaining the Defendant's court file from New York. (See Exhibit "DD," pgs. 325-326). Mr. Parker testified that the reason that he did not attempt to obtain the file was because the Defendant admitted to committing the crime. (See Exhibit "DD," p. 326).
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> . . . .
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> As to the Defendant's claim that counsel was ineffective for failure to investigate and obtain the New York offense case file, the recent United States Supreme Court case, Rompilla v. Beard, ---U.S. ----, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) is instructive. In that case, Rompilla was convicted and sentenced to death for murder. The jury found three aggravators had been proven to justify a death sentence: (1) the murder was committed in the course of another felony; (2) that the murder was committed by torture; and (3) Rompilla had a significant history of felony convictions indicating the use or threat of violence. 125 S. Ct. at 2460. Rompilla's defense attorneys presented brief testimony in mitigation: five family members who argued in effect for residual doubt, beseeching the jury for mercy, saying that they believed Rompilla was innocent and a good man. *Id.* Rompilla's defense attorneys failed to consult records of Rompilla's juvenile and adult incarcerations, although they were aware of Rompilla's criminal record. hi. The United States Supreme Court found that Rompilla's defense attorneys' performance was deficient because they failed to examine the court file on Rompilla's prior conviction. The United States Supreme Court explained:
>
> > With every effort to view the facts as a defense lawyer would have done at the time, it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising

> their opportunity to respond to a case for aggravation. The prosecution was going to use dramatic facts of a similar prior offense, and Rompilla's counsel had a duty to make all reasonable efforts to learn what they could about the offense. Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay and to anticipate the details of the aggravating evidence the Commonwealth would emphasize. Without making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim. The obligation to get the file was particularly pressing here owing to the similarity of the violent prior offense to the crime charged and Rompilla's sentencing strategy stressing residual doubt. Without making efforts to learn the details and rebut the relevance of the earlier crime, a convincing argument for residual doubt was certainly beyond any hope.

125 S.Ct. at 2465. The United States Supreme Court in Rompilla was careful to point out that they were not creating a "rigid, *per se*" rule that requires a defense counsel to do a complete review of the file on any prior conviction introduced. Id. at 2467. The Court explained that "[c]ounsel fell short here because they failed to make reasonable efforts to review the prior file, despite knowing that the prosecution intended to introduce Rompilla's prior conviction not merely by entering a notice of conviction but by quoting damaging testimony of the rape victim in that case." Id. The Court explained further that "[t]he unreasonableness of attempting no more than they did was heightened by the easy availability of the file at the trial courthouse, and the great risk that testimony about a similar violent crime would hamstring counsel's chosen defense of residual doubt." Id. The United States Supreme Court found that the state courts "were objectively

unreasonable in concluding that counsel could reasonably decline to make any effort to review the file." Id. The United States Supreme Court noted that in "[o]ther situations, where a defense lawyer is not charged with knowledge that the prosecutor intends to use a prior conviction in this way, might well warrant a different assessment." Id.

Here, Mr. Parker knew that the State of Florida intended to use the New York offense as a prior violent felony conviction for aggravation. Yet, he completely failed to even attempt to obtain the file. As shown at the evidentiary hearing, the State could not obtain the file, only defense counsel could. Capital Collateral counsel was able to easily obtain the file. Defense counsel's only reason for not obtaining the file was because he remembered the Defendant informing him that he committed the offense. In Rompilla, the United States Supreme Court held that even when a capital Defendant himself has suggested that nothing in mitigation is available, a defense counsel is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial. This is not a situation where Mr. Parker was unaware that the State planned to use the New York offense case as aggravation. At the evidentiary hearing, Mr. Parker did not testify as to any reasoned strategic judgment in failing to investigate or obtain the file pertaining to the New York offense. Under the specific facts of this case, this Court finds that counsel's performance was deficient in failing to investigate or obtain the file pertaining to the New York offense.

