IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-633

RODNEY TYRONE LOWE,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA, (Criminal Division)

****

ANSWER BRIEF OF APPELLEE/INITIAL BRIEF OF CROSS-APPELLANT

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PRELIMINARY STATEMENT

Appellant, Rodney Tyrone Lowe, was the defendant at trial and will be referred to as the "Defendant" or "Lowe". Appellee, the State of Florida, the prosecution below will be referred to as the "State". References to records and briefs will be as follows: Record on Direct Appeal - "T" for case number 60-79037; Postconviction record in case number SC05-633 - "PCR-R"; Postconviction transcripts in same case - "PCR-T"; Appellant's brief - "Br." Supplemental records will be designated by the symbol "S" preceding the record type. Where appropriate, the volume and page number(s) will be given.

STATEMENT OF THE CASE AND FACTS

On July 25, 1990, Lowe was indicted for the July 3, 1990 murder and attempted robbery of Donna Burnell as she was working at the Nu-Pack convenience store. Lowe was convicted as charged on April 12, 1991, and on May 1, 1991, sentenced to death for the murder and received 15 years for the attempted robbery.

On direct appeal, this Court made factual findings:

> On the morning of July 3, 1990, Donna Burnell, the victim, was working as a clerk at the Nu-Pack convenience store in Indian River County when a would-be robber shot her three times with a .32 caliber handgun. Ms. Burnell suffered gunshot wounds to the face, head, and chest and died on the way to the hospital. The killer fled the scene without taking any money from the cash drawer.

During the week following the shooting, investigators received information linking the defendant, Rodney Lowe, to the crime.

One week after the murder, two investigators that had been working on the case, Investigator Kerby and Sergeant Green, learned that Lowe and his girlfriend had gone to the Vero Beach Sheriff's Office to discuss a matter unrelated to the instant case. Already suspecting Lowe's involvement in the murder, Kerby and Green went to the sheriff's office where they separated Lowe and his girlfriend and, after Lowe had waived his Miranda rights, began to question him concerning the murder of Donna Burnell. Lowe denied any involvement in the murder and eventually invoked his right to counsel. The interrogation ceased and Lowe was left alone in the interrogation room. Neither Kerby nor Green bothered to put Lowe in contact with an attorney because, as they were to later testify, they did not expect to continue the questioning. Throughout the interrogation, Lowe's girlfriend had been sitting in a nearby room and had overheard much of the conversation. She became emotional and was moved to another room. After Kerby and Green left Lowe, they went to the room where the girlfriend was waiting and, at her request, explained to her the extent of the evidence they had compiled against Lowe. The girlfriend stated to the investigators that she wanted to speak to Lowe to find out what happened. She also agreed to have her conversation with Lowe recorded. Kerby later testified that, although no one urged the girlfriend to speak to Lowe, he knew there was "a good possibility" that she was going to try to get Lowe to admit his involvement in the murder.

The girlfriend succeeded in convincing Lowe to speak to the police. When Kerby returned to the interrogation room to get the girlfriend, Lowe, without prompting, told Kerby that he wanted to speak with him again. Lowe then gave the investigators a statement in which he confessed that he was the driver of the getaway car involved in the crime but denied any complicity in the murder, which he blamed on one of two alleged accomplices. Lowe's confession to

Kerby ended when Lowe once again asked for an attorney. Following this statement, Lowe was arrested and indicted for first-degree murder and attempted robbery.

At trial, the State presented witnesses who testified that, among other things, Lowe's fingerprint had been found at the scene of the crime, his car was seen leaving the parking lot of the Nu-Pack immediately after the shooting, his gun had been used in the shooting, his time card showed that he was clocked-out from his place of employment at the time of the murder, and Lowe had confessed to a close friend on the day of the shooting. The State also presented, over defense objection, the statement Lowe gave to the police on the day of his arrest. Lowe advanced no witnesses or other evidence in his defense. After closing arguments, the jury returned a verdict finding Lowe guilty of first-degree murder and attempted armed robbery with a firearm as charged.

In the penalty phase, the State introduced a certified copy of Lowe's previous conviction for robbery. Lowe presented testimony in mitigation from a principal at the correctional institution school who testified that Lowe earned his GED and did a good job working as a teacher's aide in her class; that Lowe helped other inmates with their education; that he adapted well to the structured environment of the prison; and that Lowe had not been in any serious trouble during his incarceration pending trial. A pastor of Bible studies at the correctional institution testified that he met Lowe in prison during his previous incarceration and had recommended him to stay at a halfway house, where he stayed for five months after he was released from prison; that Lowe handled responsibility well, was friendly, tried to do his best, and got a job with a lumber company; he concluded that Lowe seemed to have fallen in with a bad crowd after he left the halfway house. Lowe's employer at the lumber company testified that Lowe was an excellent employee, hard-working and reliable, and was liked by the other employees; further, that Lowe gained more responsibility over time and eventually was in charge of the yard when the foreman was not there. Other employees testified that Lowe was a good

> worker, reliable, and friendly. Lowe's aunt testified concerning his childhood and the fact that his father converted to the Jehovah's Witness faith when Lowe was a teenager. This, in her opinion, caused problems because the children rebelled. She explained that because of this Lowe was unhappy as a teenager and got into trouble as a teenager more serious than normal. Lowe's father was called by the State in rebuttal and explained that the aunt visited only twice a year; he agreed that he was a strict disciplinarian, but that he did not believe his religion caused his son to commit these acts. He stated that he would never speak to his son again. At the conclusion of the penalty phase, the jury, by a nine-to-three vote, recommended the imposition of the death penalty.
>
> The judge followed the jury's recommendation and imposed the death penalty, finding two aggravating circumstances, specifically: (1) the defendant was previously convicted of a felony involving the use or threat of violence to the person; and (2) the capital felony was committed while the defendant was engaged in or was an accomplice in the attempt to commit any robbery. In imposing the death penalty, the trial judge expressly found the mitigating circumstances did not outweigh the aggravating factors. The trial judge also sentenced Lowe to fifteen years' imprisonment for the attempted robbery conviction.

Lowe v. State, 650 So.2d 969, 971-72 (Fla. 1994).

In Lowe's direct appeal, he raised the following 17 issues:

> I - The trial court erred in denying Lowe's motion to suppress his confession where the officers deliberately bypassed Lowe's request for an attorney.
> II - Fundamental error undermined the fairness of Mr. Lowe's trial when the court permitted the jury to hear Kerby's inflammatory and prejudicial statements during tape on of the interrogation of Lowe.
> III - The trial court erred in admitting State's exhibit 32, the entire contents of a box of Lowe's personal items, which included his PSI from his prior robbery conviction and letters written to Lowe in prison.
> IV - Mr. Lowe's right to effective assistance of

counsel and to equal protection of the laws were violated by the trial court's refusal to appoint co-counsel to assist Mr. Long.

V - The trial court erred in failing to conduct an inquiry into counsel's effectiveness when appellant moved to discharge court-appointed counsel.

VI - The trial court erred in denying the motion for his disqualification under Fla. R. Crim. P 3.230.

VII - County Court Judge Wild lacked jurisdiction to preside over the instant felony prosecution where his assignment to the circuit bench was not temporary.

VIII - The trial court erred in giving, over defendant's objection, the State's special jury instruction: "inconsistent exculpatory statements can be used to affirmatively show conscious[ness] of guilt and unlawful intent."

IX - Appellant's objections to the prosecutor's improper argument in closing were erroneously overruled and the denial of his mistrial motion on theses grounds were (sic) also error.

X - The trial court erred in granting the State's motion in limine which excluded Danny Butts' spontaneous statement to Donna Brooks that "two peoples" argued with and shot his mother.

XI - The trial court erred in denying the defendant's requested instruction that the presence of the child could not be considered in the penalty recommendation.

XII - It was error to instruct on the heinousness and coldness aggravating circumstances when the evidence did not support them.

XIII - The State's penalty argument was so improper and relied so heavily on non-statutory aggravating circumstances and character attacks on appellant that a new sentencing must be held.

XVI - The court gave excessive weight to the prior violent felony by consideration of use of a weapon when Lowe was not convicted of armed robbery and of the brevity of the sentence for that robbery.

XV - The trial court erred in overruling defense objection to Officer Scully's testimony concerning Lowe's fleeing a police officer and the chase which preceded Lowe's arrest for the prior robbery.

XVI - The court failed [to] inquire into the failure of Dr/ Rifkin and Cindy Schrader to testify as defense witnesses as penalty phase and whether Mr. Lowe waived that mitigating evidence.

> XVII - The trial court failed to consider or weigh mitigation.

The Florida Supreme Court considered the issues and affirmed the conviction and sentence. Lowe, 650 So. 2d 969.

On July 20, 1995, Lowe sought certiorari review. The U.S. Supreme Court, on October 2, 1995, denied certiorari review. Lowe v. Florida, 516 U.S. 887 (1995).

In March, 1997, Lowe filed a shell motion for postconviction relief. His Amended Motion to Vacate Judgments of Conviction and Sentence was filed on September 21, 2000 and the Second Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Evidentiary Hearing and Leave to Amend was filed April 30, 2001. In the Second Amended Motion, Lowe raised 31 claims as follows:

> (I) Lowe has been denied access to public records;
> (II) the conviction and sentence are unreliable because of newly discovered evidence and/or ineffective assistance in not discovering that Dwayne Blackmon and Lorenzo Sailor went to the Nu-Pack convenience store with Lowe and that Lowe did not shoot the victim, that Blackmon was a paid informant, that Blackmon and Sailor admitted involvement in the crime and that Sailor killed the victim;
> (III) there was a lack of adversarial testing due to ineffective assistance of guilt phase counsel, withholding of exculpatory evidence, and improper trial court rulings;
> (IV) Lowe is innocent of first-degree murder based in part upon the claim Sailor and Blackmon admitted participating in the crime and that Sailor shot the victim;
> (V) the convictions and sentences are unconstitutional because they were obtained as a result of

intimidation, harassment, and coercion by law enforcement officials;
(VI) Lowe's confession was obtained in violation of the state and federal constitutions;
(VII) Lowe was denied a full adversarial testing in the penalty phase due to ineffective assistance of counsel;
(VIII) counsel was ineffective in the guilt phase by conceding the accuracy of the state's evidence, thereby, conceding Lowe's guilt without consent;
(IX) Lowe's conviction and sentence are unconstitutional because trial counsel had a conflict of interest which deprived Lowe of effective assistance of counsel;
(X) defense counsel was ineffective at the guilt and penalty phases of trial for failure to obtain an adequate mental health examination;
(XI) Lowe is innocent of the death penalty;
(XII) Lowe was denied a proper direct appeal due to omissions in the record due to trial counsel's ineffective assistance, and such prevents postconviction counsel from providing effective representation;
(XIII) counsel was ineffective in failing to remove prejudiced jurors;
(XIV) counsel was ineffective for failing to move for a change of venue; (XV) Lowe was denied a constitutional trial as a result of systematic discrimination in jury selection;
(XVI) the death sentence is imposed in a discriminatory fashion;
(XVII) Lowe has been denied his constitutional rights due to rule prohibiting juror interviews;
(XVIII) the death sentence is unconstitutional as it is based upon non-statutory aggravators and counsel was ineffective in not arguing against the non-statutory aggravation;
(XIX) Lowe's death sentence based upon improper jury instructions;
(XX) the death sentence is unconstitutional because it is based upon the felony murder aggravator which is duplicative;

(XXI) the jury instructions diluted the jury's sense of sentencing responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985);

(XXII) Lowe's capital sentence is unconstitutional because the jury instructions shifted the burden to the defense;
(XXIII) Lowe was denied a constitutional trial based upon the court's denial of co-counsel;
(XXIV) the trial court lacked jurisdiction to hear Lowe's case;
(XXV) Lowe's rights were violated when the trial court refused to discharge defense counsel upon a claim of ineffective assistance;
(XXVI) Lowe's constitutional rights were violated when the court refused the defense motion to recuse;
(XXVII) it was unconstitutional to charge Lowe with premeditated and felony murder;
(XXVIII) Florida's capital sentencing statute is unconstitutional because it fails to prevent arbitrary and capricious imposition of the death penalty;
(XXIX) Lowe is insane to be executed;
(XXX) electrocution and/or lethal injection are cruel and unusual punishment;
(XXXI) cumulative errors rendered Lowe's conviction and sentence unconstitutional. (April 30, 2001 motion).

On January 28, 2002, Lowe filed an Amendment to Second Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Evidentiary Hearing and Leave to Amend. The amendment essentially raised an additional claim of ineffective assistance of counsel, asserting counsel failed to impeach Dwayne Blackmon ("Blackmon") with his grant of immunity from perjury charges arising from a prior sworn affidavit. Additionally, the motion alleged that counsel failed to impeach Investigator Kerby with evidence of bias.

Near April 2, 2002, Lowe filed his Amendment to Claim I of the Second Amended Motion to Vacate Judgments of Conviction and

Sentence with Special Request for Evidentiary Hearing and Leave to Amend. In this pleading, he re-asserted that he was denied access to public records involving police contact with Patricia White ("White"), Lowe's girlfriend at the time of his confession.

Following the Huff[1] hearing in this cause, this Court entered an order on September 11, 2002, denying 12 of the 33 claims and setting January 7-10, 2003 for the evidentiary hearing. During the evidentiary hearing, in addition to other evidence, this Court heard testimony from Lisa Miller ("Miller"), Victoria Blackmon McBride, Blackmon, and Ben Carter ("Carter") related to the allegations Blackmon confessed to the killing.

