IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC06-378

ALEX PAGAN

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Alex Pagan, Defendant below, will be referred to as "Pagan" and Appellee, State of Florida, will be referred to as "State". Record references are:

Trial record: "TR" and Trial transcript "TT";
Postconviction record: "PCR";
Supplemental records: "S" before the record supplemented;
Initial Brief: IB.

References will be followed by volume and page number(s).

STATEMENT OF THE CASE AND FACTS

On March 25, 1993, Defendant, Alex Pagan ("Pagan"), and co-defendant, Willie Graham ("Graham") were indicted for two counts of premeditated murder for the deaths of Michael Lynn (six years old) and Freddy Jones, two counts of attempted murder of Latasha Jones and Lafayette Jones (18 months old), armed robbery, and armed burglary. Pagan v. State, 830 So.2d 792, 798-99 (Fla. 2002). The trials were severed and on November 4, 1996, Pagan's trial commenced. On December 20, 1996, he was convicted on each count as charged in the indictment. Id. at 801 (TR.5 912-17).

Following the March 3rd - 5th, 1997 penalty phase, by a vote of seven to five, the jury recommended death for the murders. A Spencer v. State, 615 So.2d 688 (Fla. 1993) hearing was held July 1, 1997, and on October 15, 1998, the court imposed death sentences for the murders of Michael Lynn and Freddy Jones, and

consecutive life sentences for the two attempted murders, armed robbery, and armed burglary convictions. All counts were to run consecutively. (TR.6 1114-26; 1150-53).

On direct appeal, this Court found:

> During the early morning hours of Tuesday, February 23, 1993, two men entered the master bedroom of the Joneses' home by crashing through the sliding glass doors. At the time, Latasha, Freddy and the couple's toddler were in bed together. No lights were on in the house except a light Latasha regularly left on above the kitchen stove. The two perpetrators were wearing ski masks.
>
> Testimony established that the two men, one hyper and the other calm, demanded money from the couple. One of the intruders indicated he was aware there was $12,000 or $13,000 in the house. He said he wanted that money and had messed up the first time. After Freddy Jones denied having any money, the hyper one began looking through the house for money. In the process, he found Michael, the couple's six-year-old son, in another room. He returned to the couple's bedroom with Michael in tow. He threw Michael on the bed and ordered Latasha to show him where the money was located.
>
> The hyper one grabbed Latasha by her arm with what felt like a gloved hand, placed a gun against her head, and walked her through the house in search of money. After finding no money, Latasha was returned to the bedroom and hit with the gun, causing her nose to bleed. The hyper one looked into the closet for the money, but was ordered by the quiet one to immediately close the door when a light came on inside. He feared they would see his face. Latasha testified the calm one's mask was partially off, and she could see that he was "very bright skinned, looked like he was white." This one called the hyper one a name that sounded like Zack or Sack.
>
> One of the gunmen asked for keys to the jeep. The calm one then told the other one to get rope. Latasha saw the calm one tie up Freddy while the hyper one

went into the garage and started up the couple's jeep. Latasha was also tied up and was looking in her husband's direction when she saw the calm one shoot him. She turned her head away and heard the calm one tell Michael, "Shorty, if you live through this, don't grow up to be like me." She heard more shots. After she was shot, Latasha pretended she was dead. More shots were fired and her baby began screaming. She believes she heard seven or eight shots and testified that the hyper one was standing in the doorway when the quiet one shot her husband.

Once the perpetrators left the house in the jeep, Latasha kicked herself free of the ropes and called out to her husband and Michael. After receiving no response, she grabbed her baby and fled into the street screaming for help. A neighborhood paramedic came to her aid. Police later discovered that Michael Lynn had been shot four times, three times in the head and once in the buttocks.

Latasha also testified her house was burglarized January 23, 1993, and that approximately $26,000 worth of clothes, jewelry, and cash was taken. She identified a picture of her wearing jewelry, including an anchor with a crucifix, and also identified pictures of a Honda ring and a Cadillac ring. She was able to identify the Cadillac ring, a chain with a large anchor, and a man's bracelet as her husband's. Some of these items were recovered from Pagan's residence on February 27, 1993, the day of his arrest. Other items of jewelry were taken by Graham to two pawn shops in the area.

Antonio Quezada and Keith Jackson, both friends of the defendants, testified they spent some time with both Pagan and Graham after the January burglary and saw both of them wearing the same jewelry that was identified by Latasha as stolen from her home. Quezada testified that Pagan told him the next time they would do it right. On the night of the murders, Quezada drove Pagan and Graham to the Jones home. Quezada indicated he dropped Pagan and Graham off around the corner from the Joneses. En route Pagan said they would kill everybody, and Graham seemed to agree. Quezada also said Pagan and Graham had gloves, but he did not see either guns or ski masks.

Quezada further testified that he went home after dropping off Pagan and Graham, and he did not expect to see them again that night. However, later the same night he responded to a knock on the door-it was Pagan. Pagan came into the apartment and told Quezada that he had killed everyone, including the children. Pagan asked Quezada to take Graham to the bus station. In response to Quezada's inquiry of how they had gotten to his house, Pagan said they had stolen the victim's car, left it at a supermarket, and offered someone gas money in exchange for a ride to Quezada's apartment.

Quezada agreed to take Graham to the bus station. Graham appeared upset and indicated he was mad because they "didn't get anything." Prior to going to the bus station, the three (Quezada, Pagan, and Graham) drove to South Beach and other parts of Miami for one and one-half to two hours. During this ride, the home invasion and murders were discussed, including the disposition of the gun that was used. When initially questioned by the police, Quezada maintained he was with Pagan all night on the night of the murders. He later said this alibi was a lie.

Keith Jackson also testified that Pagan admitted he committed the home invasion murders. He also explained that the Jones home was targeted for a burglary because the occupant was a big drug dealer and they could get some money from the house. Although Jackson said he was not really interested in burglarizing the house, he participated in several conversations with Pagan and Graham about a possible burglary. Jackson said that on January 23 he received a call from Pagan and Graham saying they had "hit" the house. When they came to Jackson's house, they had a lot of gold jewelry, including a chain with Latasha's name on it. At trial, Jackson identified some of the jewelry he had previously seen. Pagan and Graham took him to see the house they had burglarized and indicated they were going to go back because they had not gotten all of the money that was supposed to be in the house.

Jackson testified that on the day after the murders he tried to get in touch with Graham but was

unsuccessful. He got in touch with Pagan, and Pagan and Quezada came to Jackson's house. During a conversation in the bedroom between Jackson and Pagan, Pagan admitted to shooting everybody in the house. Additionally, Pagan told him they had dismantled the gun and scattered it over Miami. Jackson told Pagan that two witnesses were not dead, the baby and the female. On another occasion, Jackson said Pagan told him he shot the people because a light came on in the house and he thought they may have seen his face.

...

After the State presented evidence concerning Pagan's prior criminal record, a sexual battery and two aggravated batteries, the defense put on its case for mitigation. The witnesses included family, neighborhood friends, an attorney, and a records supervisor with the Broward Sheriff's Office. The first witness called was Pagan's uncle, Carmello Miranda. Mr. Miranda testified that Pagan's parents separated when he was approximately two years old. Mr. Miranda babysat and spent a lot of time with Pagan. He indicated Pagan was a good boy, who was always helpful around the house and in the neighborhood. Pagan told his children to stay in school and do their best.