The key issue then for this Court to determine in reference to this claim is whether the Defendant has shown prejudice by counsel's deficient performance in failing to investigate and obtain the court file on the New York offense. The Defendant cites to Merck v. State, 664 So. 2d 939 (Fla. 1995), for support of his contention that all evidence of the New York offense should have been excluded at the Defendant's penalty phase. In Merck, the Supreme Court of Florida held that a juvenile adjudication is not a conviction within the meaning of section 921.141(5)(b), Florida Statutes. 664 So. 2d at 944. However, the Supreme

Court stressed that its decision was limited to juvenile adjudications of delinquency, writing:

> We distinguish *Campbell v. State,* 571 So. 2d 415 (Fla. 1990), because that case involved "juvenile convictions." Our decision in this case is not to be read to mean that "convictions" of individuals who are juveniles which otherwise come within section 921.141(5)(b) are eliminated from consideration because the individuals are juveniles. Rather, our decision applies only to adjudications of delinquency which by statute are not convictions.

Id. In the subject case, the New York offense was an adult conviction, not an adjudication of delinquency. Article 720 of the New York State Criminal Procedure Law establishes a youthful offender statutory scheme. Individuals between the ages of sixteen and nineteen charged with a criminal offense (excluding certain enumerated felonies) who meet certain specified conditions, including having no prior felony convictions and no prior youthful adjudications, are deemed "eligible youths." N.Y. Crim. Proc. Law *§* 720.10(1)-(2). Then, upon conviction of an eligible youth in a New York court, the New York court orders a pre-sentence investigation to determine if the eligible youth is a "youthful offender," based on certain enumerated factors. N.Y. Crim. Proc. Law *§* 720.20(1). If the court finds the eligible youth to be a youthful offender, "the court must direct that the conviction be deemed vacated and replaced by a youthful offender finding; and the court must sentence the Defendant pursuant to section 60.02 of the penal law." N.Y. Crim. Proc. Law *§* 720.20(3). The youthful offender finding and resulting sentence together constitute a "youthful offender adjudication." N.Y. Crim. Proc. Law *§* 720.10(6).

New York federal courts have held that a youthful offender conviction counts as an adult conviction for sentencing purposes. United States v. Cuello, 357 F.3d 162 (2d Cir. 2004) (holding a youthful offender adjudication counted as a prior adult felony conviction); United States v. Driskell, 277 F.3d 150

(2d Cir. 2002) (holding a district court could consider a New York youthful offender adjudication in calculating a defendant's criminal history under federal guidelines, even though that conviction had been vacated under New York law). Additionally, a Virginia federal district court has held that New York state offenses, for which the Defendant had received "youthful offender status" should be counted as prior felony convictions for purposes of determining whether the Defendant was a career offender. United States v. Greene, 187 F. Supp.2d 595 (E.D. Va. 2002). The New York federal district court has explained that New York's youthful offender law evinced an intent only to "set aside" a conviction for the purposes of avoiding stigma, rather than to erase all record of the conviction or to preclude its future use by courts. United States v. Matthews, 205 F.3d 544, 548-49 (2d Cir. 2000). Florida case law holds that a youthful offender conviction is an adult sanction, not a juvenile sanction. State v. Richardson, 766 So. 2d 1111 (Fla. 2000). Therefore, Merck does not apply. The Florida Supreme Court did not overrule Campbell v. State, 571 So. 2d 415 (Fla. 1990) in Merck, but made a distinction between a juvenile adjudication and a juvenile who is convicted as an adult. The Defendant was convicted of an adult sanction at the age of eighteen and sentenced to the Department of Corrections.

The Defendant's claim that his New York conviction was vacated and cannot be considered as a prior violent felony has no merit. Johnson v. Mississippi, 486 U.S. 578 (1988) does not apply because in that case, the conviction had been reversed, as opposed to this case where the New York robbery adjudication and conviction was never reversed. The language employed in New York that the conviction is deemed "vacated" does not mean that the conviction is reversed or is void, it simply means that the youthful offender sentence replaces the adult sentence. United States v. Cuello, 357 F.2d 162, 165 (2d Cir. 2004).