After this hearing, Lowe filed a Supplemental Amendment to his Second Amended Motion to Vacate Judgments on January 23, 2003. There, he asserted a Brady v. Maryland, 373 U.S. 83 (1963) violation. Lowe contends that the State had withheld information that certain Indian River County Sheriff's detectives knew of alleged admissions by Blackmon to Miller and others that he was involved in the robbery of the Nu-Pack store and was the shooter of Donna Burnell. The court held additional evidentiary hearings on February 11, March 19, and April 25,

[1] Huff v. State, 622 So.2d 982 (Fla. 1983).

2003 regarding this.

On June 20, 2003, Lowe served a Supplemental Claim to Defendant's Second Amended Motion. The sole claim was the unconstitutionality of Florida's capital sentencing under Ring v. Arizona, 122 S.Ct. 2428 (2002).

On August 9, 2004, the court denied relief. On or about August 26, 2004, Lowe moved for a rehearing and filed a successive motion for postconviction relief re-alleging Blackmon made admissions that he killed Donna Burnell. Lowe pointed to alleged admissions Blackmon made to Lisa Grone ("Grone") between March and August of 2003, some time after Blackmon's postconviction evidentiary hearing testimony. Since the alleged statements were made after the hearing, the State conceded the need for an evidentiary hearing. On November 23, 2004, this Court held a hearing on the rehearing and successive motion.

On January 13, 2005, under Florida Rule of Criminal Procedure 3.851(e)(2),[2] Lowe filed another postconviction motion entitled, Motion to Vacate Judgments of Conviction and Sentence Based upon Newly Discovered Evidence. In that motion, he claimed Blackmon allegedly made admissions to Maureen McQuade and David

[2] Rule 3.851(e)(2) provides in part: *"Successive Motion*. A motion filed under this rule is successive if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence." In filing under this motion provision, Lowe admits his is successive to his prior pleadings.

Stinson. Lowe then filed an amendment on March 2, 2005, claiming another Blackmon admission, this time to Michael Lee.

Before the State could respond to that amendment, the trial court issued an order granting a new penalty phase trial.

SUMMARY OF THE ARGUMENT

ARGUMENT I - The State addresses Lowe's claims IB, ID, IE and IIIA here and submits the court properly determined the claims were in part procedurally barred, legally insufficient, and meritless as Lowe he did not meet his burden of proof.

ARGUMENT II – Procedurally barred, and meritless are the claims of ineffectiveness for failing to present statements by Donna Burnell and Danny Butts. The admission of the statements was raised and rejected on appeal.

ARGUEMNT III – The court properly found Lowe did not carry his burden to prove that any exculpatory evidence was suppressed as was argued in Claims IC, IID2, and IIIB.

ARGUMENT IV – The record supports the conclusion Lowe's claims of ineffectiveness related to his handling of the physical evidence were barred and meritless.

ARGUEMENT V – Counsel did not render ineffective assistance with respect to the admission of Patricia White's testimony and Lowe's confession. Moreover, the claims are barred.

CROSS-APPEAL – It was error of law and fact, to grant a new penalty phase. The court merely assumed similar accounts of Blackmon's alleged admissions should be heard by a jury, but failed to take into account the admissibility of the accounts or their impact upon the sentence given the trial evidence.

ARGUMENT

ARGUMENT I

TRIAL COURT DID NOT ERR IN DENYING POST CONVICTION RELIEF SINCE LOWE DID NOT CARRY HIS BURDEN FOR A CLAIM OF INEFFECTIVENESS OF COUNSEL UNDER STRICKLAND OR MEET THE REQUIREMENT FOR NEWLY DISCOVERED EVIDENCE.

In his appeal from the lower court's denial of his motion to vacate judgement, Lowe makes numerous claims of inadequacy of counsel. The alleged ineffectiveness of his trial counsel resulted in a denial of an adversarial "testing" at trial, the jury not having evidence of other participants in the crime besides Lowe, and irrelevant and prejudicial matters coming into evidence. In his Argument I (Br. p. 1-26) Lowe alleges, essentially, that Blackmon admitted being the shooter to various individuals and then lied at the trial and subsequent post-conviction hearing, claiming he was sick in bed on the day of the robbery and murder. Lowe asserts his trial counsel failed to find and to present this evidence. He continues this vein in his Argument III (Br. p. 53-78) saying that Blackmon was not properly impeached with supposedly inconsistent statements.

The trial court granted and held an extensive evidentiary hearing on these grounds. After a full hearing, encompassing several hearing dates and numerous witnesses, the court properly

denied each of these claims in written opinions detailing its findings and reasoning.

The standard of review for claims of ineffective assistance of counsel following an evidentiary hearing under Strickland v. Washington, 466 U.S. 668 (1984), is *de novo*, with deference given the trial court's factual findings. "For ineffective assistance of counsel claims raised in postconviction proceedings, the appellate court affords deference to findings of fact based on competent, substantial evidence, and independently reviews deficiency and prejudice as mixed questions of law and fact." Freeman v. State, 858 So.2d 319, 323 (Fla. 2003). Recently, this Court discussed its review following an evidentiary hearing:

> ... we review the deficiency and prejudice prongs as "mixed questions of law and fact subject to a *de novo* review standard but ... the trial court's factual findings are to be given deference. So long as the [trial court's] decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence." *Sochor v. State*, 883 So.2d 766, 781 (Fla. 2004) (quoting *Porter v. State*, 788 So.2d 917, 923 (Fla. 2001)) (emphasis omitted).

Arbelaez v. State, 889 So.2d 25, 32 (Fla. 2005).4 4 See Reed v. State, 875 So.2d 415 (Fla. 2004); Davis v. State, 875 So.2d 359, 365 (Fla. 2003); Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001); State v. Riechmann, 777 So. 2d 342 (Fla. 2000); Sims v. State,

754 So. 2d 657, 670 (Fla. 2000); Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Rutherford v. State, 727 So. 2d 216 (Fla. 1998); Rivera v. State, 717 So. 2d 477, 482 (Fla. 1998); Rose v. State, 675 So. 2d 567 (Fla. 1996).

For a defendant to prevail on an ineffective assistance claim, he must establish (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. 688-89. This Court has explained:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla.2001) (quoting Strickland, 466 U.S. at 687). At all times, the defendant bears the burden of proving not only that counsel's representation fell below an objective standard of reasonableness, and was not the result of a strategic decision, but also that actual and substantial prejudice resulted from the deficiency. Under

Strickland, it is the defendant's burden to prove that counsel's actions were unreasonable under prevailing professional norms and that the offending conduct was not the result of a strategic decision See; Strickland, 466 at 688-89; Gamble v. State, 877 So.2d 706, 711 (Fla. 2004).

In Davis, 875 So.2d at 365, this Court reiterated that the deficiency prong of Strickland requires the defendant to establish that the "conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards." (citing Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Davis, 875 So.2d at 365. In assessing an ineffectiveness claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89. "Judicial scrutiny of counsel's performance must be highly deferential" and "the distorting effects of hindsight" must be eliminated in order to "reconstruct the circumstances of counsel's challenged conduct," and "evaluate

the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Davis, 875 So.2d 365. A "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" must be employed. Strickland, 466 U.S. at 689 (citation omitted). The ability to create a more favorable strategy years later does not prove deficiency. See Patton v. State, 784 So. 2d 380 (Fla. 2000); Cherry v. State, 659 So. 2d 1069 (Fla. 1995). "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla.), cert. denied, 479 U.S. 972 (1986).

Expounding upon Strickland and challenges to the investigation counsel conducted, the United States Supreme Court cautioned in Wiggins v. Smith, 539 U.S. 510, 533 (2003):

> In finding that Schlaich and Nethercott's investigation did not meet *Strickland*'s performance standards, **we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case**. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*. 466 U.S., at 689, 80 L Ed 2d 674, 104 S Ct 2052. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Id.*, at 690-691 . .

> .. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.*, at 691 . . . .

Wiggins, 539 U.S. at 533 (emphasis supplied). From Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus must be on **what** efforts were undertaken and **why** a specific strategy was chosen over another. Counsel does not need to conduct an investigation (even a non-exhaustive, preliminary investigation) to be reasonable in declining to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 (stating "[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation."). With these principles in mind, the State asserts that the court's factual findings and legal conclusions must be upheld on appeal.

Lowe disputes the court's findings of fact on witness credibility as well as its legal determination that the defense failed to present sufficient evidence at the evidentiary hearings to prove its claims. As discussed below, the court's denial of relief on each of these issues was proper and appropriate. This Court should uphold the denial of postconviction relief.

As discussed in detail below, Lowe failed to meet his

burden of proving that any prejudice resulted. He is not entitled to relief. He failed to meet his burden of proof at the evidentiary hearing on any of these issues and, furthermore, has consistently failed to address the overwhelming and compelling evidence admitted at trial conclusively proving his guilt. Ineffective assistance of counsel under Strickland has not been proven. The court's rejection of all the claims of ineffective assistance of counsel must be affirmed.

A. Lowe failed to show prejudice for counsel's deficient performance with regard to witnesses Lisa Miller and Ben Carter.

In his Argument IB, Lowe asserts that his trial counsel performed inadequately by failing to investigate and to find Miller and Carter, witnesses to Blackmon's alleged admission. Lowe argues here, and throughout the brief, that the jury's verdict of first degree murder rested solely upon a theory of a lone gunman. He argues that since the prosecutor chose to stress the theory that Lowe acted alone in murdering Donna Burnell, the jury would have had no choice but to acquit Lowe of first degree murder if they had heard any evidence at all that suggested more than one person were involved in the crime. Hence, in his view, prejudice resulted because his attorney failed to find and to present these witnesses.

The court heard from both Miller and Carter at the

evidentiary hearing. Miller claimed that several months after the murder, she was present when Blackmon admitted to shooting Donna Burnell. (PCR-T.16 717-719). She claimed she told three different police officers about these statements: Detective Phil Williams, Detective John Grimmach, and Detective Parrish. (Id. 719-723). Carter also testified, saying that he too heard Blackmon claim to have killed Ms. Burnell, both at the time Miller was present as well as additional times after the trial. (PCR-T.21 1246). There were, however, substantial and numerous discrepancies between the testimonies of Miller and Carter.

The State impeached both Miller and Carter. Miller had prior felony convictions and had served a prior prison sentence. (PCR-T.16 741-743). Carter's testimonies were internally inconsistent which the State brought to light during cross examination. (PCR-T.21 1246-1257). Likewise, each story contradicted the other. The three detectives also testified during the evidentiary hearing and all denied ever receiving any information from Miller about this murder. (PCR-T.17 833, 841, 852). Finally, Victoria Blackmon, and Blackmon himself, testified at the hearing, denying Blackmon ever admitted to shooting Burnell; their testimonies were consistent with their numerous previous statements they had given the police as well as with their trial testimonies which established Blackmon was

home at the time the murder took place. (PCR-T.18 909-910, PCR-T.19 1034-1036).

In its August 8, 2004 Order Denying the Motion to Vacate, the court, while concluding that trial counsel's performance was deficient for not finding and presenting Miller and Carter, specifically found that no prejudice resulted. Their combined testimony carries little weight. It absolutely does not negate all the trial evidence proving Lowe's guilt. It does not deny Lowe's presence and participation in the crime. It does not undermine White's testimony about Lowe using her car and her taking him back to work immediately after the murder or that she woke up both Blackmon and his wife Victoria when she went to their house immediately after dropping Lowe off at work. It does not undermine Victoria's testimony that her husband was sick and asleep in bed until White awakened him. It does not negate the accuracy of the physical evidence of Lowe's fingerprints at the crime scene. There is no way possible for prejudice to result given the overwhelming evidence presented of Lowe's participation in and guilt of the murder of Donna Burnell.

Furthermore, their testimony would only have been admissible at trial as impeachment; it would not have been substantive evidence of anything. The evidence these witnesses would present does not fit the definition of "newly discovered

evidence.” See Jones v. State, 709 So.2d 512, 525 (Fla. 1998) (finding due process considerations did not warrant postconviction relief based on newly discovered evidence consisting of declarant's alleged statements that he, rather than defendant, murdered police officer; all witnesses but one were prison inmates with extensive felony records, all of the statements were allegedly made after defendant had been sentenced to death, and alleged confessions were somewhat contradictory); United States v. Seabolt, 958 F.2d 231, 233 (8th Cir. 1992)(noting "a statement by one criminal to another criminal ... is more apt to be jailhouse braggadocio than a statement against his criminal interest.").

The court also made specific findings that Miller and Carter were inconsistent with each other on significant details. The internal inconsistencies in Carter’s testimony alone are indicative of collusion, or at least discussions, between the witnesses about their statements. Their testimonies differed from each other on the circumstances of when Blackmon allegedly made these statements. Both were convicted felons with crimes of dishonesty in their history. The court did not find these witnesses persuasive or credible. The court found that even if Miller and Carter would have impeached Blackmon to some extent, neither person’s testimony would have negated the overwhelming

evidence of Lowe's participation and guilt. "This Court finds the Defendant has failed to demonstrate that there is a reasonable probability that, but for trial counsel's deficient performance, the outcome would have been different. ... The jury was instructed on the alternative theories of first degree premeditated murder and first degree felony murder." (citation omitted). Thus, there is no reasonable probability that the outcome would have been different." (PCR-R 2048).