Video depositions of Yolanda Esbro and Anthony Penia were played for the jury. Ms. Esbro knew Pagan from the neighborhood he grew up in; her son was a close friend of Pagan's when they were in the third grade and the two remained close thereafter. She opined that Pagan and his sister got along well. Anthony Penia was Pagan's best friend growing up. He said Pagan was a funny, nice, and good person.

Maria Rivera, Pagan's mother, testified concerning his childhood and relationship with his father, Michael Pagan. She indicated that Michael was married when she first met him. When Pagan was seven months old, she had an altercation with Michael, and Michael physically abused her. After her daughter Yvette was born, she tried to make up with Michael, but he said he did not love her and had someone else. Maria was able to take care of the children with the help of her grandmother. During this time, the father did not visit. When Pagan was eighteen years old, he

was charged with an offense against a girl. He spent four or five years in prison. After his release, he started drinking and his personality changed.

Pagan's great-grandmother, Provilencia Alasaya, testified that she raised him in New York. His sister, Yvette Pagan, testified he was a good brother to her and treated her with respect.

Sharon Livingston, a classification records supervisor with the Broward Sheriff's Office, testified she reviewed his file and noted he had been incarcerated since his arrest in 1993. During that time he had not accumulated any disciplinary reports; he had an exemplary prison record. Michael Rocque, a lawyer and law professor at Nova Law School, testified he represented Pagan for a year but had to withdraw from the case because of personal problems. Rocque indicated Pagan helped him by giving him positive advice concerning his personal life.

The penalty jury recommended the (sic) Pagan be sentenced to death by a vote of seven to five.

Dr. Martha Jacobson, a licensed psychologist and an expert in the field of forensic psychology, testified on Pagan's behalf at the *Spencer* hearing. She indicated Pagan has a borderline personality disorder and suffered from attention deficit disorder as a child. In response to Dr. Jacobson's testimony, the State presented Dr. Harley Stock, a forensic psychologist, who disputed Jacobson's finding of borderline personality disorder, concluding instead that Pagan suffered from antisocial personality disorder. Dr. Stock also took issue with Dr. Jacobson's conclusion that Pagan suffered from attention deficit disorder, finding instead that Pagan scored high on tests requiring attention to detail and environment. Moreover, the doctor indicated Pagan had no problem paying attention during his lengthy jail interview.

Other defense evidence was presented at the Spencer hearing, including a videotaped deposition of Michael Pagan, the defendant's father. The testimony of Pagan's aunt, Doris Bardandaes, concerning Pagan's relationship with his family during the course of his

> life was also received by the trial judge. A former roommate, Cynthia Valera, presented evidence concerning Pagan's relationship with her two small children and Pagan's actions and attitudes when he had been drinking.
>
> The trial court entered its sentencing order on October 15, 1998, imposing a sentence of death for each of the murders. In support of the sentences, the trial court found three aggravating circumstances: that Pagan had been convicted of a prior violent felony; that the murder was committed during the course of a felony; and that the murder was cold, calculated, and premeditated. The trial court also found as a statutory mitigating circumstance, under the catch-all of any other factor, that Pagan had a deprived childhood. Several nonstatutory mitigators were found, including that Pagan suffered from attention deficit disorder; had a borderline personality disorder; was a loving brother; was a loving grandson and great grandson; was a loving friend; and displayed good conduct while in custody.

Pagan, 830 So.2d at 799-802 (footnotes omitted).

Seventeen issues[1] were raised and rejected[2] on direct

[1] 1-sufficiency of the evidence; 2-error to allow Williams Rule evidence of prior burglary; 3-error to deny motion to suppress; 4-error to permit state to bolster witness credibility; 5-surreptiously recorded conversation should have been suppressed; 6-error to uphold State's Batson challenge; 7-error in denying new trial; 8-error to deny one/more mistrials; 9-error to show photographs of deceased; 10-discovery violation concerning voice line-up; 11-Stae made improper golden rule argument; 12-error to reference Desert Storm camouflage jacket; 13-error to allow Jackson to explain he decided to testify because of six-year old child's death; 14-error to permit medical examiner to give expert opinion on glass; 15-error to allow voice line-up and admit testimony; 16-cumulative errors; 17-proportionality. (Initial Brief SC60-94365).

[2] This Court found sufficient evidence from Pagan's confession (direct evidence), his statements of intent connecting him with Graham and their prior burglary of the Jones' home showing motive, the victim's jewelry and property found in Pagan's apartment, and Pagan's admissions to Antonio Quezada and Keith

appeal. Pagan, 830 So.2d at 805-17. On November 7, 2002, Pagan's rehearing on various issues and the new claim that the sentence was unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002), was denied. The Supreme Court, on June 9, 2004, denied Pagan's petition for certiorari raising the Ring claim. Pagan v. Florida, 539 U.S. 919 (2003).

On June 8, 2004, Pagan filed his motion for postconviction

Jackson. Pagan, 830 So.2d at 803-04. This Court rejected the challenge to the Williams rule evidence finding the January 1993 burglary was not dissimilar and was not a feature of the case. Id., at 805-06. The search warrant was proper; it established probable cause, any omissions/inaccuracies were insufficient to void such finding, and the property seized did not exceed the scope of the warrant. Id., at 806-09. The claim of prosecutorial misconduct alleging improper bolstering of a witness was rejected; State's argument was a direct/fair/accurate response to defense arguments. Id., at 809. No error was found in the admission of a tape of a conversation between Quezada and Jackson as it rebutted the defense claim of recent fabrication. Id., at 809-10. The denial of a strike of Juror Laster was found unpreserved. Pagan, 830 So.2d at 810. Denial of a new trial and various motions for mistrial were affirmed as they were not argued with specificity, thus, were waived. Id., at 810-11. While unpreserved, the photographs of the deceased child were admitted properly. Id. at 811. The record refuted claim of discovery violation regarding voice lineup; admissibility of voice lineup was unpreserved. Id., at 811-12. The State's closing argument "in no way violate[d]" the prohibition of "golden rule" arguments. Id., at 812-13. With respect to the State's referencing Graham wearing a Desert Storm camouflage jacket, this Court found the reference to the camouflage jacket proper, but identifying it as "Desert Storm", improper, yet harmless, as that fact could not be reasonably inferred from the evidence. Id., at 813. Jackson's motivation for cooperating (child's death) was relevant jury issue. The motions for mistrial were denied properly. Id., at 813-14. There was no error in permitting the medical examiner to testify about injuries caused by glass. Id., at 814-15. There was no cumulative error as there was only one harmless error. Id. at 815. Pagan's sentence was proportional. Id., at 817.

relief. A Case Management Hearing pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993) was held on November 5, 2004, resulting in the court granting a hearing on Claims III, XI, XII, and XIII while reserving on the other issues raised. The evidentiary hearing was held on February 7th - 9th, 2005 at which time Pagan presented evidence and testimony on his four claims combined as: (1) a Brady v. Maryland, 373 U.S. 83 (1962) violation arising from the State's alleged failure to disclose a police report noting Alex Ramirez resided in Turtle Bay (Claim III); (2) ineffective assistance of penalty phase counsel under Strickland v. Washington, 466 U.S. 688 (1984) and Ake v. Oklahoma, 470 U.S. 69 (1985) as related to his investigation/presentation of mitigation and mental health evidence (Claims X and XI); and (3) ineffectiveness under Strickland for counsel's failure to challenge the facts of the prior violent felony conviction (indecent assault) used in aggravation (Claim XIII). In support of his claims, Pagan called trial counsel, Dennis Colleran ("Colleran"), penalty phase counsel, Ken Malnik ("Malnik"), friends/family members (Phillip Howard, Viola Miranda, and Miguel Pagan),[3] and mental health experts, Dr. Henry Dee and Dr. Mark Cunningham.