The Defendant asserts that even if the evidence of the New York case would have been admissible, and even if its disposition would have supported the prior violent felony aggravator, prejudice is still manifest because the jury was told and the judge found that the

Defendant had been convicted and sent to prison for armed robbery, instead of robbery. The New York documents show that the Defendant plead to and was convicted of robbery in the third degree. The New York statutes define "robbery" as "forcible stealing" and that:

A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or the retention thereof immediately after the taking; or

2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

N.Y. Penal Law §160.00. After defining "robbery," the New York statutes then define robbery in the third degree, second degree, and first degree. N.Y. Penal Law §160.05-160.15. Section 160.05 of the New York statutes provides that a "person is guilty of robbery in the third degree when he forcibly steals property." By its statutory definition of third degree robbery in New York, this meets the aggravating factor in section 921.141(5)(b) that the Defendant was convicted of "a felony involving the use or threat of violence." Moreover, the Florida Supreme Court has held that for purposes of section 921.141(5)(b) that *any* robbery conviction is as a matter of law a felony involving the use or threat of violence. Simmons v. State, 419 So. 2d 316, 319 (Fla. 1982). Therefore, the Court finds that the Defendant was convicted of a prior violent felony for purposes of section 921.141(5)(b). See generally Donaldson v. State, 722 So. 2d 177, 184 (Fla. 1998) (explaining that section 921.141(5)(b) specifically "limits the evidence to that of a violent crime for which the Defendant is actually convicted.")

However, prejudice is still manifest because **the jury heard that the Defendant was convicted for a prior "armed" robbery** and sent to prison. The judge also

made the finding that the Defendant was convicted of a prior "armed" robbery. The bulk of the State's penalty phase case was devoted to this prior New York conviction. The prejudice is that for an "armed" robbery conviction, the Defendant had to be "armed with a deadly weapon," threatened "immediate use of a dangerous instrument," or displayed a firearm. N.Y. Penal Law §160.15. In the subject case, the State argued in the penalty phase that the Defendant displayed a firearm in robbing and kidnapping Kim Hallock and Chip Flynn. (See Exhibit "C," pgs. 112-113, 116). **The fact that the jury was left with the false impression that the Defendant had been convicted of a prior offense in which he robbed someone with a firearm,** similar in nature to the crime charged in this case is highly prejudicial. **The difference in a lay person's mind between an "armed robbery" and a robbery is substantially different.** This Court recognizes that both are, as a matter of law, violent felonies and count as aggravators under our death penalty law; however, **the difference in the finder of fact's mind cannot be overlooked. The trial judge even found that the Defendant was convicted of an armed robbery which was an erroneous finding of fact.**

Had Mr. Parker received the New York file, he would have found information regarding the crime to which the Defendant plead, 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.

This Court finds that the failure to investigate, obtain, and review the New York file constituted deficient performance under both Strickland and Rompilla, and the failure to do this was sufficiently prejudicial to the Defendant in the penalty phase of this case to warrant a new penalty phase proceeding.

(Emphasis supplied)

(V24, R4068-4077).

The trial court erred in its finding that the jury was under the mistaken belief that Green was convicted of armed robbery rather than simple robbery. The testimony and argument from both parties was consistent that Green was only convicted of robbery. There was only one mention of armed robbery, and that was that Green was *charged* with armed robbery but pled to robbery. Whether the judge[20] made an error in his sentencing order is an issue for the judge to resolve; however, that does not involve the jury or a complete new penalty phase. Furthermore, it is not clear that Judge Antoon was mistaken about the status of the robbery. In one place in his order, he refers to the prior conviction as "armed robbery." (TT2840). Shortly thereafter, he refers to the prior conviction as "robbery." (TT2845).[21] Considering every reference at the trial was to "robbery," it should not be assumed the reference to armed robbery was anything more than a scrivener's error and Judge Antoon was not perfectly aware the conviction was for robbery.