Lowe failed to meet his burden of proof on the prejudice prong of the Strickland standard. He has utterly failed to address the evidence presented to the jury that absolutely linked him to the crime and murder and that precluded any prejudice. Some of the evidence of Lowe's guilt included fingerprints, eye witness testimony about the car, the gun and casings, and, not least, Lowe's literal confession to being involved in robbing the store at the time Mrs. Burnell was shot. (T. 739-814). Lowe's presence at the NuPak store, and being the sole perpetrator of the robbery-murder, as well as Blackmon's lack of involvement were corroborated by the fact the robbery-murder occurred on July 3, 1990, between 10:07 a.m. (last register sale) and 10:13 a.m. (time the 911 call is placed), at a time when Lowe was clocked out of work between 9:58 a.m. and 10:36 a.m. that morning, but Blackmon was seen at home. White reported that Lowe had her

white Ford which Steven Leudtke (“Leudtke”) identified as being at the scene and driven by a single black male. Also, White stated Lowe picked her up between 10:00 and 11:00 a.m. and she returned him to work. The time trials established that it took 22 minutes to drive from Lowe’s business to the Nu-Pack store then to his home and back to Gator Lumber. The record shows that it took about 40 minutes to make a one-way trip from Blackmon’s home to the Nu-Pack store. After returning Lowe to work, White arrived at the Blackmon residence where she awakened Blackmon and his wife Victoria. Clearly, Lowe was the perpetrator: he was away from work at the time of the crime and Blackmon was home in bed with his wife.

The court properly noted the felony murder jury instruction, coupled with the substantial uncontradicted evidence of Lowe’s presence at the crime scene, provided the jury with a more than adequate basis to convict Lowe of first degree felony murder no matter what argument the State chose to present in its closing statement. In fact, during the evidentiary hearing, Carter’s and Miller’s testimonies indicated Lowe was present during the crime. The court was correct in its holding that there was not a reasonable probability the verdict would have been different if this evidence had been presented. Its denial of relief was

appropriate and should be upheld.

B. Lowe failed to show either deficient performance or prejudice in his counsel's not impeaching Blackmon with his affidavit.

Under Argument IIIA, Lowe contends his counsel was ineffective for not impeaching Blackmon at trial with his pre-trial affidavit given to his previous counsel. Lowe argues this impeachment would have exposed Blackmon as a liar and the jury would have rejected his testimony outright. (Br. 54-77). Under Lowe's analysis, Blackmon provided the only direct evidence of Lowe's involvement in Burnell's killing. Lowe is mistaken.

During the evidentiary hearing on this claim, Blackmon testified claiming portions of the affidavit were false. In its opinion, the court stated that it compared the affidavit and the statement Blackmon gave to the police and found them to be substantially similar and that, therefore, "the effectiveness of the Affidavit for impeachment purposes is questionable." (PCR-R 2053). The court went on to find that even if counsel had impeached Blackmon with the affidavit, the trial's outcome would have been the same. The court based this finding on all the evidence previously discussed in section A and reincorporated here that conclusively linked Lowe to the murder. Id. Lowe failed to meet his burden of showing prejudice under Strickland.

At the evidentiary hearing, the court heard how the assistant public defender ("APD") coerced Blackmon into giving a false affidavit. That came to light during a subsequent statement Blackmon gave the police. The State notified the court about the APD's actions and the court removed him as Lowe's attorney. Long was appointed and given the file. While counsel James Long ("Long") initially testified he did not recall his reasoning for not using the affidavit as impeachment, he later said Blackmon's recantation was behind the reason for not pursuing the impeachment issue at trial. (PCR-T.15 573-578).

John Unruh ("Unruh"), an Assistant Public Defender, also testified at the evidentiary hearing. Shortly before this trial, he represented both Lowe and Blackmon simultaneously. Unruh stated that the affidavit was in the file he gave Long when the court removed him from the case for a conflict of interest and that he would have impeached Blackmon with the it. However, on cross examination, the state established that it was in fact Unruh who pressured Blackmon into signing the affidavit and that Blackmon's statement to the police would have been introduced at trial to refute the affidavit. (PCR-T.18 907-946). It was Unruh's pitting Lowe against Blackmon and preparing the affidavit Blackmon signed which led to his removal as trial counsel.

Blackmon also testified that he did not kill Donna Burnell and that there were portions of the affidavit he was unsure were even in it when he signed it. He stated that he would not have signed the affidavit unless Unruh directed him to do so. Blackmon averred that at the time of the crime, Carter told the police Lowe committed the crime. (PCR.T 908-947).

To recap, Unruh directed Blackmon to give this affidavit. After doing so, Blackmon then gave a statement to the State, contradicting a portion of the affidavit. If trial counsel had tried to impeach Blackmon with the affidavit, the State would have brought out why he signed the affidavit in the first place and then offered Blackmon's statement to the police to rebut the impeachment attempt. It is highly unlikely that the jury would have simply disregarded Blackmon's testimony or acquitted Lowe under these circumstances. Moreover, second-guessing how Long handled the case does not satisfy Lowe's burden. See Cherry, 659 So.2d at 1073 (stating "standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result"). Here, although another attorney might have done something differently, Lowe has failed to prove the outcome would have changed and, thus, has not established prejudice. In light of all of the evidence linking Lowe to the crime (the

fingerprints, the confession, etc.), Long's impeaching Blackmon with a questionable affidavit prepared by a discredited, discharged counsel would not have resulted in a different outcome. This Court should affirm the denial of relief.

C. Lowe failed to prove that the alleged newly discovered evidence would have been admissible in a guilt phase trial or would have produced an acquittal.

Lowe also claims he has newly discovered evidence of additional witnesses purporting to have heard Blackmon confess to the murder of Burnell. He contends that Grone, Maureen McQuade ("McQuade"), and David Stinson ("Stinson") each heard post trial statements by Blackmon claiming he was the shooter. Grone claims to have heard Blackmon's admissions in March 2003, early in their relationship. McQuade claims to have heard them in the late 1990's when they lived together. Stinson claims to have heard them in 1992 when they were getting high together. McQuade and Stinson turned up after the court concluded the evidentiary hearings. Grone testified at an evidentiary hearing on his successive motion.

The court found Grone's evidence was "newly discovered."[3]

[3] The State maintains its arguments presented in previous briefs and responses that Grone's testimony is not in fact "newly discovered evidence." It incorporates its earlier argument and wants to preserve its objections and stance should this Court reverse and return the case to the lower court for further evidentiary hearings and proceedings.

(PCR-R 2584). It also found her testimony analogous to Miller's and Carter's in that it did not undermine the jury's verdict of guilt under the first degree felony murder theory. The court found nothing Grone testified to:

> undermine[d] the Defendant's confession to his girlfriend that he was the driver of the getaway car involved in the crime, evidence of the Defendant's fingerprints found at the scene, testimony concerning the sighting of the Defendant's girlfriend's car in the parking lot of the convenience store immediately after the shooting, evidence that the Defendant's gun was used in the shooting, or evidence of the Defendant's time card showing that he was clocked out from work at the time of the murder.

(PCR-R 2047). All of this evidence supported a conviction under the felony murder instruction given to the jury. Consequently, Lowe suffered no prejudice in the guilt aspect of the case.

With respect to McQuade and Stinson, the court assumed, based upon their affidavits, that their testimony would be the same. Given its ruling on Miller and Carter, it did not make a final ruling on their evidence other than to conclude that the felony murder conviction would not be altered. Without a probability of a different verdict, Lowe did not carry his burden under Wright to get relief on a newly discovered evidence claim.

The State incorporates its analysis and arguments made in IA

and II above into this discussion. Nothing Grone, Stinson, or McQuade had to say rebutted the overwhelming evidence of Lowe's participation in and guilt for the murder of Burnell. Since Lowe cannot show prejudice in his guilt phase, these claims of newly discovered evidence are without merit.

To get relief under a claim of newly discovered evidence, Lowe must show:

> ... the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." If this test is met, the court must next consider whether the newly discovered evidence is of such a nature as to probably produce an acquittal on retrial. Additionally, we have said that newly discovered evidence, by its very nature, is evidence that existed but was unknown at the time of the prior proceedings.

Wright v. State, 857 So.2d 861, 870-71 (Fla. 2003) (citations omitted). See Kokal v. State, 901 So.2d 766 (Fla. 2005); Brown v. State, 846 So.2d 1114, 1126 (Fla. 2003); Ventura v. State, 794 So. 2d 553, 570 (Fla. 2001); Robinson v. State, 770 So. 2d 1167, 1170 (Fla. 2000); Jones, 709 So.2d at 520-21; Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992); Porter v. State, 653 So.2d 374, 380 (Fla. 1995). Looking clearly at the trial evidence and the law given the jury, Lowe did not and cannot show the prejudice required to be entitled to relief.

Jones, 709 So.2d at 523 is instructive and the case situation is analogous to this one. In each, a defendant, here Lowe apparently through the assistance of Carter and Miller, convinced a number of inmates to testify about a third party's alleged confession to committing the murder. In fact, while Miller was incarcerated with Grone she called postconviction counsel and then handed the telephone to Grone to speak. This Court rejected Jones' claim that the alleged confessions should be admitted as substantive evidence, stating:

> ...Moreover, unlike the confessions in *Chambers*, the alleged confessions in this case lack indicia of trustworthiness. **The fact that more inmates have come forward does not necessarily render the confessions trustworthy**. The confessions were not made prior to the original trial in circumstances indicating trustworthiness, such as spontaneously to a close acquaintance as in *Chambers*, or to his own counsel or the police shortly after the crime, but were made to a variety of inmates with whom Schofield served prison time.
>
> All of the statements were allegedly made after Jones had been sentenced to death; in many cases more than a decade elapsed before the inmate came forward until after Jones' most recent death warrant was signed, **waiting anywhere from four to fifteen years to report their information**.
>
> Except for Schofield's former girlfriend, the **witnesses were all prison inmates with extensive felony records**. However, it is not their felony records alone that cast doubt on the witness' credibility. Judge Soud's observations in his 1992 order, wherein he analyzed the reasons the confessions were not particularly reliable, are equally valid here even in light of the testimony

> of the additional witnesses. Like the witnesses in 1992, the witnesses who testified at the most recent hearing spoke only in general terms of Schofield's possible involvement in the murder of Officer Szafranski. **No witness testified to any unique details surrounding the murder. In fact none of the witnesses related specific details of the crime**...

Jones, 709 So.2d at 525 (footnotes omitted, emphasis supplied).

"[I]n conducting a cumulative analysis of newly discovered evidence, we must evaluate the newly discovered evidence in conjunction with the evidence submitted at trial and the evidence presented at prior evidentiary hearings. See Jones, 709 So. 2d at 522." Kokal, 901 So.2d at 776. While recantation testimony can be newly discovered evidence, courts regard it as "exceedingly unreliable." Lightbourne v. State, 742 So.2d 238, 247 (Fla. 1999). In reiterating that recanted testimony can be newly discovered evidence this Court ruled that the trial judge is required to review "all the circumstances of the case" while bearing in mind that recanted 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." Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994). A court may grant a new trial only when it is satisfied that the recanted testimony is of such a nature that a different verdict would probably result. Id. Moreover, simply because several witnesses trickle forward years after the trial, and now after the alleged

confessor is dead, to accuse Blackmon does not automatically require a new trial. See Melendez v. State, 718 So.2d 746, 747-48 (Fla. 1998) (rejecting claim of newly discovered evidence of five witnesses who alleged another suspect confessed to the murder where new witnesses were convicted felons, none of which were credible); Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997) (affirming rejection of relief upon claim of newly discovered evidence as new witnesses were not credible and offered testimony inconsistent with trial evidence).

Grone's testimony and Stinson's and McQuade's affidavits do not support Lowe's claims for relief. Nothing these witnesses would offer would have any impact upon the felony murder conviction. Comparing all the allegations of Blackmon's admissions with the trial evidence and hearing testimony plainly shows there is no reasonable likelihood of acquittal on retrial. Blackmon and his ex-wife denied these "confessions" at the evidentiary hearing testifying, as they did at trial, that they were home in bed when the homicide occurred. White's car, which Lowe used that morning, was at the NuPac store. Lowe admitted being at the store that morning. Leudtke saw White's car with a lone black male wearing a Gator Lumber uniform. Lowe's fingerprints were in the store. The State demonstrated Carter,

Miller, and Grone are convicted felons[4] who knew each other and discussed this case in jail. The affidavits from McQuade and Stinson show a similar connection with drugs and felony convictions. None of these witnesses came forward immediately, some waiting more than a decade to offer testimony, and some even waiting until after Blackmon was deceased and no longer could be harmed by these allegations. The totality of the evidence shows the "newly discovered" evidence is not of such a nature that it would produce an acquittal on retrial. Not only is the "new evidence" unreliable, but it is refuted by the known trial facts and evidence.

While the State continues to dispute that these witnesses are newly discovered evidence, a further question remains of whether their testimony would be admissible at a guilt phase trial. Blackmon is now dead, as the court established at the hearing in November 2004. The entirety of evidence by Grone, McQuade, and Stinson is Blackmon's out of court statement concerning the shooting which Lowe wishes to offer for the truth

[4] Although not fully confessed to by the prior witnesses, it is clear each had a motive, or at a minimum a lack of fear, to allege Blackmon made inculpatory admissions. Whether it was to help their friend, Lowe, or to exact revenge for some unvoiced injustice Blackmon may have inflicted, the witnesses were not credible and their testimony did not mesh with the known facts in spite of the court's general conclusion that each reported Blackmon's admissions to the killing.

of the matter asserted. This is classic hearsay.