[3] Alternately throughout the trial and other hearings, Miguel Pagan was referred to as Miguel and Michael. The State will use "Miguel Pagan" to indicate Pagan's father.

Based upon the evidence and appellate record, the trial court found Pagan failed to establish a Brady violation or meet his heavy burden under Strickland. Pagan failed to prove that the State suppressed the identity of Alex/Alejandro Ramirez, or that counsel could not have discovered his residence with the use of due diligence. Not only did Colleran admit he used Ramirez to cast doubt on the State's case, but the best he offered in support of a Brady claim was that had he known of the police document identifying where Ramirez lived and as an associate, of co-defendant Graham, counsel would have “pushed heavier" in asserting Ramirez was the perpetrator. The court found such did not establish a Brady violation.

Likewise, the court rejected Pagan's claim that Malnik failed to investigate and present all evidence in mitigation to the jury. Malnik explained he conducted his own mitigation investigation obtaining background documents as well as interviewing witnesses. He passed this information onto his mental health expert, and based upon the result of the investigation and mental health evaluation, he determined it was best to reserve Dr. Jacobson's testimony for the Spencer hearing as Pagan's Attention Deficit Disorder, which Dr. Jacobson would report, "didn't necessarily explain the crime to a jury." (PCR.17 1130-35). Further, Malnik explained that his doctor would not find the statutory mental health mitigators, most

likely, because Pagan refused to admit to the crime, thus, he was left with ADD, which he thought was better presented to the trial court alone.

Also, as the court found, Pagan's new mental health experts and family member's testimony offered a different approach to a mitigation presentation; they did not offer any evidence which would establish ineffectiveness under Strickland. The family evidence either was cumulative to what was presented at trial or testimony on the more negative aspects of Pagan's upbringing. The doctors merely offered new opinions developed years after trial, or took exception to the trial strategy Malnik employed.

During the evidentiary hearing, Pagan's new clinical neuropsychologist, Dr. Dee, noted that comments contained in school records were consistent with a "history of Attention Deficit Disorder." (PCR.19 1327). He offered that Pagan had a full scale IQ of 120, but the memory scale test indicated cerebral damage/memory impairment. Dr. Dee concluded Pagan has memory problems because his results fell in the normal range, but should have been superior based on his superior range IQ. (PCR.19 1317-22, 1326, 1338, 1342-43). He thought this might impact Pagan by manifesting itself as forgetfulness or "increased impulsivity and irritability." However, Dr. Dee noted it would be difficult to know how memory impairment affected Pagan's behavior during the crime. Although he suggested the

crimes were not sophisticated, and were poorly carried out, he admitted "I don't know all of the details of the crime, only what I've read from the court, you know files and people's comments on it." (PCR.19 1339-41, 1344-45).

Dr. Cunningham, unlicensed in Florida, was found to be an expert in forensic and clinical psychology, but **not** in Florida mitigation. He was permitted to report on why he believed counsel did not do his job properly. (PCR.19 1472). The pith of Dr. Cunningham's testimony was a disagreement with counsel's strategy. It was the doctor's opinion more emphasis should have been placed on showing how Pagan reached the point in his life to commit murder, and focus on Pagan's history/developmental experiences going to the "catch all" mitigator. (PCR.19 1472-76).

Upon the evidence presented during the evidentiary hearing and trial record, the court concluded Pagan failed to carry his burden to obtain relief, because he did not prove his Brady or Strickland claims and the other matters which did not obtain an hearing, either were pled insufficiently, were procedurally barred, were refuted from the record, or were without merit. (PCR.4 640-62). Following the denial of relief, Pagan appealed and with the filing of his initial brief here, he filed a petition for writ of habeas corpus in case number SC07-1327. The State's answer to this appeal follows and the response to

the habeas corpus petition is filed under separate cover.

SUMMARY OF THE ARGUMENT

Issue I – The court's rejection of Pagan's Brady claim as it relates to information that an "Alex Ramirez" resided in Turtle Bay, is supported by substantial, competent evidence and the law. Relief was denied properly.

Issue II - The order rejecting the claim that penalty phase counsel was ineffective in the manner he investigated and presented the mitigation case, is supported by competent, substantial evidence, and follows the dictates of Strickland. The denial of relief should be affirmed.

Issue III – The court correctly credited penalty phase counsel's strategic decision made after a through, investigation regarding challenging Pagan's prior violent felony indecent assault conviction. The findings are supported by competent substantial evidence and comport with Strickland.

ISSUE IV – Jackson's plea agreement was not suppressed as the State made the disclosure pre-trial; any additional evidence may have been secured with the use of due diligence.

Issue V – The court correctly rejected Pagan's Giglio claim as any difference between Keith Jackson's recollection of the year of his re-arrest is immaterial beyond a reasonable doubt.

Issues VI and VII – Pagan has failed to establish that he was precluded from calling Wanda Jackson, thus, there was

neither improper State nor erroneous judicial action. Likewise, he has not shown that Keith Jackson could be impeached with Wanda's deposition, thus, ineffectiveness was not shown.

Issue VIII – Pagan is barred from using an ineffectiveness claim to re-litigate differences between the arrest/search warrant applications and later know facts. Likewise, he has failed to show that Wanda Jackson's deposition testimony could be used to impeach Detective Peloso.

Issue IX – Pagan's appellate argument is conclusory, and should be found waived. Further, the record establishes the ineffectiveness claim is legally insufficient in part, and refuted from the record. No prejudice was shown.

ARGUMENT

ISSUE I

PAGAN'S BRADY CLAIM REGARDING ALEX RAMIREZ'S RESIDENCE IN TURTLE BAY AND HIS ASSOCIATION WITH WILLIE GRAHAM (restated).

Pagan complains the State withheld the April 2, 1993 Miramar Police Department Information Sheet, which contained the statement "[Willie] Graham also has known associate Alex Pamirez who resides in Turtle Bay," in violation of Brady v. Maryland, 373 U.S. 83 (1962). Following an evidentiary hearing, relief was denied. Pagan asserts such was error as his counsel could have investigated Alex Ramirez more intently, used this

information to cast doubt upon the police investigation, and implicate Keith Jackson in the crimes charged and impeach his trial testimony. (IB 13-16). The evidence and law support the denial of relief. This Court should affirm.

In analyzing Brady claims, the reviewing Court defers to the factual findings made by the trial 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 v. State, 748 So.2d 1028, 1031-32 (Fla. 1999); Rogers v. State, 782 So.2d 373, 376 (Fla. 2001).

In order to establish a Brady violation, Evans must show:[4] "[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 v. Greene, 119 S.Ct. 1936, 1948 (1999); Occhicone v.