The relevant facts from trial are: Bob Rubin, Probation and

[20] Judge Antoon was the trial judge in 1989-1990. Judge Jacobus is the postconviction trial judge.
[21] This order is also attached for the Court's convenience.

Parole in Florida, supervised Green beginning January 31, 1978 (TT2192). Rubin testified that Green had transferred from New York and was on parole for "armed robbery" (TT2194); however, it was later clarified Green was charged with armed robbery, but he pled to robbery and was sentenced as a Youthful Offender (TT2216-17). State's Exhibit 1 at the penalty phase states that Green's New York conviction was for "robbery." (TT2204, 3059). During closing argument, the prosecutor talked to the jury about "the robbery in New York" for which Green was "sentenced to prison as a youthful offender." (TT2284). Mr. Parker told the jury that the prior "robbery" conviction should not be given weight because Green received "youthful offender treatment, a 15-16-year old boy." (TT2314).

The issue was also addressed at the *"Spencer"*[22] hearing (TT2407). The prosecutor referred to the New York offense as a "robbery" (TT2378), stated that Green was arrested for "robbery" in New York, and was convicted of "robbery" in New York, and that they are "talking about robbery". (TT2379). The prosecutor also stated that he believed Green was 17 or 18 at the time of the New York offense. (TT2380). Mr. Parker argued that the

[22] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), had not been decided at the time of Green's sentencing procedure; however, the trial judge used a comparable procedure by having oral arguments on the aggravating/mitigation circumstances on November 7, 1990. (TT2339-2420). Sentencing was February 8,

State did not file any judgment and sentence of the New York offense, and there was insufficient proof. (TT2405). He also argued that Green was very young at the time of the New York offense and received Youthful Offender treatment, the offense was remote and should be given little weight (TT2407). And a Youthful Offender conviction should not be considered a prior violent felony. (TT2252).

The record shows that after the clarification that Green may have been arrested for armed robbery, but pled to robbery, all parties were crystal clear that the offense was a robbery. There was no subsequent reference to the jury of anything except "robbery." The only exhibit which was introduced regarding the New York conviction, State's Exhibit 1, listed the offense as "robbery." The collateral judge's conclusions that Mr. Parker could have found additional mitigating evidence by investigating the New York conviction does not account for the evidence Mr. Parker did present. The jury was aware Green was very young at the time and received special consideration as a youthful offender. The "additional" information that the judge refers to is that Green may not have been guilty and that the co-defendant's charges were dropped. This information is neither admissible nor relevant. The New York conviction stands. Whatever happened to the co-defendant is not relevant. The fact

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1991. (TT2442-2459).

the jury knew that Green was charged with armed robbery but was convicted of robbery, is not error. The State is permitted to place the facts of the prior violent felony before the jury. *Power v. State*, 886 So. 2d 952, 964 (Fla. 2004).

Rompilla v. Beard, 545 U.S. 374 (2005) is distinguishable. In that case, unlike this case, there was a vast amount of mitigating evidence that was available from a file that was in the local clerk's office. That evidence included prison files which pictured Rompilla's childhood and mental health very differently from anything defense counsel had seen or heard. An evaluation by a corrections counselor stated that Rompilla was reared in a slum environment, came to the attention of juvenile authorities, quit school at 16, started a series of incarcerations often of assaultive nature and commonly related to over-indulgence in alcoholic beverages, mental health tests pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling. *Id*. at 378.

CONCLUSION

Based on the arguments and authorities herein, the Appellee/ Cross-Appellant respectfully requests this Honorable Court affirm the trial court order insofar as it denies guilt phase relief and reverse the trial court order insofar as it grants

Appellant/Cross-Appellee a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **Mark Gruber**, CCRC-Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, this _____ day of August, 2006.

Assistant Attorney General

CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Courier New, 12 point font, pursuant to Fla. R. App. 9.210.

Assistant Attorney General