A court must determine whether the proposed newly discovered evidence would be admissible at trial and "then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial.'" Kokal, 901 So.2d at 775 (citations omitted). See Sims v. State, 754 So. 2d 657, 660 (Fla. 2000) (stating that even "[a]ssuming the ... evidence qualif[ies] as newly discovered, no relief is warranted if the evidence would not be admissible at trial."). Lowe has not shown that these classic hearsay statements would be admissible in the guilt phase of a new trial were one ordered. See Grim v. State, 841 So.2d 455, 464 (Fla. 2003) (finding no abuse of discretion in refusing to admit hearsay testimony under Chambers v. Mississippi, 410 U.S. 284 (1973), where, unlike Chambers, the statement's reliability was not established clearly); Sliney, 699 So.2d at 670 (rejecting claim hearsay was admissible under Chambers because statements were critical to Sliney's defense, and noting in Chambers "court held that such third party confessions should "have been admitted because the statements' reliability was clearly established" and Sliney had not made requisite showing).

Given the above, this Court should uphold the lower court's

denial of relief on the claim of newly discovered evidence.

D. Lowe is not entitled to relief for cumulative prejudice since he showed neither deficiency nor prejudice under his previous claims.

Finally, Lowe argues he is entitled to relief due to the cumulative prejudice of the previous claims. He posits that if all the alleged "confessions" by Blackmon had been presented via Miller, Cater, Grone, McQuade, and Stinson, the jury would believe there was a lone shooter and Blackmon was that person.

The court denied this claim as well, finding it had no merit given the overwhelming evidence of Lowe's participation in the crime and death of Burnell. (PCR-R 2058). The court had denied Lowe's other claims as procedurally barred, legally insufficient, and/or without merit as discussed earlier in this brief.

Since the court found no prejudice in those claims, there could not be cumulative prejudice so as to invalidate his conviction. See Downs v. State, 740 So. 2d 506, 509 (Fla. 1999) (finding where allegations of individual error are found meritless, a cumulative error argument based on the asserted errors must fall); Melendez, 718 So. 2d at 749 (concluding where each claim is meritless or procedurally barred, there is no cumulative error to consider); Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984) sentence vacated on other grounds, 524 So. 2d 419

(Fla. 1988). The State incorporates its previous analysis and arguments and submits this Court should affirm.

ARGUMENT II

TRIAL COURT DID NOT ERR IN DENYING POST CONVICTION RELIEF SINCE LOWE DID NOT CARRY HIS BURDEN FOR A CLAIM OF INEFFECTIVENESS OF COUNSEL UNDER STRICKLAND WITH REGARD STATEMENTS BY DONNA BURNELL AND DANNY BUTTS AND STEVEN LEUDTKE'S TESTIMONY ABOUT THE LINEUP.

Lowe claims he is entitled to post conviction relief because of ineffectiveness of counsel with regard to the admission of statements made by Donna Burnell when she was dying and by Danny Butts shortly after the shooting as well as for not eliciting further testimony from Leudtke regarding a suspect lineup he was shown by police. It is Lowe's position that each of these resulted in prejudice that warranted the court vacating the judgement against him.

The standard of review for claims of ineffective assistance of counsel following an evidentiary hearing under Strickland is *de novo*, with deference given the court's factual findings. "For ineffective assistance of counsel claims raised in postconviction proceedings, the appellate court affords deference to findings of fact based on competent, substantial evidence, and independently reviews deficiency and prejudice as mixed questions of law and

fact." Freeman, 858 So.2d at 323.

A. Lowe failed to meet his burden of proof in showing either deficient performance or prejudice with regard alleged statement by Donna Burnell.

In his Argument II B (Br. 31-34), Lowe claims counsel was deficient for failing to present evidence that Donna Burnell told the police that she did not know her assailant. The defendant argues that the victim told Sgt. Ewert she did not know who shot her, and that this evidence would have contradicted the state's theory that Lowe shot the victim. The trial court found that Lowe presented no evidence of this at the evidentiary hearing and, therefore, this claim was without merit. Lowe failed to meet either prong of the Strickland test. (PCR-R 2048).

Lowe presented no evidence that Burnell knew him in any manner. James Long, the original trial counsel, testified at the evidentiary hearing that he had no memory of a police report detailing Burnell's lack of knowledge of her shooter nor did he remember the defendant claiming to know her. (PCR-T.14 499-501). Long could not have be ineffective in his performance if Lowe did not tell or supply his counsel with the necessary facts. Cherry v. State, 781 So. 2d 1049, 1050 (Fla. 2001) (rejecting claim of ineffectiveness where defendant's actions constrained counsel's performance because "reasonableness of counsel's actions may be

determined or substantially influenced by the defendant's own statements or actions"); Rutherford, 727 So.2d at 224-25 (reasoning counsel was not ineffective where he failed to investigate, develop, and present mitigating evidence regarding defendant's harsh childhood and war experiences where counsel had reasonable basis not to present this evidence and where defendant did not cooperate in presenting certain mitigation evidence); Sims v. State, 602 So. 2d 1253, 1257 (Fla. 1992) (finding when defendant directs counsel not to collect evidence, counsel is not ineffective in following client's wishes because counsel "has considerable discretion in preparing trial strategy and choosing the means of reaching the client's objectives").

Moreover, Lowe waived this claim by presenting no other evidence of it at the hearing. Since he provided no evidentiary support for this claim, the trial court's denial of relief was proper. Owen v. State, 773 So. 2d 510 (Fla. 2000)(affirming court finding that defendant waived evidentiary claim when he made no effort to introduce evidence to support claim). The trial record also fails to support this contention of Lowe. The record reflects that Sgt. Ewert told the victim not to talk and put his finger in her hand and told her to squeeze once for no and twice for yes. Sgt. Ewert asked the victim if she knew who he was and she responded yes by squeezing his finger. He also

testified that she rolled her eyes back and looked at him, and that every time he asked a question thereafter, she responded shallowly “no, no, no.” (T. 541-542). The State played the tape of Lowe’s statement during the trial where he claimed to know her by sight alone from his patronage of another convenience store where she had worked. (T. 701-707). There simply is no evidence in the record of any of the proceedings indicating that Ms. Burnell knew Lowe. The mere possibility that she might have recognized his face is simply speculation.

Lowe failed to meet his burden of presenting evidence on this claim. He has failed to meet either of the required Strickland prongs; he has shown no deficient performance by his trial counsel because there is no evidence that Burnell knew Lowe or that Lowe told trial counsel that Burnell knew him. That left counsel with a patently self-serving comment by Lowe that he could not be the shooter because he recognized Burnell from another store. Further, there can be no prejudice from such a lack of affirmative evidence. There is simply no evidence that Burnell recognized him. Additionally, her repeated “no” does not support his claim since it is unclear whether she was responding cogently. “A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice

component is not satisfied." Kennedy, 547 So.2d at 914. The court's ruling denying this claim should be upheld.

B. Lowe's claim of ineffectiveness of counsel with regard to the testimony of or statement by Danny Butts is procedurally barred and without merit for failing to show either deficient performance or prejudice.

According to Lowe, his counsel was ineffective for: (1) not challenging the State's evidence that Danny Butts, an eye-witness to the murder, was not competent to testify and (2) not seeking admission of the statement as an excited utterance under an exception to the hearsay rule. (Br. 39-46). Lowe maintains counsel missed presenting exculpatory evidence by failing to offer an additional statement by Butts to Leudtke to bolster his argument that Butts was a competent witness and by failing to seek admission of his statements as excited utterances; this failure allegedly undermined confidence in the outcome of the trial. This issue is procedurally barred and without merit.

The lower court made specific findings, ruling that it was indeed procedurally barred and without merit. "This Court finds that this claim is procedurally barred and meritless." (PCR-R 2050). It also addressed Lowe's argument that the statements were admissible as excited utterances even if the child were incompetent. The court reasoned "[f]inally, the Defendant failed to establish that Danny Butts' hearsay statements would have met

the standard for reliability to be admissible under an exception to the hearsay rule. ... [T]he hearsay statement would not have been admissible as an excited utterance." Id., 2051. These rulings were firmly based upon the case record and evidence. This court should uphold the denial of relief.

This Court covered exhaustively the issue of Butts' competency to testify in its opinion on the direct appeal. See Lowe, 650 So. 2d at 975-77, n. 7. "Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." Muhammad v. State, 603 So.2d 488, 489 (Fla. 1992). Lowe is utilizing the inappropriate strategy of advancing a different argument, ineffective assistance, to re-litigate the issue. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (holding "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal."); Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995)(same). A second, undetailed statement does not transform either an incompetent witness into a competent one, nor does it alter the plain fact that this court has already ruled on the issue.

Turning to the merits, Lowe cites Perez v. State, 536 So. 2d 206 (Fla. 1988) and section 90.803(2), Florida Statutes to

argue Butts' statement would have come into evidence as an excited utterance even though he was incompetent to testify. Two problems exist with Lowe's argument. First, a statement by a person incapable of counting about the purported number of perpetrators does not become reliable simply because he was excited when he said it. Second, Lowe did not establish prejudice arising from his counsel's performance as required by Strickland.

A court must undergo a thorough analysis of a statement, and its underlying reliability, before it can be admitted as an excited utterance exception to the hearsay rule. In determining the admissibility of a statement under section 90.803(2), a court considers factors such as the length of time between the event and the statement, the age of the declarant, his physical and mental condition, the circumstances surrounding the event, and the subject matter of the statement sought to be admitted. See, McGauley v. State, 638 So. 2d 973, 974 (Fla. 4th DCA 1994); State v. Jano, 524 So. 2d 660, 663 (Fla. 1988). The reason courts conduct such a analysis is to ascertain the reliability of the statement. In Perez, this Court concluded that section 90.803(23) "provides that before the out-of-court statements of the child victim may be admitted the court must first find, in a hearing, that 'the time, content, and circumstances of the statement provide sufficient safeguards of reliability'" and that

such a determination is a question for the trial court. Perez, 536 So. 2d at 209. This Court specifically said the court's assessment of the time, content, and circumstance of the hearsay statement determined whether the statement was reliable and thereby obviated the need to find the child declarant competent to testify under section 90.603(2), Florida Statutes. Perez, 536 So.2d at 209-11. Lowe's argument takes the issue of assessing reliability completely out of the equation, in direct contradiction of the case law.

Here, the judge determined the child could not count or express numbers accurately; its finding and ruling were upheld on appeal. Lowe, 650 So. 2d at 975-77, n.7. Butts' statements were unreliable and inadmissible. Lowe presented nothing at the evidentiary hearing to overcome these fatal flaws. Consequently, he has failed to establish counsel was deficient in not seeking to admit the statement under a hearsay exception. The failure to raise a nonmeritorious issue is not ineffectiveness. King v. Dugger, 555 So. 2d 355, 357-58 (Fla. 1990).

Furthermore, Lowe has not shown prejudice arising from counsel's action. Since this statement by Butts was not reliable and, consequently, would never have been admitted into evidence, Lowe suffered no prejudice from his counsel not seeking to admit

it before the jury. This claim fails to meet either of the Strickland prongs. It is, therefore, without merit. This court should uphold the denial of relief under this claim.

C. Lowe failed to meet his burden of proof to show either deficient performance or prejudice with regard alleged Leudtke's testimony regarding the police lineup.

Lowe's next claim is that his counsel was ineffective for failing to properly cross examine Leudtke to bring out the details of the police line-up, highlighting the fact Leudtke failed to pick out Lowe from the line-up. (Br. 48-53). Lowe contends had the jury known this, he would have been acquitted; thus, but for counsel's deficiency, the result of the trial would have been different. Once again, Lowe failed to meet his burden under Strickland by showing any deficient performance and failed to address the overwhelming evidence of his guilt that was presented at trial, thereby removing any claim of prejudice.

The court granted and held an evidentiary hearing on this claim during which the defense presented the testimony of counsel James Long. Long testified that it was his thought process that since the jury knew there was no one who could identify Lowe, he did not consider it vital to explicitly cross examine the witness about a non-identification. In essence, Long considered and rejected the need to add cumulative evidence that a particular witness did not

identify Lowe when the jury knew that no witness identified him.

Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. See Stewart v. State, 801 So.2d 59, 65 (Fla. 2001) (finding "[c]laims expressing mere disagreement with trial counsel's strategy are insufficient."). Moreover, “strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000). See Robinson v. State, 913 So.2d 514 (Fla. 2005); State v. Bolender, 503 So.2d 1247, 1250 (Fla. 1987).

Lowe did not demonstrate counsel's performance was deficient nor that there was a reasonable probability the outcome of the proceeding would have been different absent the deficient performance. See Haliburton v. Singletary, 691 So. 2d 466 (Fla. 1997). Lowe has not identified how the fact Leudtke did not pick him out of a line-up would show deficient performance or prejudice Lowe under Strickland given the cross-examination counsel conducted showed that Leudtke could not identify him. A counsel does not automatically render ineffective assistance by not impeaching a witness with a report, if cross-examination is used to bring out the weaknesses in the witness's testimony. See Van Poyck v. State, 694

So.2d 686, 697 (Fla. 1997)(finding counsel was not ineffective in his cross-examination of witness because through examination was conducted even though witness was not attacked directly); Card v. Dugger, 911 F. 2d 1494, 1507 (11th Cir. 1990). Long cross-examined Leudtke on the lack of a credible line-up, the fact that the line-up was composed of five or six black males, and that he had mentioned two looked familiar. (T. 565-66). The jury could reasonably infer Lowe was in the line-up, otherwise there would have been no reason to address the issue.

The court aptly stated the jury did not use a lack of identification of Lowe in rendering a verdict of guilt. The jury did use, and Lowe ignores, all the evidence that did connect him to the murder, including his confession, his fingerprints, the gun and casings, etc. Cf. Bush v. Wainwright, 505 So. 2d 409, 411 (Fla. 1987) (rejecting claim of ineffectiveness of appellate counsel for not challenging constitutionality of line-up where suppression of line-up would not have altered out come of case as defendant was linked to crime without line-up). After considering the testimony and the evidence elicited at trial and the evidentiary hearing, the court held Lowe did not meet either of the Strickland prongs. "This Court finds that the Defendant has failed to meet either prong of *Strickland*. The Defendant's trial counsel, James Long, testified at the evidentiary hearing that he did not consider the live line-up

important because Leudtke never identified the Defendant. The live line-up was not used as evidence to convict the Defendant." (PCR-R 2051). That ruling was appropriate and should be upheld.