[4] In Way, 760 So.2d at 910-11, this Court quoted Strickler and its three components, but noted that 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. This Court recognized that where the evidence was available equally to both parties or that the defense was aware of the evidence and could have obtained it, the evidence had not been suppressed. See Occhicone, 768 So.2d at 1042 (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.").

State, 768 So. 2d 1037, 1042 (Fla. 2000); Way v. State, 760 So.2d 903, 910 (2000). "[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). "The 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 U.S. v. Agurs, 427 U.S. 97, 109-10 (1976)). No Brady violation occurs "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); Provenzano v, State, 616 So. 2d 428, 430 (Fla. 1993). Prejudice is shown by the suppression of exculpatory, material evidence, i.e., where "there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed." Stickler, 119 S.Ct. at 1952. Reasonable probability is "a probability sufficient to undermine confidence in the outcome." Kyles, 514 U.S. at 435.

Upon the pleadings and presentations, the court determined:

The Defendant argued that the State violated *Brady v. Maryland* by suppressing evidence concerning the identity of an alternate suspect in a police report, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution (Defendant's Motion at 14). This claim was heard at the evidentiary hearing on February 7th through February 9th 2005. At the evidentiary hearing, the Defendant called his trial counsel, Dennis Colleran, Esq., Penalty Phase counsel, Ken Malnik, Esq., Philip Howard, Viola Miranda, Miguel Pagan and mental health experts, Dr. Henry Dee and Dr. Mark Cunningham.

To prove a *Brady* violation, the Defendant must show that: (1) the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) the suppression resulted in prejudice. *Rogers v. State*, 782 So.2d 373, 378 (Fla. 2001) *citing Strickler v. Green*, 527 U.S. 263, 280-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). *See also Guzman v. State*, 868 So.2d 498 (Fla. 2003).

This Court finds that the Defendant has not established a Brady violation. The Defendant has not shown, either through his Motion for Post Conviction Relief, or through evidence presented at the evidentiary hearing, that the identity of an alternate suspect, which was contained in a police report, violated the provisions of Brady. The Defendant claimed that a sentence in the report: "[Willie] Graham also has known associate Alex Ramirez who resides in Turtle Bay, "was exculpatory and intentionally suppressed by the State. (Defendant's Motion at 14-15) (Evidentiary Hearing (E.H.) pp. 10, 21-22). This Court finds that trial counsel Colleran's speculation that he would have pressed "heavier" in arguing that Ramirez was the perpetrator of the crime is not the test for a Brady violation. (E.H. p.4-45). Testimony at the hearing revealed that Colleran was aware by at least July 1, 1993, that Ramirez was a "real person." (E.H. p.35). Accordingly, as reasonable trial strategy, Colleran used this identity "mix-up" argument in the Motion to Suppress, Motion for a New Trial, and before the jury.

> (E.H. p.35-36). This Court finds that the alleged *Brady* "evidence" was available to the Defendant prior to and at the time of trial, and therefore, was not suppressed by the State. *Occhicone v. State*, 768 So.2d 1037, 1042 (Fla. 2000).
>
> Further, *arguendo*, even if the alleged evidence may have been *Brady* material, this Court finds that the evidence would not have affected the result of the proceedings. Given the testimony presented at the hearing, including that of Latasha Jones, this Court finds that the information that Ramirez lived in Turtle Bay and was an associate of Willie Graham, would not have undermined the confidence in the outcome of the proceedings. See State's Post-Hearing Memoranda/Written Closing Argument pp.4-17, which sets forth further detailed testimony and case law, attached hereto as Exhibit "B"; *Pagan*, 830 So.2d at 800. Therefore, the Defendant's Claim III is **DENIED**.

(PCR.4 644-46). This ruling is supported by the facts and law.

The April 2nd Information Sheet ("report") was addressed to Willie Graham's alleged solicitation of murder of Detective Ron Peluso. However, Pagan focuses on a single sentence contained therein: "[Willie] Graham also has known associate Alex Ramirez who resides in Turtle Bay."[5] During the evidentiary hearing, trial counsel, Dennis Colleran ("Colleran"), claimed the report showed that Ramirez, the name Keith Jackson first reported as the perpetrator, was a "real person" and was an "associate" of

[5] In his motion for postconviction relief and during the evidentiary hearing, Pagan suggested the first word, "reliable", of the first paragraph of the April 2nd Information Sheet somehow modifies the second paragraph's notations that Graham and Ramirez were associates. Using common rules of grammar, such is an improper construction of the paragraphs. The word "reliable" refers to the information in the first paragraph which discusses the development that Graham was soliciting a murder. No modifiers were included in the second paragraph.

Willie Graham who was a gang member, soliciting the murder of a detective, and was a named co-defendant. (PCR.17 1040, 1051-52). In Colleran's mind, the report would have made Ramirez a prime suspect and caused him to investigate "with the kind of gravity that it deserved" and to ask his private investigator to find a connection between Ramirez, Willie and Anthony Graham, and Keith Jackson. Colleran offered that he could have impeached Jackson with the report and that the document would have allowed him to press "heavier" for Ramirez to be the perpetrator and to argue his motions more strongly. (PCR.17 1053-56, 1074-75). Such is not the test for a Brady violation. Based upon the record and Colleran's later admissions, he makes too much of this report, and his speculation as to what he may have done or how the case could have been put in a different light are not supported by the facts. As the court found, there was no Brady violation.

Colleran,[6] who became involved with the case on March 22, 1993, submitted he had put in almost 3,000 hours, knew at least by July 1, 1993, about three years before trial, that Ramirez was a "real person" who worked with Anthony and Willie Graham at Olsten Temporary Services. This fact also was disclosed through Keith Jackson, who had said he thought "Alex's" last name was

[6] Colleran was compelled to admit the report contains no reference to Alex Pagan, and Antonio Quezada corroborated Keith Jackson's account of Pagan's participation in the crimes. In fact, Quezada was a more powerful witness who testified to more direct knowledge of the crime. (PCR.17 1063-64, 1073).

Ramirez because Pagan and Willie Graham worked together. From this, Colleran had his investigators attempt for two years to develop a connection between Ramirez, Graham, and Jackson, in addition to trying to get information to discredit Jackson's alibi. Colleran's investigation revealed Ramirez had no criminal record and seemed to be "a straight shooter" and not "somebody who would be under Jackson's control." The defense used the workplace connection/Jackson name "mix-up" to its advantage in the motion to suppress, in the motion for new trial, and before the jury by arguing there was no Ramirez, and that Jackson had lied to the police. These arguments were made even though Colleran knew Ramirez was a real person and had a pay stub supporting Jackson's alibi. (PCR.17 1065-76).

Pagan's defense was that he was not involved in the crimes. In support, he pointed to Jackson as having identified the "Alex" who did the crimes as "Alex or Alejandro Ramirez" and that the police listed "Alejandro Ramirez" on the search and arrest warrants. Further, he pointed to Jackson as the possible perpetrator along with Willie Graham. The State's proof of guilt consisted in part of Antonio Quezada's testimony about Pagan's whereabouts on the night of the crimes, Pagan's admissions to Jackson and Antonio Quezada, and Pagan's possession of jewelry belonging to the victims taken in a prior January burglary of their home. Pagan, 830 So.2d at 798-801.