ARGUMENT III

TRIAL COURT DID NOT ERR IN DENYING POST CONVICTION RELIEF SINCE LOWE DID NOT CARRY HIS BURDEN FOR BRADY CLAIMS INVOLVING ALLEGED SUPPRESSION OF BLACKMON'S ADMISSIONS, STATEMENTS BY DANNY BUTTS, AND BLACKMON'S ALLEGED STATUS AS A POLICE INFORMANT.

Lowe claims the state suppressed or withheld several items of crucial evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). He contends the evidence withheld includes: Lisa Miller's and Michael Lee's statements to the police (Br. 17-24); whether Blackmon was a paid police informant (Br. 77-78); and Butt's statements concerning the number of men involved in the crime (Br. 46-48). The alleged suppression, he claims, prejudiced him.

The standard of review for an appeal from a court's denial of a rule 3.851 motion following an evidentiary hearing is: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgement for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."'" Blanco, 702 So.2d at 1252, quoting Demps v.

State, 462 So.2d 1074, 1075 (Fla. 1984) quoting Goldfarb v. Robertson, 82 So.2d 504, 506 (Fla. 1955). In analyzing Brady claims, the reviewing Court defers to the factual findings made by the lower court to the extent they are supported by competent, substantial evidence, but reviews *de novo* the application of those facts to the law. See Stephens, 748 So.2d at 1031-32; see also Rogers v. State, 782 So.2d 373, 376 (Fla. 2001).

In order to establish a Brady violation, a defendant must show:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991) (quoting United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989)). See, Strickler v. Greene, 119 S.Ct. 1936, 1948 (1999); U.S. v. Starrett, 55 F.3d 1525, 1555 (11th Cir. 1995); Jones, 709 So. 2d at 519. "[F]avorable evidence is material and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 435 (1995). “As noted by the United States

Supreme Court, '[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.'" Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988) (quoting United States v. Agurs, 427 U.S. 97, 109-10 (1976)). For a successful Brady claim. a petitioner must also show: 1) that he did not have and could not have obtained the evidence by exercising due diligence; and 2) that the prosecution actually suppressed the favorable, material evidence. Evidence is not deemed suppressed, and, therefore, "'[t]here is no Brady violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence.'" Freeman v. State, 761 So. 2d 1055, 1061-62 (Fla. 2000) (quoting Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993).

In Way v. State, 760 So. 2d 903, 910 (2000), this Court quoted Strickler v. Greene, 527 U.S. 263 (1999) stating:

> There are three components of a true Brady violation: [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.

Strickler, 119 S.Ct. at 1948. However, in order for evidence to be deemed "suppressed", it is only reasonable for the defendant to

prove he neither had the evidence nor was able to discover it through due diligence. If the defendant had the evidence, it could hardly be considered suppressed. In fact, in Way this Court recognized that where the evidence was available equally to the defense and State or that the defense was aware of the evidence and could have obtained it, the evidence had not been suppressed. Way, 760 So. 2d at 911. See, Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000) (reasoning "[a]lthough the 'due diligence' requirement is absent from the Supreme Court's most recent formulation of the Brady test, it continues to follow that a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.").

A crucial aspect of a Brady claim is the necessity for the defense to show prejudice resulted from the withholding of the evidence. Prejudice exists when the suppressed exculpatory, material evidence is such that "there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." Stickler, 119 S. Ct. at 1952. "Reasonable probability" is "a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985) (plurality); Kyles, 514 U.S. at 435.

A. Lowe failed to prove the State suppressed any evidence

regarding Blackmon's alleged admissions which resulted in prejudicing the defense.

Lowe contends the State suppressed evidence of Blackmon's alleged admissions to Miller and Michael Lee ("Lee"). According to Lowe, Miller (and other undisclosed sources) gave various police officers and/or agencies information about Blackmon's alleged confession which they failed to turn over to the defense in violation of Brady. Lowe argues that the court's finding Miller's testimony lacked credibility was a result of a flawed legal analysis because the court should have viewed the evidence from the jury's perspective. He also argues that an unnamed police officer approached Lee while he was incarcerated and asked him to lie about hearing Blackmon confess. As a result of these alleged errors, Lowe maintains he is entitled to a new guilt phase. The State disagrees.

The court found this claim meritles as Lowe failed to establish Miller contacted any State agency. As discussed above, at the evidentiary hearing, Miller and various officers testified about whether she informed the police of any alleged admissions by Blackmon. In resolving the conflict the court believed the officers, and thereby, found Miller had not contacted them. The court found the claim meritless because the defense failed to present credible evidence to support it in its motions or hearings. (PCR-R 2072). Lowe failed to prove any evidence even existed to suppress.

At the evidentiary hearing, the court heard from Chief Phil Williams and Detectives Joe Parrish and John Grimmach, all of whom denied under oath that Miller informed them about any admissions by Blackmon to being the shooter. (PCR-T.17 833, 841, 852). The court heard inconsistent statements by Miller herself in, Carter's testimony (discussed above), as well as the facts about her criminal convictions and incarcerations which impeached her veracity and credibility. (PCR-T.16 741). Simply put, after seeing and hearing the testimonies, the court believed the officers over Miller. This Court will defer to the credibility findings of the trial court given its superior vantage point to assess the witnesses.

Lowe failed to establish Miller gave the police any information regarding Lowe. The court's decision denying this Brady claim was properly based upon competent, substantial evidence. This situation is analogous to that presented in Lightbourne, 841 So.2d at 437-439, where this Court upheld the court's findings on witnesses' credibility. In Lightbourne the court held an evidentiary hearing where a witness with prior felony convictions testified that two officers asked him to get information from Lightbourne regarding the murder. The witness agreed to assist and reported defendant's confession to the police. The officers testified they were not involved in the defendant's case. This Court upheld the court's finding that the witness's testimony lacked credibility, a

determination supported by the internal contradictions within the witness's testimony, because its determination was supported by competent, substantial evidence. Balancing and comparing Miller's statements to the other witnesses' discussed above in section I A, the court's assessment was well founded and reasoned.

The contentions about Lee are incredible and without merit as well. Lowe asserts that while Lee was incarcerated, an unnamed detective approached him and asked him, a complete stranger to Blackmon, to get Blackmon to confess. After that, Lee promptly ran into Blackmon who immediately confessed to Lee, a total stranger. Lee did not come forth for years because he was afraid of Blackmon's voodoo powers. The only issue before this court with regard to Lee is whether the state withheld exculpatory evidence. Lowe never specified the identity of the alleged officer. Not only has Lowe failed to demonstrate that any evidence was suppressed, he cannot show that he suffered prejudice given the multiple layers of inadmissible and unreliable hearsay involved in this allegation. This evidence would be inadmissible in a guilt phase trial. The state incorporates its legal analysis in IA and III. See Grim, 841 So.2d at 464 (finding no abuse of discretion in refusing to admit hearsay testimony under Chambers v. Mississippi, 410 U.S. 284 (1973), where, unlike Chambers, statement's reliability was not established); Sliney, 699 So.2d at 670 (rejecting claim hearsay was

admissible under Chambers because statements were critical to defense, and noting in Chambers "court held that such third party confessions should 'have been admitted because the statements' reliability was clearly established" and Sliney had not made showing). This Court should uphold the denial of this Brady claim.

B. Lowe failed to prove Blackmon was a paid police informant much less that the State suppressed it or any prejudice resulted.

Lowe argues that the State withheld evidence that Blackmon was a paid informant for the Sebastian Police Department. While Lowe claims this evidence directly attacks the Blackmon's credibility, he failed to prove how it was suppressed or favorable to his defense.

Carter testified for the defense at the evidentiary hearing, but gave no evidence that Blackmon was a paid informant. He merely said that he was with Blackmon when he provided information, albeit lies, to law enforcement. (PCR-T.17 776). Lowe presented no other evidence on this claim. The court stated: "This Court finds that the Defendant has failed to establish that any agency withheld this information or that this evidence could not have been discovered by due diligence. ... [The] testimony does not establish that Mr. Blackmon was a paid confidential informant or that any state agency withheld this evidence. Moreover, the Defendant failed to establish how he was prejudiced, except to

argue that it was 'critical impeachment evidence.'" (PCR-R 2056-2057). This decision is supported by the facts and the law.

Lowe presented no evidence to support this claim, thus, denial was proper. Cf Owen, 773 So. 2d 510 (affirming court finding that defendant waived evidentiary claim when defendant made no effort to introduce evidence to support claim). This claim fails because Lowe did not establish under what hearsay exception Carter's testimony would be admissible. The testimony does not show Blackmon was a paid informant. Given the extensive evidence presented in this case against Lowe, discussed multiple times above and incorporated here, there is no possibility Lowe would have been acquitted even if Carter testified Blackmon spoke to the police. The denial must be affirmed.

C. Lowe failed to prove he suffered any prejudice as a result of the State not turning over Danny Butts's second statement.

The final Brady issue involves a note concerning a woman who spoke with Butts when she picked him up from the store following the shooting. The note indicated Butts said "bad guys" hurt his mother. Lowe argues he was prejudiced because this statement could have helped the court determine Butts was competent to testify and if he had testified, the jury would have heard evidence of more than one perpetrator and, thus, would not have convicted Lowe.

Contrary to Lowe's assertion, the court did specifically address this Brady claim involving Butts' comments. The court found Lowe "has failed to establish that the State's failure to disclose the evidence was prejudicial. These statements were merely consistent and corroborative with the statement that was excluded at the time of trial. ... Danny Butts was incompetent to testify. [citation omitted] As such, [he] would not have been permitted to testify at trial and these additional statements would not have been admitted." (PCR-R 2057).

The State incorporates its responses in Arguments I & II here and submits Lowe did not establish that the outcome of the trial would have differed had this information had been disclosed. Even if more than one person was in the NuPac store, Lowe would still be guilty under a felony murder theory. While establishing the note was not given to the defense, Lowe failed to show the requisite prejudice required for relief for Brady violations.

The statement was not admissible at trial; thus, Lowe's argument is irrelevant. This Court previously addressed the admissibility of Butts's statements and agreed with the court that he was incompetent to testify. Lowe, 650 So.2d at 976. There was overwhelming evidence Butts was incompetent to testify. Lowe, 650 So.2d at 975-77, n.7. This alleged statement does not alter Butts'

inability to count. No reasonable probability exists this new evidence would have altered the outcome of the decision. Since Butts was not competent, then this alleged testimony could not have been placed before the jury. Had it been disclosed and offered, the evidence would have been excluded. Consequently, Lowe has not shown that the result of the trail would have been different. The jury would never have heard this evidence and consequently their verdict would not have been altered. No prejudice can exist in such a situation. The Brady claim was not established. The denial of relief should be upheld.

ARGUMENT IV

COURT DID NOT ERR IN DENYING POST CONVICTION RELIEF SINCE LOWE DID NOT CARRY HIS BURDEN FOR A CLAIM OF INEFFECTIVENESS OF COUNSEL UNDER STRICKLAND FOR HIS HANDLING OF THE PSI, THE SUNGLASSES, THE TAPED CONFESSION, OR THE TIME TRIALS AND/OR IS PROCEDURALLY BARRED.

Lowe claims he is entitled to post conviction relief because of ineffectiveness of counsel with regard to the admission of various items of evidence, specifically the PSI report, the sunglasses, the unredacted tape of Lowe's confession, and the time trial evidence. He claims each of these resulted in prejudice that warranted the court vacating the judgement against him.

The standard of review for claims of ineffective assistance

of counsel following an evidentiary hearing under Strickland, is *de novo*, with deference given the court's factual findings. See Freeman, 858 So.2d at 323.

A. Lowe's claim of ineffectiveness for the admission of the PSI report was procedurally barred and meritless.

Lowe's next claim of ineffective assistance involves the admission into evidence at trial of the PSI report and his mother's letters contained in a box of his belongings. The only evidence Lowe presented at the evidentiary hearing was a statement by Long saying he did not know these items were in the box when it was admitted into evidence. The court ruled this claim procedurally barred, meritless, and insufficient under the Strickland. (PCR-R 2053).

The court found the claim barred and without merit because the admission of the box's contents was fully litigated on direct appeal. Lowe may not use a different argument in post-conviction litigation to rechallenge the matter. Medina, 573 So. 2d at 295; Harvey, 656 So. 2d at 1256. As a result, such procedurally barred claims should be denied. Muhammad, 603 So. 2d at 489. This Court resolved this issue on direct appeal:

> In his third claim, Lowe argues that the trial court erred in allowing the State to introduce into evidence the entire contents of a box containing Lowe's personal items. One of the items in the box was a pair of sunglasses belonging to Lowe that were allegedly similar to the glasses worn by the person seen

> leaving the Nu-Pack immediately after the murder. The State moved to have all of the contents of the box admitted into evidence in order to prove that the glasses belonged to Lowe exclusively. Along with the sunglasses, there were other personal items in the box. Included were a pre-sentence investigation report from Lowe's earlier conviction and letters from Lowe's mother detailing Lowe's prior exploits and sins. We find that this issue is also barred for lack of a contemporaneous objection. Defense counsel's objection to the introduction of this evidence was based on relevancy. We find that the box was relevant to prove that the items in the box belonged to Lowe personally and were his exclusively. The sunglasses in the box, being personal to Lowe, were relevant to the evidence in this case. The sunglasses were the evidence defense counsel was trying to keep out by his objection. The wording of the objection indicates that counsel was certainly aware of the nature of the remaining contents of the box at the time of the objection but no objection was made on the basis of prejudice from the PSI and the mother's letters. Further, we find that, even if counsel had preserved this issue for review, any error in admitting these items into evidence was harmless beyond a reasonable doubt given the record in this case.