Pre-trial discovery, provided Colleran, included the pay stub for Alex Ramirez from Olsten Temporary Service showing he worked with Willie and Anthony Graham and Detective Learned's April 28, 1993 report. The propriety of the search and arrest warrants were litigated which included a discussion of the "confusion" between Alex Pagan and Alex/Alejandro Ramirez,[7] and how the police determined that the "Alex" they were in search of and eventually arrested was Alex Pagan (TT.1 72, 80-84; TT.5 461-78, 489-93, 513-17, 532-34; TT.6 596-600, 605-08, 610, 620-23, 689, 693-94; TT.7 713, 716-22, 724-25, 728-30, 740-42, 750-51, 755-61; TT.20 2328-43). As the record shows, Jackson merely said "Alex" was the perpetrator, gave certain unique factors, such as his recent release from a specific prison, and residence which Jackson pointed out to the police. All fit Pagan, and the defense has not shown otherwise. Pagan has not established that Alex Ramirez's association with Willie Graham was exculpatory.

[7] Several officers at the suppression hearing and trial, including Detective Peluso, explained how the name Ramirez came to be on the warrants. Such was based upon witnesses saying that "Alex" was involved and had been released from prison recently. Jackson informed the police "Alex" knew and worked with Willie Graham - the name "Alejandro Ramirez" was selected from Olsten Temporary Services as it could be shortened to "Alex" so police assumed initially "Alex's" last name was Ramirez. However, further investigation proved that it was not. Jackson pointed out where "Alex", the perpetrator, lived and accompanied the police to Alex Pagan's apartment. Despite the mix-up of the last names, all other identifying information was correct, and Jackson later identified Pagan as the "Alex" he knew to be involved in the murders. (TT.6 597-608, 620-23; TT.20 2328-43; TT.25 3050-3163).

Here, Pagan asserts the sentence, "Graham also has known associate of Alex Ramirez who resides in Turtle Bay" is Brady material requiring disclosure. There is nothing exculpatory in the statement that Alex Ramirez and Graham are associates. The fact Ramirez and Graham may have known each other does not undermine confidence that Graham and Pagan committed the double homicide and attendant crimes as testified to by Keith Jackson, and more importantly, by Antonio Quezada. Moreover, while the April 2nd report may not have been turned over to the defense, the information it contained had been disclosed. All parties knew Ramirez and Graham worked together and how the police came to put "Alejandro Ramirez" on the warrants. As a result, the connection between Ramirez and Graham was not suppressed.

The inference Pagan attempts to draw, i.e., the mere fact the police put in writing that Ramierez and Graham were associates somehow would have made a difference in the investigation done and defense offered, is not the test under Brady. Boyd v. State, 910 So.2d 167, 179-80 (Fla. 2005) is instructive. There, the defense was complaining that the State destroyed a report of possible matches developed through an AFIS evaluation. This Court rejected the Brady claim because the mere possibility that there would be other matches that may have helped the defense was insufficient to establish "materiality." Id. See Agurs, 427 U.S. at 109-10 (stating "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."); Allen v. State, 854 So.2d 1255, 1260 (Fla. 2003) (recognizing that evidence is “material” only if it "could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict."). Merely because the police classified Ramirez and Graham as associates, does not put the case against Pagan in such a different light; this is especially true where there was substantial evidence against Pagan in the form of his admissions to his friends, Quezada and Jackson, and possession of the proceeds from the prior burglary of the Jones’ home. See Boyd, 910 So.2d at 179-80 (noting “[g]iven the substantial amount of other evidence against Boyd, there is no reasonable probability that this list [of possible fingerprint matches] would have affected the outcome at trial.’”); Hegwood v. State, 575 So.2d 170, 172 (Fla. 1991)).

Further, Graham could have many associates, even those who might assist with the solicitation of murder of a police officer or be a gang member. This would not exonerate Pagan nor give him evidence to mitigate his sentence.

Likewise, the mere fact that a residence was listed for Ramirez does not establish a Brady violation. Pagan offered nothing at the evidentiary hearing to suggest that knowing

Ramirez's residence in Turtle Bay would have altered his investigation. What Colleran claimed was that he would have investigated or pushed "heavier." Yet, the State established that Colleran directed two private investigators, Hi-Tech Investigations and Patrick Investigative Services, over two years, to look into Alex Ramirez based upon the knowledge Ramierez was real and associated with Willie Graham. Also, Colleran noted Ramirez may be a "clean-cut family man" and in that case, the investigator might just talk to him. The defense knew how to contact Alex/Alejandro Ramirez, or had a means of finding his address through his place of employment, Olsten Temporary. In fact, Colleran had Ramirez's NCIC report which showed no criminal activity, and although he knew Ramirez existed, he chose to go with a defense that Ramirez did not exist and that Jackson had lied to the police in this regard. (PCR.17 1066). Pagan offered no evidence Ramirez's residence in Turtle Bay played any role whatsoever in the development of a defense nor has he shown his investigation was hampered by the non-disclosure of the April 2nd report. As the court concluded, confidence in the trial has not been undermined. The record establishes the defense knew of Alex Ramirez and how to get in touch with him (PCR.17 1065-76). There was no Brady violation.

In fact, not only has Pagan failed to show the suppression of exculpatory, material evidence, but, he has not shown

prejudice given the overwhelming evidence from associates and eye-witnesses that Pagan planned and committed the crimes of which he was convicted. When the Ramirez's residence and association with Graham is assessed along with the incriminating evidence recovered from Pagan and the admissions he made to not only Jackson, but to Quezada, there is no question that the result of the proceedings would not have been different. In the conversations Pagan had with Jackson and/or Quezada, he admitted to the January 1993 burglary of the Jones' residence, his dissatisfaction with the property taken, and desire to return to get more money. Pagan was found in possession of property from the January burglary, and during the robbery (second home invasion) one of the perpetrators told the surviving victim, Latasha Jones, they had "messed up" the first time and that they wanted the money. Pagan, 832 So.2d at 799.

As found by this Court:

> Antonio Quezada and Keith Jackson, both friends of the defendants, testified they spent some time with both Pagan and Graham after the January burglary and saw both of them wearing the same jewelry that was identified by Latasha as stolen from her home. Quezada testified that Pagan told him the next time they would do it right. On the night of the murders, Quezada drove Pagan and Graham to the Jones home. Quezada indicated he dropped Pagan and Graham off around the corner from the Joneses. En route Pagan said they would kill everybody, and Graham seemed to agree. Quezada also said Pagan and Graham had gloves, but he did not see either guns or ski masks.
>
> Quezada further testified that he went home after

> dropping off Pagan and Graham, and he did not expect to see them again that night. However, later the same night he responded to a knock on the door-it was Pagan. Pagan came into the apartment and told Quezada that he had killed everyone, including the children. Pagan asked Quezada to take Graham to the bus station. In response to Quezada's inquiry of how they had gotten to his house, Pagan said they had stolen the victim's car, left it at a supermarket, and offered someone gas money in exchange for a ride to Quezada's apartment.
>
> ...
>
> Keith Jackson also testified that Pagan admitted he committed the home invasion murders. ... Jackson said that on January 23 he received a call from Pagan and Graham saying they had "hit" the house. When they came to Jackson's house, they had a lot of gold jewelry, including a chain with Latasha's name on it. At trial, Jackson identified some of the jewelry he had previously seen. Pagan and Graham took him to see the house they had burglarized and indicated they were going to go back because they had not gotten all of the money that was supposed to be in the house.
>
> Jackson testified that on the day after the murders he tried to get in touch with Graham but was unsuccessful. He got in touch with Pagan, and Pagan and Quezada came to Jackson's house. During a conversation in the bedroom between Jackson and Pagan, Pagan admitted to shooting everybody in the house. Additionally, Pagan told him they had dismantled the gun and scattered it over Miami. Jackson told Pagan that two witnesses were not dead, the baby and the female. On another occasion, Jackson said Pagan told him he shot the people because a light came on in the house and he thought they may have seen his face.

Pagan, 830 So.2d at 800-01. Also, victim Latasha Jones, testified that a light had come on in the room and she saw a portion of the face of one of her assailants. Id. at 799. Quezada confirmed the dismantling and scattering of the murder

weapon. Id. at 800. Given this, it cannot be said that had the jury known Ramirez lived in Turtle Bay and was an associate of Willie's, that confidence in the verdict or sentence would be undermined especially given the above outlined evidence against Pagan. The rejection of this Brady allegation must be affirmed.

ISSUE II

PENALTY PHASE COUNSEL THOROUGHLY INVESTIGATED AND MADE REASONED STRATEGIC DECISIONS THEREBY RENDERING EFFECTIVE ASSITANCE OF COUNSEL (restated).

Pagan submits his counsel prevented him from presenting "important and powerful mitigating evidence" due to his ineffectiveness. He charges that Ken Malnik ("Malnik") did a poor investigation(IB 58-59, 63) and deficiently kept information from the jury. Pagan argues Malnik should have presented to the jury Dr. Jacobson's diagnosis that he had Attention Deficit Disorder ("A.D.D.") and should have challenged Dr. Stock's finding Pagan had an Antisocial Personality Disorder.(IB 32, 53-58, 63-64, 78-83). He asserts his new mental health professional, Dr. Dee, opined Pagan was not malingering, but has organic brain damage, which shows Malnik failed to secure an adequate mental examination.(IB 84-84). According to Pagan, Malnik should have explored and presented his childhood history to show there was a long history of family

dysfunction[8] beginning with Pagan's great-grandparents, and continuing through his immediate family to suggest it may be passed genetically or through repeated poor character/behavior, which in turn causes dysfunction in later generations and Pagan experiencing: (1) sexual abuse; (2) possible genetic susceptibility to alcohol/substance abuse (3) parental abuse/neglect leading to school absences and suggesting a basis for his later violence; (4) physical and emotional abuse at the hands of his mother; and (5) most of the male role models in Pagan's life were criminals. (IB 64-78). It is also Pagan's complaint that the court, State, and defense referred to the wrong standard when discussing mitigation; i.e., criminal responsibility when it should have been moral culpability. (IB 49).

Contrary to Pagan's allegations, Malnik conducted a constitutionally professional penalty phase and made reasoned choices based on that investigation in conformance with Strickland and its progeny. Pagan offers nothing but mere disagreement with counsel's strategy and new doctors who, years

[8] The examples Pagan suggests should have been offered are: (a) grandmother's long-term extramarital affair; (b) mother had little contact with father or paternal family; Pagan's father (Miguel Pagan) abandoned family - never paid support; (c) Miguel's maternal grandfather "lost his mind"; (d) Pagan's paternal grandfather was an alcoholic and "psychiatrically discharged" from military; (e) paternal uncle had substance abuse problem and was beaten to death. (IB 65-64).

later, have come up with more favorable opinions. Such evidence does not support the ineffectiveness claim. The court's order denying relief sets forth findings of fact supported by competent, substantial evidence and comports with the law as set forth in Strickland. This Court should affirm.

The standard of review for ineffectiveness claims following an evidentiary hearing 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 v. State, 858 So.2d 319, 323 (Fla. 2003).

> ...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.

Arbelaez v. State, 889 So.2d 25, 32 (Fla. 2005). See Reed v. State, 875 So.2d 415 (Fla. 2004); Davis v. State, 875 So.2d 359, 365 (Fla. 2003); State v. Riechmann, 777 So.2d 342 (Fla. 2000); Sims v. State, 754 So.2d 657, 670 (Fla. 2000).

To prevail on an ineffectiveness claim, the defendant must prove (1) counsel's representation fell below an objective

standard of reasonableness, and (2) but for the deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. 688-89.

> 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).[9]

[9] At all times, the defendant bears the burden of proving counsel's representation fell below an objective standard of reasonableness, was not the result of a strategic decision, and that actual, substantial prejudice resulted from the deficiency. See Strickland; 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 establish counsel's conduct was "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. In assessing the 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. 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

Expounding upon Strickland, the Supreme Court cautioned in Wiggins v. Smith, 539 U.S. 510, 533 (2003):

> In finding that [the] 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*.... 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." ... A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances."

Wiggins, 539 U.S. at 533. From Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus is on **what** efforts were undertaken and **why** a strategy was chosen. Investigation (even non-exhaustive, preliminary) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 (“[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.”).

Pagan suggests Ring v. Arizona, 536 U.S. 584 (2002) implicates Florida capital sentencing and this case. (IB 33).

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test when it is clear that the prejudice component is not satisfied.” Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986).

Also, he presents numerous cases where this Court has reversed death sentences imposed over the jury's life recommendation. (IB 33-47). Contrary to his citations, this Court has rejected challenges to capital sentencing based upon Ring. Parker v. State, 904 So.2d 370, 383 (Fla. 2005); Porter v. Crosby, 840 So.2d 981, 986 (Fla. 2003); Brown v. Moore, 800 So.2d 223, 224-25 (Fla. 2001). Moreover, this is not an override case on direct appeal, instead, it is a collateral challenge to Pagan's penalty phase counsel's performance. Hence, the two prong test of deficiency and prejudice under Strickland controls.

Upon the evidentiary hearing, the court denied relief:

Defendant's Claims X and XI[10]

[10] In addressing these claims, the court stated in footnote 2:

> Although the Defendant separated Claims X and XI in his Motion to Vacate, both claims are inextricably intertwined as each raise identical or similar issues regarding the alleged failure of counsel to adequately investigate mitigation evidence, and the alleged failure of counsel and the Defendant's clinical and forensic expert to provide mental health mitigation under *Ake v. Oklahoma*. In Claim XI, the Defendant reiterated the identical first eight paragraphs that were set forth in Defendant's Claim X, and stated that current counsel retained experts in the fields of psychology and neural psychology, who found many more mitigating factors present. The Defendant concluded his claim in the same manner as his conclusion in Claim X. (Defendant's Motion at 40-41). However, an examination of the caption of Claim Xi reveals that the Defendant alleged that counsel failed to provide necessary information to the mental health expert. Nonetheless, the Defendant did not plead what information was necessary and this Court finds that Claim Xi was legally insufficient as pled.

(PCR.4 651, footnote 2).