Lowe, 650 So. 2d at 974 (emphasis added). The court's ruling that the claim is procedurally barred should be upheld.

As mentioned above, Lowe did not present any evidence to show his counsel was ineffective other than the one comment by Long saying he had not known the details of the box's contents. That alone is insufficient to show ineffectiveness. The claim was properly denied as it failed the first Strickland prong. Cf Owen, 773 So. 2d 510 (affirming court's finding defendant waived claim when he made no effort to introduce evidence to support claim).

Also, Lowe did not meet the test for establishing prejudice. "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell, 490 So. 2d at 932. On this issue, this Court ruled that any error was harmless beyond a reasonable doubt. Where there has been a finding on direct appeal that an alleged error is harmless beyond a reasonable doubt, then there can be no finding of prejudice under Strickland. See White v. State, 559 So. 2d 1097, 1099-1100 (Fla. 1990) (rejecting ineffectiveness claim regarding counsel's failure to preserve issues for appeal based upon earlier finding by court on direct appeal that unpreserved errors would not constitute fundamental error); Teffeteller v. Dugger, 734 So. 2d 1009, 1019 (Fla. 1988) (finding defendant had failed to meet prejudice prong

of Strickland on issue that counsel failed to adequately argue case below given it was rejected without discussion); Cherry v. State, 659 So. 2d at 1072 (same). Even without the procedural bar, the claim fails on its merits as any the error was harmless. The court's denial should be affirmed.

B. Lowe's claim of ineffectiveness for the admission of the sunglasses is procedurally barred and without merit.

Lowe alleges counsel was ineffective for failing to object to the pair of sunglasses, kept in a box of Lowe's personal items, the State moved into evidence. He contends Long erred in his cross examination of Leudtke, giving the jury the false impression the murderer was wearing sunglasses rather than wire-rimmed glasses. The "botched" examination, Lowe claims, undermined Long's closing argument about the glasses. For prejudice, Lowe asserts the false impression coupled with the admission of the irrelevant sunglasses harmfully linked him as the murderer. The State submits the claim is procedurally barred and without merit.

The court held that because this Court had deemed any error in the admission of the sunglasses harmless beyond a reasonable doubt, Lowe was not entitled to relief. (PCR-R

2050). As discussed previously with regard to the PSI report, Lowe cannot show prejudice under Strickland since this Court has ruled the admission of the evidence harmless. White, 559 So.2d at 1099-1100.

For the same reasons that ineffectiveness was not shown with respect to the PSI report and letters, Lowe has not carried his burden regarding the sunglasses. Again, there is a procedural bar on this claim since this Court already addressed this issue on direct appeal. It is improper to use a different argument to obtain review in postconviction litigation. Rivera v. State, 717 So. 2d 477, 480 n.2 (Fla. 1998)(finding claim procedurally barred as it is merely using a different argument to relitigate claim); Muhammad, 603 So. 2d at 489; Medina, 573 So. 2d at 295.

This claim is without merit because even if the admission of the sunglasses was erroneous, it was not prejudicial. Lowe's arguments about the lack of relevancy of the sunglasses addresses neither the difficulty he has in showing prejudice, given this Court's opinion on the direct appeal, nor the substantial amount of other evidence proving his guilt. The only evidence Lowe presented was Long's testimony about his strategy to undermine the impact of the sunglasses. The fact that Long's argument and his

cross examination may not have meshed seamlessly does not establish prejudice, especially where this Court found the sunglasses harmless on appeal. Lowe is not entitled to relief on a claim of ineffectiveness where there has been an earlier appellate court finding that an unpreserved error did not rise to the level of fundamental error. See White, 559 So.2d at 1099-1100(rejecting ineffectiveness claim regarding counsel's failure to preserve issues for appeal based upon earlier finding on direct appeal that unpreserved errors would not constitute fundamental error); Teffeteller, 734 So.2d at 1019; Cherry, 659 So.2d at 1072. Lowe did not meet his burden of proof.

It cannot be said that absent the admission of the sunglasses the jury would have rejected: the fingerprint evidence; Lowe's confession he was at the NuPac store; Leudtke's testimony identifying a lone black male of Lowe's description and wearing a Gator Lumber uniform leaving the store just after the shooting; and that all this happened during a time Lowe was clocked out of work. Lowe has not shown that but for trial counsel's alleged deficiency a different verdict would have been obtained. This Court should affirm the denial of relief.

C. Lowe's claim of ineffectiveness for the admission of the unredacted tape of Lowe's confession is

procedurally barred and without merit.

Lowe claims that counsel was ineffective for not objecting to and ensuring that prejudicial material was redacted from a tape of Lowe's statement to detectives. References to Lowe's prior criminal history and his invocation of his Fifth Amendment rights came before the jury because of counsel's actions. Lowe contends this evidence prejudiced the jury so much that their verdict was based upon Lowe's past, his bad character, and lack of remorse rather than on actual evidence of guilt. The rejection of this matter is supported by the law and facts and should be affirmed.

Long testified at the evidentiary hearing, but Lowe rejects out of hand Long's reasoning and strategy for not objecting to various portions of the tape. While the court did not address Long's testimony in its opinion or whether his performance was deficient, it did find no prejudice resulted from the admission of this evidence since on direct appeal this Court found no fundamental error. (PCR-R 2055).

In resolving the challenge to the admission of the unredacted tape, this Court reasoned:

In his second claim, Lowe asserts that

> the trial court erred in allowing the jury to hear portions of the taped interrogation of Lowe in which Investigator Kerby referred to Lowe's previous robbery conviction and the fact that he had been previously incarcerated and also stated his opinion that Lowe was guilty of the murder in the instant case and lacked remorse. Prior to trial, the State redacted the references to Lowe's criminal history from the tape at defense counsel's request. Defense counsel then approved the redactions in a hearing before the trial judge. Because no further objection to the tape was made, this claim is barred by our contemporaneous objection rule. *See Castor v. State*, 365 So. 2d 701 (Fla. 1978). Contrary to Lowe's assertion, we find that any error in admitting the unredacted portions of the tape was not fundamental error so as to defeat our application of the contemporaneous objection rule.

Lowe, 650 So. 2d at 974 (emphasis added). Using this reasoning, then there can be no showing of prejudice under Strickland for counsel's failure to object to the tape. The court's ruling Lowe failed to carry his burden under Strickland is correct. See White, 559 So. 2d at 1099-1100 (rejecting ineffectiveness claim regarding counsel's failure to preserve issue appeal based upon earlier finding that unpreserved alleged errors would not constitute fundamental error); Teffeteller, 734 So. 2d at 1019.

Moreover, Lowe may not use the claim of

ineffectiveness to gain a second appeal. The State incorporates its previous analysis, case citations, and argument presented for the PSI report into this section. Again, there is a procedural bar on this claim since this Court already addressed this issue on direct appeal. See Rivera, 717 So.2d at 480 n.2; Muhammad, 603 So.2d at 489; Medina, 573 So.2d at 295; Harvey, 656 So. 2d 1256; Cherry, 659 So.2d at 1072. This Court should affirm.

D. Lowe's claim of ineffectiveness for the admission of time trial evidence is procedurally barred and without merit.

Lowe claims counsel was ineffective on multiple grounds for his lack of objections and challenges to the video taped "reenactment" of the crime. By not challenging the accuracy and methodology of the tape, counsel allowed the jury to believe Lowe committed the murder alone. He argues that if the jury had rejected[5] or not heard the tape, they would have concluded Blackmon was involved and culpable for the crime. (Br. 34-39). Later in his brief, Lowe argues counsel's failure to object to the tape and "conceding" its accuracy during closing arguments "virtually directed" the jury to find Lowe to be the

[5] This alone is pure speculation on Lowe's part and an invasion of the jury's province.

shooter. (Br. 93-95). Lowe posits that if the jury had believed that more than one individual was involved in the crime or that someone else was the shooter, he would not have been found guilty. The State incorporates its answer to Claims I & III in addition to the following to show the meritlessnss of Lowe's claim that he was not alone when he shot and killed Burnell. Given this, Lowe has not carried his burden under Strickland.

Once again, Long testified. The defense also presented the testimony of Don Felicella who reviewed the time period analysis tape. He questioned the validity of its result since it was not done to alleged scientific protocols. Based on the evidence the defense presented at the hearing, the court found that it had failed to establish the unreliability of the time study. (PCR-R 2049).

Moreover, Long attacked the time study in his closing. (T. 1058). He argued the prosecution was picking and choosing the aspects of the study it wanted the jury to believe. Given that even at the evidentiary hearing the defense expert did not show the unreliability of the study, Long's approach at trial is not objectively unreasonable. Lowe has not shown any deficiency as he has not established what more counsel could have done. Cf Owen, 773 So. 2d 510

(affirming court finding defendant waived evidentiary claim by failing to produce evidence to support the claim).

At the evidentiary hearing, Felicella admitted he conducted **no study** of his own; he merely did an internet map search to determine the travel times. His analysis of the tape rested upon addresses and trial excerpts Lowe gave him. (PCR-T.15 631-671). Given the limitations of Mr. Felicella's analysis and the fact that he did no time study which called into question the actual times the police developed, using the appropriate safe guards and protocols he testified to, the defense failed to prove that the time study presented to the jury was inaccurate. Lowe cannot show that the outcome of the trial would have been different, but for this admission. As argued previously, there were copious amounts of evidence tying Lowe to the commission of this crime, including fingerprints, eyewitness testimony, and Lowe's confession. There is no reasonable possibility that the verdict would have been different even if the time studies were excluded from evidence. Lowe has not shown prejudice under Strickland. This Court should affirm.

ARGUMENT V

COURT DID NOT ERR IN DENYING POST CONVICTION RELIEF SINCE LOWE DID NOT CARRY HIS BURDEN FOR A CLAIM OF INEFFECTIVENESS OF COUNSEL UNDER STRICKLAND FOR FAILING TO CHALLENGE HIS CONFESSION AND TO IMPEACH WHITE AND SINCE THEY ARE PROCEDURALLY BARRED.

In his Argument V (Br. 95-100), Lowe once again argues his counsel was ineffective for failing to challenge his police confession and for not impeaching Patricia White. Based upon White's evidentiary hearing testimony recanting her original statements and testimony regarding the events surrounding the confession, he contends that the police used White as an agent to obtain an illegal confession from him in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and various sections of Article I of the Florida Constitution. He also claims that counsel did not impeach her testimony at trial with her prior deposition testimony.

The court denied relief finding the matter barred and stated "With respect to Patricia White, this Court has found that her recantation is unreliable....As such, the Defendant has failed to meet either prong of *Strickland*. (PCR-R 2054). After the evidentiary hearing, the court

found White's new and improved testimony to be unreliable and unbelievable. (PCR-R 2045-2046). The court found Green's testimony, where he denied coercing White or fixing criminal charges, believable.

A defendant may not relitigate an issue that has been addressed on appeal. Issues raised and disposed of on appeal are barred in post-conviction proceedings. Muhammad, 603 So.2d 488. Proceedings under rule 3.850 are not to be used as a second appeal. Medina, 573 So.2d 293. Moreover, it is inappropriate to use a different argument to relitigate the same issue. Id.

On appeal, this Court reviewed the facts surrounding White speaking with Lowe and stated: "under the circumstances, the police did not employ the girlfriend [White] as an agent to coerce a confession from Lowe and that the trial court did not err in admitting Lowe's incriminating statement." Lowe, 650 So.2d at 974. Here, Lowe asserts counsel should have impeached White to show the police used her as an agent to coerce a confession. Lowe's attempts to differentiate his argument from the issue on appeal cannot succeed as this Court already determined his confession was uncoerced and White was not acting as an agent.

All of these arguments apply equally to Lowe's claim of prejudice by counsel not impeaching White at trial with her deposition. Lowe attempts to reinvigorate a failed issue under a new guise, i.e. that of ineffective assistance. This court examined and decided the issue on appeal. Lowe failed to prove deficient performance or prejudice in not impeaching White. His claims are refuted by the record. The claim also rests on White's recanted testimony discussed below.

This claim is meritless as Lowe failed to establish the police pressured White to obtain a confession. At that hearing, White claimed the detectives promised they would drop all the charges against her if she got Lowe to confess. White testified she recanted her trial testimony because her life is different now and she needs to make amends. (PCR-T.16 676-681). On cross, White admitted she was in love with Lowe at the time of the crime. Despite that, she lied against him consistently at her deposition, pre-trial hearings, and at trial even though she knew he could be sentenced to death. She lied because Det. Green intimidated her even though he was not present each time she testified. She conceded no officer forced or threatened her to speak to Lowe, she did so on her own so she could find out what happened. (PCR-T.16 681-693).

Green testified at the evidentiary hearing that he never coerced White to speak to Lowe, nor did he ask her to falsify her testimony. Green stated that he never fixed any worthless check charges for White and has no idea why charges were not filed. (PCR-T.18 1017-1026). At the hearing, White simply recanted her original testimony, claiming now Green coerced her into obtaining a confession from Lowe. Recanted testimony is "exceedingly unreliable." Spaziano v. State, 660 So.2d 1363, 1365 n. 1 (Fla. 1995).

> Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. Spaziano v. State, 660 So.2d 1363, 1365 n. 1 (Fla.1995). . 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.