The Defendant claimed that his counsel was ineffective by failing to provide a proper mental health expert, and alleged that his expert, Dr. Martha Jacobson's clinical and forensic testing and testimony fell below the standard of care in the community. The Defendant argued that although Dr. Jacobson's report contained several indicators of organic brain damage, this "syndrome" was never fully explored. Additionally, the Defendant claimed that Cynthia Valera's testimony at the *Spencer* hearing allegedly contained evidence of psychological dysfunction, which was also not fully investigated. The Defendant further argued that Dr. Jacobson failed to interview the Defendant's family members, friends or associates, which would have been necessary for her to perform a complete mitigation examination. (Defendant's Motion at 31-32).

The Defendant claims that his penalty phase counsel was also ineffective for his alleged failure to conduct an investigation on mitigation, his alleged failure to present mitigation evidence to the jury, and then, later to the Court. The Defendant alleged that there was no corroborating evidence regarding any information received and relied upon by Dr. Jacobson. Additionally, the Defendant suggested that the only information available were school records, deposition regarding the prior sexual assault case, the instant case probable cause affidavit, and the doctor's interview with the Defendant. Furthermore, the Defendant argued that on cross-examination, the State elicited testimony from Dr. Jacobson that she did not speak to the Defendant's childhood friend, any teachers, or members of his immediate family including his mother or sister. Therefore, the Defendant claimed that he was prejudiced by the failure of both Dr. Jacobson and his counsel, because there were many more mitigating factors which could have and should have been presented to the jury. Thus, the Defendant claimed that under the law, since the trial Court was required to give great weight to the jury's recommendation, the absence of mitigation evidence demonstrated that this Court's weighing process was flawed, and the Defendant's jury voted for death "on the slimmest of margins; by a vote of 7 to [5] one vote away from a life recommendation." (Defendant's

Motion at 38-40).

... The State responded that the trial record established that the evidence that Pagan is referencing in his claim was in fact discovered during his trial counsel's investigation and developed before the Court in the *Spencer* hearing. Therefore, the State argued that this evidence would have been cumulative. (State's Post-Hearing Memorandum at 18). The State argued, and this Court agrees, that deficient performance on counsel's part has not been shown. *See Wiggins v. Smith*, 539 U.S. 510 (2003).

The State further argued that, even if the evidence that the Defendant referenced had been presented, the evidence would not have changed the outcome of the proceedings. The State pointed out, and this Court agrees, that the Defendant has not challenged the aggravating factors, which "standing alone, would be sufficient to out-weigh the mitigating circumstances." (See, Sentencing Order p.12); see also State's Post-Hearing Memorandum at 19). The State argued, and this Court also agrees, that Penalty Phase Counsel Malnik fulfilled his professional responsibility under *Wiggins, Ake* and *Strickland*. Malnik had a multitude of experience as an Assistant Public Defender, private criminal defense counsel, and tried six prior capital post-conviction cases. (See State's Post-Hearing Memoranda; E.H. v1 p.53).

At the Evidentiary Hearing, testimony was elicited from Malnik that demonstrated that: (1) he conducted his own investigation by obtaining school records and jail records; (2) he interviewed the Defendant; (3) he interviewed the Defendant's family and friends; and (4) he consulted with Dr. Rich, Dr. Jacobson and Dr. Rocque. (E.H. v1 pp 65, 72-78; v2 135-40). Further, Malnik had discovered that the Defendant was hospitalized for an appendectomy. Malnik was also aware that the Defendant was hit in the head as a child, but was not hospitalized and did not lose consciousness. (E.H. v1 pp.81-90). Additionally, Malnik was in possession of the Defendant's prison records and the Public Defender's files from the prior violent felony convictions. *Id*.

At the Evidentiary Hearing, Malnik testified as

to why he did not present Dr. Jacobson before the jury, and instead reserved her testimony for the *Spencer* hearing. He specifically explained the problems he saw with using the Defendant's A.D.D. as a mitigator, "[t]he difficulty that I had with it as a mitigator was that it didn't necessarily explain the crime to a jury. It may explain the crime to a scientist, it may be a psychologist looking at it but the perception of a jury could be to -- I wouldn't necessarily square with it." (E.H. v1 100-05). Further, Malnik later testified that:

> The evidence that we had in terms of mental health mitigation I would classify as legitimate, but honestly not the strongest. Why do I say that? I did not have any statutory mental health mitigators. I had obtained the services of a doctor who had a reputation of being defense oriented. She could not give me any statutory mental health mitigators. Why she couldn't you would have to ask her, but I suspect from our conversations the reason being was that Mr. pagan denied, and had every right to deny, involvement in this case. So, when I'm looking at what I'm going to put across I don't have any statutory mental health mitigators. What I do have, I have A.D.D., which could be a diagnosis and I agree with you, I didn't have the school records, but I didn't have the strongest indications that he suffered from A.D.H.D."

(E.H.v1 113-16); (see also State's Post-Hearing Memorandum, pp. 25-59).

This Court finds that the Defendant has not shown that any mitigating factors were left undeveloped by Dr. Jacobson from her alleged failure to personally interview witnesses. The Defendant has also not shown that Dr. Jacobson's evaluation was erroneous, or that a life sentence would have resulted had Dr. Jacobson personally interviewed those witnesses.

Further, the Defendant's presentation of new mental health experts, with different opinions about his mental health condition, and a new approach to

> presenting the Defendant's family history to the jury, does not show deficiency on behalf of the Defendant's penalty phase counsel. *See, Jones v. State*, 855 So.2d 611, 618 (Fla. 2003); *Asay v. State*, 769 So.2d 974, 986 (Fla. 2000). For the foregoing reasons, the Defendant has not shown that Malnik's representation was deficient, or that the alleged deficiency resulted in any prejudice. *Woods v. State*, 531 So.2d 79, 82 (Fla. 1988). Additionally, this Court finds that Malnik's performance involved reasonable trial strategy given the facts with which he had to work and the Defendant's claim of innocence.
>
> After reviewing the Defendant's Motion and the testimony elicited at the Evidentiary Hearing, this Court finds that the Strickland prongs for deficiency and/or prejudice have not been met, and therefore, the Defendant's Claims X and XI must be **DENIED**.

(PCR.4 651-54)

A review of the record evidence supports these findings and legal conclusions. Malnik did a proper, thorough investigation under Wiggins, developed a strategy, and made reasoned decisions not to present Dr. Jacobson's testimony as well as Pagan's alleged substance abuse problems before the jury.[11] Much of the evidence Pagan maintains was not discovered/presented was in fact gathered during counsel's investigation and developed before the jury and/or trial court in the Spencer hearing. Deficient performance has not been shown and the evidence now

[11] Pagan's postconviction expert, Dr. Cunningham, agreed with Malnik's strategy. He offered that absent an Axis One major mental disorder, a "battle of the experts" should be avoided. In his opinion, what is important is Pagan's history, not the labels placed on his disorders such as anti-social personality or borderline personality disorder. (PCR.19 1454-55, 1469).

offered as mitigation does not establish prejudice. Had such evidence been developed and/or presented, the sentencing result would not be different as the "new" mitigation was either cumulative or merely a different way of presenting the same information. The aggravation of (1) prior violent felony;[12] (2) felony murder; and (3) cold, calculated, and premeditated ("CCP") are unchallenged; nothing has been offered to change trial court's conclusion that "[e]very one of the aggravating factors in this case, standing alone, would be sufficient to out-weigh the mitigating circumstances." (TR.6 1125). Malnik fulfilled his professional responsibility under Wiggins; Ake; and Strickland.