Armstrong, 642 So. 2d at 735 (emphasis added).

Once the court determined White was not credible, he had the duty to deny relief. With these principles in mind, it is apparent Lowe has not established his claim. The court's finding White's recantation was not credible is amply supported by the record and should be given great deference on appeal. Van Poyck, 694 So.2d 686 (upholding credibility determination by court when it rejected ineffectiveness claim based on testimony of counsel irrespective of contrary testimony of co-counsel); Knight v. Dugger, 574 So.2d 1066, 1073 (Fla. 1990)(upholding court's factual findings that state witnesses were more credible than defense witnesses was within court's discretion and not to be disturbed). These claims are without merit. The court properly denied relief.

ARGUMENT ON CROSS-APPEAL

THE COURT FAILED TO FOLLOW THE LAW WHEN IT GRANTED A NEW PENALTY PHASE BASED ON CLAIMS OF INEFFECTIVE ASSISTANCE AND NEWLY DISCOVERED EVIDENCE RELATED TO ALLEGATIONS BLACKMON CONFESSED TO KILLING THE VICTIM.

The court erred in granting a new penalty phase as the it failed to apply the correct law in addressing the prejudice prong of Strickland and in analyzing the claim of newly discovered evidence under Jones, 709 So.2d at 521-22. On the basis of testimony of impeached witnesses, the court

found Blackmon had made statements indicating he was the actual shooter of the victim, Donna Burnell ("Burnell"), thus, calling into question the sentencing court's conclusions: (1) Lowe acted alone in the robbery and murder; and (2) that the mitigators of "disproportionate punishment" and "minor participant in the crime of another" did not apply. (PCR-R.14 2580, 2583). Also, the court questioned whether there may be an Enmund/Tison[6] issue. (PCR-R.14 2584). The court's analysis, contrary to the requirements of the law for both ineffective assistance and newly discovered evidence, failed to assess the effect the "new" testimony[7] would have on the sentence. The court completely ignored and failed to weigh the new testimony against the trial and evidentiary hearing testimony of witnesses establishing Blackmon was not at the convenience store when the robbery and murder took place. This Court

[6] Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987).

[7] While the court outlined the procedural history and the claims raised by Lowe in his Second Successive Motion and Amendment to Second Successive Motion, announcing newly discovered witnesses Maureen McQuade, David Stinson, and Michael Lee, the court did not hold an evidentiary hearing regarding these witnesses and did not grant relief based on those pleadings. As a result, the State will limit its factual argument to the witnesses from whom the court heard and discussed in granting relief. However, legal argument will be offered in support of the summary denial of further hearings regarding these witnesses.

should reverse the granting of a new penalty phase and order the court to reinstate the death sentence.

Whether counsel was ineffective under Strickland, is reviewed *de novo*. Stephens v. State, 748 So.2d 1028 (Fla. 1999). Claims of ineffective assistance of counsel are governed by the dictates of Strickland, and in order to establish such a claim, a defendant must prove:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla. 2001).

In discussing the standard of review for claims of newly discovered evidence, this Court has stated:

> In reviewing the trial court's application of the newly discovered evidence rule, this Court applies the following standard of review:
>
> > As long as the trial court's findings are supported by

> competent substantial evidence, "this Court will not substitute its own judgment for that of the trial court on question of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."
>
> *Melendez*, 718 So.2d at 747-48 (quoting *Blanco*, 702 So.2d at 1251).

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

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

> First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." [c.o.]
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. [c.o] **To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and**

> **the evidence which was introduced at the trial**." [c.o.]

Jones, 709 So.2d at 521-22 (emphasis supplied). "Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial" Marquard v. State, 850 So.2d 417, 424 (Fla. 2002) (citing Brown v. State, 381 So.2d 690 (Fla. 1980); Bell v. State, 90 So.2d 704 (Fla. 1956)).

With respect to recantations, this Court has stated:

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

Armstrong, 642 So. 2d at 735(emphasis supplied).

Although outlined in the Statement of the Case and Facts in the State's answer brief above, the history

pertinent to this issue bear repeating. The procedural history of this point commences with the filing of the Second Amended Motion for postconviction relief wherein Lowe asserted **Lorenzo Sailor was the actual killer** and counsel was ineffective (guilt phase - Claim II) for having failed to uncover and present the testimony of Miller and Carter. A similar allegation was level at counsel regarding the penalty phase (Claim VII). However, during the litigation, Lowe's focus turned from Sailor as the actual killer, to Blackmon. Following the denial of postconviction relief by order dated August 9, 2004, Lowe filed a rehearing and a successive motion alleging Blackmon had confessed to Grone that he was the actual killer. A hearing was held on this successive motion and argument was held on the motion for rehearing. Before the court could rule, Lowe filed a second successive motion presenting two additional witnesses, Maureen McQuade and David Stinson, to claim Blackmon admitted being the shooter. On March 2, 2005, again before the court ruled on the rehearing and first successive motion, Lowe added another witness, Michael Lee, in an amendment to the second successive motion. Following a Case Management Conference on the Second Successive Motion, an order on al pending motions was issued. The court granted the rehearing, finding

counsel's ineffectiveness did not undermine confidence in the guilt phase, but required a new penalty phase. Additionally, the court found that the testimony of Grone was newly discovered evidence which also required a new penalty phase be held, but denied an evidentiary hearing on the second successive motion and its amendment given the court's ruling granting a new penalty phase on the rehearing of Claim VII and the first successive motion.

The granting the new penalty phase based upon the rehearing and first successive motion was error. The court confined its analysis and ruling to noting the similarities between the versions Miller, Carter, and Grone rebutted Blackmon's account and that Grone's testimony was "sufficiently credible to warrant consideration by a penalty phase jury and trial court in determining the Defendant's level of participation in the murder sufficient to justify the imposition of the death penalty." Such is not the standard to be applied under either Jones for newly discovered evidence nor Strickland for prejudice.

The court erred in granting relief without assessing the effect of the new witnesses on the sentencing result in light of not only Blackmon's trial and evidentiary hearing testimony, but that of the unchallenged trial testimony of

other witnesses that Blackmon was at home at the time of the crime. Not only did Blackmon's testimony remained constant; he was not involved with the robbery and murder, instead he was home sick in bed, but such was corroborated by other witnesses. Vickie Blackmon McBride ("Vickie") corroborated Blackmon's account at trial, and reconfirmed this years later at the evidentiary hearing after she and Blackmon were divorced and embroiled in a custody battle.

Further, Blackmon's testimony, and the finding Lowe was the sole perpetrator of the crimes, were supported by the forensic evidence along with the testimony of Lowe's girlfriend, White, and eye-witness, Steven Leudtke, who saw only one man leaving the convenience store driving White's car. None of this was taken into account by the trial court and weighed against Grone's account. Such was a departure from the dictates of Jones, 709 So.2d at 522 (requiring court to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial" when assessing granting a new trial based on newly discovered evidence); and Armstrong, 642 So. 2d at 735 (noting "[o]nly 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").

Likewise, it does not pass the test announced in Strickland for assessing prejudice. Blackmon's testimony, and those of the witnesses to the events on the day of the murder remained unchanged and the trial evidence showing only one perpetrator was not undermined. The failure to assess allegations leveled against Blackmon in light of the existing, unassailed testimony and evidence, establishes that the court erred as a matter of law. See Strickland, 466 U.S. at 694 (finding defendant must show that but for counsel's error, trial result would have been different).

To fully appreciate the court's erroneous application of the law under both a Strickland prejudice analysis and newly discovered evidence, it is important to review the facts brought out at trial and the evidentiary hearings. Such evidence shows Blackmon was not at the Nu-Pack store at the time of the robbery/murder. Only one black male, in possession of Patty White's car was at the Nu-Pack store that day. It was Lowe based on the unrefuted evidence: (1) Lowe's fingerprints were found in the store on a hamburger wrapper in the microwave oven; (2) a cold soda can was left on the counter; (3) a man fitting Lowe's description and wearing the uniform of the company where Lowe worked was

seen leaving the store moments before the victim was found; and (4) Lowe made admissions he was the perpetrator.

The trial testimony established Lowe was in possession of the murder weapon and was the sole perpetrator of the robbery/murder at Nu-Pack store. Blackmon's involvement in the planning of the crime and whereabouts on the day of the crime were addressed at trial. As outlined below, the record proves Blackmon was home sick at the time of the crime and the timing of the crimes made it impossible for Blackmon to have been involved.

Leudtke told the trial jury that he arrived at the Nu-Pack store near 10:00 a.m. and saw a black male exit the establishment. The man was between 5'8" to 5'10" weighing between 150 to 160 pounds and wearing a shirt like the Gator Lumber uniform taken from Lowe's home (this description fit Lowe and he had Patty White's car that morning). The black male was "high-stepping" it to a white Ford, identified as Patty White's car. Upon entering, Leudtke saw the victim lying on the floor and heard her child screaming. Leudtke called 911. (T 548, 550, 552, 554-58, 571). Carl Dordelman testified Lowe had a .32 caliber gun two days before the murder. (T 635-36). Mary Burke, Gator Lumber office manager, reported that on July

3, 1990, Lowe punched out of work at 9:58 a.m. and punched back in at 10:34 a.m. (T 665-67). Sergeant Chuck Green ("Green") averred that the 911 call was made at 10:13 a.m. by Leudtke, and that Burnell was shot three times with a .32 caliber gun. Four .32 caliber bullets and eleven shell casings were recovered from a Wabasso park. Green collected the .32 caliber murder weapon from Blackmon along with a box of ammunition. (T 819, 822-24, 830-31). Ronald Sinclare, crime scene investigator, responded to the Nu-Pack store on July 3, 1990 and found a cold 7-Up soda can and a hamburger wrapper in the microwave. The last sale had been at 10:07 a.m. He collected projectiles from the scene and bullets from Lowe's car. He also timed that it took 22 minutes to drive from Gator Lumber to the Nu-Pack, to Lowe's home, and back to Gator Lumber. It took 55 minutes to drive from Gator Lumber to the Wabasso area, to Nu-Pack, to Wabasso, to Lowe's home, and back to Gator Lumber. (T 450-52, 464-66, 469, 490, 503-04, 512-15). Gary Rathman opined that bullets from the victim's body and the casings recovered from the Wabasso park came from Lowe's gun. (T 969-70, 976-77). Deborah Fisher reported Lowe's left index finger and right thumb prints were on the cellophane wrapper recovered from the scene. (T 991-92).

White testified at trial that she was Lowe's

girlfriend at the time and that she owned a white Mercury Topaz which Lowe drove to work on July 3, 1990. That day, he picked up White between 10:00 a.m. and 11:00 a.m. and she took him back to his work. After dropping Lowe off, White went to the Blackmon residence where she met with Vickie and saw Blackmon. Blackmon was in bed, looking as though he had just awakened, and indicated he was sick. He complained of a sore throat. White knew Lowe had a .32 caliber revolver which he had fired in a Wabasso park and in their yard. She identified the gun marked in evidence. On July 2, 1990, White saw Lowe with the gun; he put it under the car seat. The next day, when she was stopped by the police after leaving Blackmon's home, she checked for the gun, but it was not there. (T 852, 854-61, 863, 876).

At trial, Victoria Blackmon testified she was married to Blackmon. On July 3, 1990, White stopped by the Blackmon home and awakened Vickie and Blackmon who were asleep in bed together. Dwayne was home sick with tonsillitis. Shortly thereafter, when driving in White's Topaz, Vickie and White were stopped by an officer checking all white cars because of the murder. After being released, they arrived at Gator Lumber near 11:00 a.m. where they met Lowe who drove them back to Vickie's, where they found Blackmon still home in bed. (T 892-98, 909-13).

Blackmon told the jury he had purchased a .32 caliber gun for Lowe's June 1990 birthday. Sometimes they would shoot the gun at a Wabasso park. Blackmon's home was about 40 minutes from the Nu-Pack store. On July 3, 1990, during the time of the robbery/murder, Blackmon was home sick in bed with swollen tonsils and a sore throat. Vickie was with him. (ROA 918-21, 923-24, 931-32, 943-44).

The testimony from the January 2003 evidentiary hearing and subsequent hearings addressed to this issue established that three witnesses, two prior to trial, and one after the postconviction evidentiary hearing, claimed to have heard Blackmon admit to being present at the robbery of the Nu-Pak store and to having killed Burnell. However, as will be evident from the following the weight of such allegations is insufficient to establish prejudice under Strickland or a basis for a new penalty phase under the newly discovered evidence test. Had the court conducted such an analysis instead of merely finding the new witnesses were consistent in some respects and rebutted Blackmon's trial testimony, relief would have been denied.

Miller claimed she overheard Blackmon confess to murdering Burnell. Miller noted that a few months after the murder, she was at Ruby Mae Blackmon's home with

Carter, Blackmon, Vickie, and Brenda Mosely. There, Blackmon said "I killed one bitch I'll do it again", while he was arguing with his wife, Vickie. Miller reported Blackmon and Carter discussed the details of the shooting and Blackmon said he, Lowe, and Sailor went to the store together, and he and Lowe went inside. It was Miller's testimony that Blackmon admitted he was at the counter, and Lowe went to the soda case, and that Blackmon admitted "[The victim] hesitated, so I shot her" and "Them fools believe me and now I'm, gonna walk." Miller averred she told Detectives Parrish and Grimmach, as well as Chief Williams, that Blackmon admitted to Burnell's murder. (PCR-T.16 710, 717-22). Parrish, Grimmach, and Williams categorically denied receiving any information from Miller regarding Lowe (PCR-T.17 833, 841, 852). The court believed the officers on this point.

Blackmon testified he was not involved in Burnell's shooting, and was not with Lowe during the course of the robbery/homicide. He denied making any admissions to Carter or Miller. In fact, Blackmon never told anyone he was with Lowe at the Nu-Pack on the day of the murder; he never told anyone he killed Burnell. (PCR-T.18 908-911).

Victoria Blackmon McBride[8] testified she and Blackmon divorced in 1998, were in a custody dispute, and she hated her ex-husband. She recalled that in 1990, she and Blackmon were living together and never, during all the years they knew each other, did Blackmon admit to the murder at the Nu-Pack store, nor has he ever said he was with Lowe on the day of the murder. (PCR-T.19 1033-34).

Carter averred Blackmon admitted to that Lowe and Lorenzo Sailor were present at the Nu-Pack when Blackmon shot the clerk. According to Carter, these admissions were made "sometime after the trial was going on." Carter had ten felony convictions (PCR-T.21 1239-40, 1243-49).

Grone reported Miller and she were incarcerated together in May/June 2004, and Miller called Lowe's postconviction counsel, and then Grone got on the phone. (PCR-T.25 1377, 1381-83, 1388, 1393). Grone admitted to a conviction for a crime of dishonesty, and being in jail for a failure to appear for her driving under the influence case. (PCR-T.25 1377, 1380, 1389-90). She stated she was living with Blackmon, who she agreed was a "very physically large, imposing man", someone that no one would miss

[8]Vickie Blackmon reported collateral counsel's investigator, Jeff, suggested "Well, wouldn't it be easiest just to get rid of [Blackmon] and say he did [the murder]?" Jeff said he did not "want Rodney to die." (PCR-R 1041-42).

walking in the room. It was Grone's testimony that between March 2003 and his death that August, she and Blackmon lived together and, in March 2003, she had a conversation with him regarding an article in the news paper. (PCR-T.25 1373-75, 1379, 1386-88). Grone reported Blackmon admitted to shooting the clerk during a robbery involving Lowe, who was in the store during the robbery/murder, and Ben who remained in the car. (PCR-T.25 1375, 1381) She did not go to the police about the admission, but came forward now because Miller put her in contact with Lowe's defense team; and because Blackmon was dead, she was not concerned her testimony could harm him. (PCR-T.25 1383-85, 1389, 1393).

Blackmon's presence at home sick at the time of the robbery/murdered has not been undermined by anything Lowe presented in his postconviction litigation. The claims by Lowe's friends and/or those that may have a vendetta against Blackmon, do not show that a life sentence would have been imposed had they been called to testify. Lowe's presence at the NuPak and sole perpetrator of the robbery murder as well as Blackmon's lack of involvement were corroborated by the fact the robbery/murder occurred on July 3, 1990, between 10:07 a.m. (last register sale) and 10:13 a.m. (time the 911 call is placed), at a time when Lowe was clocked out of work between 9:58 a.m. and 10:36

a.m. that morning, but Blackmon was seen at home. White reported that Lowe had her white Ford which Steven Leudtke identified as being at the scene and driven by a single black male. Also, White stated Lowe picked her up between 10:00 and 11:00 a.m. and she returned him to work. The time trials established that it took 22 minutes to drive from Lowe' business to the Nu-Pack, then to his home and back to Gator Lumber. The record shows that it took about 40 minutes to make a one-way trip from Blackmon's home to the Nu-Pack store. After returning Lowe to work, White arrived at the Blackmon residence where she awakened Blackmon and Vickie. Clearly, Lowe was the perpetrator as he was away from work at the time of the crime and Blackmon was home in bed with Vickie.

The alleged admissions by Blackmon, as offered by Miller, Carter, and Grone, do not undermine the trial and evidentiary hearing evidence which conclusively proves Blackmon was not at the Nu-Pack store on July 3, 1990 and did not commit the crimes for which Lowe was convicted and sentenced properly. The court's failure to take such evidence into account and to conduct a full analysis of this evidence in light of the new allegations supports the State's claim that the court erred as a matter of law. Jones, 709 So.2d at 523 is instructive, and had the trial

court applied the correct law, would have been a basis for finding the new evidence did not require a new sentencing. As outlined above, there were inconsistencies between the versions each witness reported, the only consistency being that Blackmon admitted killing Burnell and that Lowe was with him. However, the unrefuted testimony of White and Vickie was that Blackmon was home in bed at the time of the robbery. Nothing reported by Miller, Carter, or Grone call that testimony into question.

This Court has rejected the suggestion that the sheer number of people claiming that another had confessed was sufficient to grant a new trial or to admit such alleged confession as substantive evidence, stating:

> ...Moreover, unlike the confessions in *Chambers*, the alleged confessions in this case lack indicia of trustworthiness. **The fact that more inmates have come forward does not necessarily render the confessions trustworthy**. The confessions were not made prior to the original trial in circumstances indicating trustworthiness, such as spontaneously to a close acquaintance as in *Chambers*, or to his own counsel or the police shortly after the crime, but were made to a variety of inmates with whom Schofield served prison time.
>
> All of the statements were allegedly made after Jones had been sentenced to death; in many cases more than a decade elapsed before the inmate came forward until after Jones' most recent death warrant was signed, **waiting anywhere from four to fifteen years to report their information**.

> Except for Schofield's former girlfriend, the **witnesses were all prison inmates with extensive felony records**. However, it is not their felony records alone that cast doubt on the witness' credibility. Judge Soud's observations in his 1992 order, wherein he analyzed the reasons the confessions were not particularly reliable, are equally valid here even in light of the testimony of the additional witnesses. Like the witnesses in 1992, the witnesses who testified at the most recent hearing spoke only in general terms of Schofield's possible involvement in the murder of Officer Szafranski. **No witness testified to any unique details surrounding the murder. In fact none of the witnesses related specific details of the crime**...

Jones, 709 So.2d at 525 (footnotes omitted, emphasis supplied).

"[I]n conducting a cumulative analysis of newly discovered evidence, we must evaluate the newly discovered evidence in conjunction with the evidence submitted at trial and the evidence presented at prior evidentiary hearings. See Jones, 709 So.2d at 522." Kokal v. State, 901 So.2d 766, 776 (Fla. 2005). While recantation testimony may be considered newly discovered evidence, Lightbourne, 742 So.2d at 247, it is regarded as "exceedingly unreliable." In Armstrong, 642 So.2d at 735, this Court reiterated that recanted testimony could be considered newly discovered, but the trial judge is required to review "all the circumstances of the case" while bearing in mind that recanted 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." Merely because there are multiple witnesses, either friendly to Lowe and/or antagonistic to Blackmon, coming forward to accuse Blackmon does not automatically require a new trial. See Melendez, 718 So.2d at 747-48 (rejecting claim of newly discovered evidence of five witnesses who alleged another suspect confessed to the murder where new witnesses were convicted felons, none of which were credible enough to change the jury's verdict); Blanco, 702 So.2d at 1252 (affirming rejection of relief upon claim of newly discovered evidence as new witnesses were not credible and offered testimony inconsistent with trial evidence).

Had the court fully applied the law, it would have found, as this Court should so find, that the allegations of the new witnesses, in light of what was presented at trial, would not have resulted in a life sentence under either Strickland or newly discovered evidence. A weighing of the allegations by Miller, Carter, and Grone against the original trial and evidentiary hearing testimony establishes that the new allegations pale in comparison to the evidence, both eye-witness and forensic, showing Lowe to be the sole perpetrator. Hence, there is no reasonable likelihood of a life sentence. The trial evidence, as

outlined above, clearly established Blackmon was not with, nor could he have been with, Lowe at the time Lowe committed the robbery/murder at Nu-Pack. Such was confirmed by not only Blackmon's wife Vickie, but Lowe's girlfriend, White. Leudtke saw one black male, fitting Lowe's description not Blackmon's physique,[9] exit the Nu-Pack store and drive White's car. White testified Lowe had her car that morning. The time trials proved Lowe would not have had sufficient time to leave work, pick up Blackmon in Wabasso, commit the murder, return Blackmon to his home and get to work within the 36 minutes Lowe was absent from his job. Vickie testified Blackmon was with her that morning, and it was not until White arrived that Vickie and Blackmon separated. Only Lowe's fingerprints were found at Nu-Pack and Lowe had possession of the murder weapon that day.

The 2003 evidentiary hearing testimony from Blackmon and his ex-wife Vickie reaffirmed that Blackmon was not involved in the robbery murder, and never told anyone he committed the crimes.[10] Conversely, the testimony from

[9] Grone described Blackmon as a "**very physically large, imposing man" that no one would miss walking in the room**. (PCR-T.25 1387) (emphasis supplied).

[10] Although Blackmon denied telling anyone he killed the clerk, should this Court wish to speculate that the

Carter, Miller, and Grone establish they are convicted felons[11] who knew each other and had discussed this case in jail, but the court failed to take this into account and failed to weigh the new evidence against the old. This Court should find that the trial court erred, and that there was no basis for granting a new penalty phase. The minimal weight of the testimony from the new witnesses based upon the timing of their discovery and/or conflicts with known facts show that neither prejudice nor a probability that a life sentence would have been imposed has been established under the law when applied properly.

Blackmon was not indicted, and the after-the-fact allegations, do not establish an Enmund/Tison issue as erroneously suggested by the trial court, nor do they

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allegations are true, they again do not undercut in the least the testimony of Patricia White and Vickie Blackmon who reported Blackmon was home in bed during the time the robbery/murder occurred. An after the fact statement made to invoke fear or gain respect from other criminals, "puffing" about ones criminal prowess, does not make that confession of guilt true. It does not call into question any of the other evidence, eye-witness and forensic, establishing Lowe as the sole person who robbed the Nu-Pak and killed Burnell.

[11] Although not fully confessed by the prior witnesses, it is clear each had a motive, or at a minimum a lack of fear, to allege Blackmon made inculpatory admissions. Whether it be to help their friend, Lowe, or to exact revenge for some unvoiced injustice Blackmon may have inflicted, the witnesses were not credible and their testimony did not mesh with the known facts.

undermine the sentencing determination that Lowe acted alone. In Franqui v. State, 804 So.2d 1185, 1206 n.12 (Fla. 2001), the Florida Supreme Court stated: "In *Tison v. Arizona* ... the Court held that a finding of major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement for consistency with the Eighth Amendment." Lowe was a major participant; he had the gun, he was in the Nu-Pak based on his fingerprints, he admitted to driving from the scene, a man fitting his description was the sole person seen leaving the scene and driving White car, and Lowe had the opportunity to commit the crime as he was clocked out of work at the time, while Blackmon was home in bed. There is no disparate treatment as Blackmon was not present and was not charged with the crime. All of the evidence points to Lowe, thus, the rejection of the minor participant mitigator and finding he was the sole perpetrator remain valid findings. Both aggravators, prior violent felony and felony murder, remain undisturbed. As such, the court's failure to conduct a complete analysis requires reversal and remand for reinstatement of the death sentence.

Although the court did not hold an evidentiary hearing on nor base its decision to grant a new penalty phase on

the three witnesses offered in the Second Successive Motion and Amendment to it, the same analysis would apply to them. It is not the sheer number of people who may come forward to help get someone off death row by making allegations that anther person confessed to the crime, especially one now deceased, but the strength of the new evidence when assessed against what existed at trial. As noted by the trial court, the affidavits of David Stinson, Maureen McQuade, and Michael Lee, were nothing more than additional reports of Blackmon's alleged confession. Given the strong, and unimpeached trial testimony that Blackmon was at home, leads to that same conclusion that the allegations of McQuade, Stinson, and Lee would not result in a life sentence.[12]

[12] The lack of due diligence and abuse of the process were raised by the State when it opposed the Second Successive Motion and the amendment to it. The trial court did not address the legal claims as it had granted relief on prior motions. The State reserves the right to argue again that Lowe's failed to show due diligence and was abusing the process by presenting in piecemeal fashion "new" witnesses to Blackmon's alleged admission, should this Court agree with the State that the trial court failed to apply the proper law, but disagree that the witnesses McQuade, Stinson, or Lee can be rejected summarily for the same reason that the testimony of as Miller, Carter, and Grone would not produce a life sentence. Due diligence was not shown because McQuade, Stinson, or Lee were alleged to be relating information which occurred after trial, (sometime between 1991 and 1997), but well before the final postconviction motion was filed and before the first evidentiary hearing. It is significant to note that Lowe

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of post-conviction relief related to guilt phase issues, but reverse the court's order granting of a new penalty phase.

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did not allege in his motions these witnesses "came forward" unsolicited by Lowe. To the contrary, it is clear they were found by Lowe. There is no stated reason why the same investigative work was not done by Lowe prior to filing his first successive motion which involved the exact same issue. These witnesses are alleged to have evidence which was available before the 2003 postconviction evidentiary hearing, and as such, a lack of diligence should be found. See Glock v. Moore, 776 So.2d 243, 251 (Fla. 2001) (holding claim of newly discovered evidence in capital case must be brought within one year of date evidence was discovered or could have been discovered through due diligence); Buenoano v. State, 708 So.2d 941, 947-48 (Fla. 1998); White, 664 So.2d at 244. Moreover, Lowe is abusing the process by litigating this claim in piecemeal fashion. Cf. Pope v. State, 702 So.2d 221, 223 (Fla. 1997) (noting successive postconviction motion may be denied summarily as an abuse of the process where no newly discovered evidence is presented and there is no basis for not having raised claim in earlier motion).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Rachael L. Day, Esq. Office of the Capital Collateral Regional Counsel - South, 101 NE 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301 on July 31, 2006.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on July 31, 2006.

_____

LESLIE T. CAMPBELL