By the time of Pagan's 1996 trial, Malnik had been practicing about 14 years.[13] He inherited Pagan's case from

[12] The prior violent felony aggravator was based on five prior convictions: (1) two counts of aggravated battery with a deadly weapon; (2) indecent assault; (3) attempted murder of Latasha Jones and Lafayette Jones; (4) first-degree murder of Freddie Jones; (5) first-degree murder of Michael Lynn. (TR.6 1115).

[13] Since 1982, Malnik practiced criminal law exclusively. He was an Assistant Public Defender for seven years, with approximately 50 jury trials. For three years he was with Larry Davis, a criminal defense counsel, and between 1993 and 1999 he had his own practice. During that time he did "two stints" with the Capital Collateral Regional Counsel where he handled six capital postconviction cases. Prior to or contemporaneous with Pagan's case, Malnik handled seven first-degree murder cases, two of which were guilt phase only, the others were penalty phase only. Malnik did specialized training during his career. He took two or three "Life Over Death" seminars which focused on representing murder defendants in the guilt and penalty phases.

prior penalty phase counsel, Mickey Rocque, who had been on the case for a year and had completed some investigation, including obtaining a mental health expert, Dr. Rich. Although Mr. Rocque had secured Dr. Rich, after Malnik had reviewed Dr. Rich's evaluation with the doctor and Mr. Rocque, Malnik obtained the appointment of Dr. Jacobson for purposes of mental health and mitigation. At the time of his July 1994 appointment, Malnik was aware of the aggravators applicable to the case and had the trial discovery. He did not use an investigator or mitigation specialist. Rather, Malnik conducted his own investigation by obtaining school records, jail records, interviewing Pagan and his family/friends, and consulting with Dr. Rich, Dr. Jacobson, and Mr. Rocque (PCR.17 1092-97, 1101-08; PCR.18 1165-69). While Malnik did not have the actual hospital records, he had discovered that Pagan was in the hospital briefly for an appendectomy which was not significant. Further, he knew Pagan had been hit in the head as a child, but was not hospitalized and had not lost consciousness. Malnik also had Pagan's prison records and the Public Defender's files from the prior violent felony convictions (PCR.17 1113-20).

Dr. Jacobson was appointed shortly before jury selection because Malnik knew the trial would last two months and there

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Almost all of his continuing legal education credits were in criminal law. (PCR.17 1083-86).

would be a significant break between the guilt and penalty phases (about two-and-one-half months). Malnik disagreed he was deficient for waiting to have Dr. Jacobson appointed, and disagreed with any implication he waited too long to start. Instead, he recalled "there had been substantial investigation into Mr. Pagan's case before the case began as evidenced by [his billing] records and the notes provided to [Capital Collateral Counsel.]" Malnik had collected "a lot of information about Mr. Pagan's life before...we went to the psychologist" and this information was passed onto Dr. Jacobson who conducted neuropsychological testing. (PCR.17 1121-25).

Malnik had a reasoned strategy for withholding Dr. Jacobson from the jury, but presenting her at the Spencer hearing as is evident from the following:

> A. My own views, and I have reasonable doubts about this, really are irrelevant at this point but the problem we had with the A.D.D. was that the State's theory was that Mr. Pagan was the calm one and that the A.D.D. as an explanation for this crime was totally inconsistent with the behavior of the person that was convicted of this crime, that being somebody that was methodical, cold and seemingly not the hyper one. The hyper one in this case was Willie Graham. So to answer your question, the A.D.D. was a problem because it didn't explain the crime.
>
> Q. Did you discuss this problem with Dr. Jacobson?
>
> A. Very much.
>
> Q. And as it related to the crime very much so?
>
> A. Where it became the greatest problem with me was

when I took Stock's deposition, that's where it became a problem that the A.D.D. was problematic in terms of explaining the crime. To really answer your question more would be this, if you had a crime in which it appeared that somebody just flipped out and you could show that they, that they had a history of psychosis, that that disorder, whatever that psychotic disorder would help explain the crime. This A.D.D. did not help explain this crime and in a lot of ways it was inconsistent with the crime.

...

A. ...I was aware that literature would suggest that A.D.D. could, could be -- people with that could be more prone to commit crimes. I knew that and I think Jacobson explained it. The difficulty that I had with it as a mitigator was that it didn't necessarily explain the crime to a jury. It may explain the crime to a scientist, it may to a psychologist looking at it but the perception of a jury could be to -- It wouldn't necessarily square with it. I don't want to go beyond your question...there was some inherent problems with it.

Q. Okay. So, any value that the diagnosis of A.D.D. on Mr. Pagan's entire life you thought was not as important as to, as important as the damage it would have caused because of the guilt verdict?

A. ... I believe that Dr. Jacobson's testimony as to A.D.D. had value. In preparing for this hearing I read where I was going to call her as a witness in the penalty phase that ... my opening mentioned calling a psychologist. Unfortunately, what I felt was after taking Dr. Stock's deposition I felt, one, that I was going to have difficulty proving A.D.D., that his testimony unfortunately for a lot of reasons was going to be stronger and was going to -- one, I wasn't even sure I was going to establish a diagnosis. Two, if I could establish it the value of it was going to be greatly diluted, that's comparing Stock's testimony to Dr. Jacobson's testimony.

...

Q. Okay. So, at the time that you were going

through this process I'm trying to decide whether or not to put Dr. Jacobson on and testify about the A.D.D., you did not have any of the information contained in the school records[14] that would have given a strong indication of A.D.D. or A.D.H.D.?

A. I've got to take issue with your characterization of the school records. The school records never stated that he suffered from A.D.H.D. The school records suggested some behavioral indications of A.D.H.D. but one of the things that Stock pointed out in the Spencer hearing was that by the '70's in most schools people with A.D.H.D. were being classified, it was being classified as a disability. So when I ultimately had the school records there was never a classification of Mr. Pagan suffering A.D.H.D., so I have to take issue with the second part of your statement. First, I probably didn't have them at the time of the penalty phase. But two, ultimately when I did have them, the school records, they never confirmed A.D.H.D., he was never classified as that. That doesn't mean that he didn't have it, but I didn't have records indicating that he was being treated for A.D.H.D. in school.

...

A. ...but here's a problem that I had, Mr. Cannon, this was something that LaPort does that was very slick. When he questioned the, the friend of Mr. Pagan, the friend from New York he asked him specifically about some of Alex's behavioral characteristics in the fifth grade, was Alex jumpy, he was not paying attention. It turned out that Alex appeared to be focused, according to this friend, so that there wasn't even some of the anecdotal evidence to suggest that he had A.D.H.D.

...

A. Correct. I think he asked about his behavior and basically -- so anecdotally from his friend, again, I

[14] In spite of his earlier confusion over the timing of receipt of the school records, Malnik made it clear he had the school records by February, 1997 before he made the decision on how best to present Dr. Jacobson. (PCR.18 1165-70).

> realize that his friend is not the best historian but there was contrary anecdotal evidence that he suggested that he suffered from A.D.H.D.

(PCR.17 1130-1135).

Malnik reiterated regarding his decision to reserve Dr. Jacobson for the Spencer hearing:

> A. ... I've thought very long and hard about this answer and I know how important this proceeding is to Mr. Pagan and I will tell you that I have vivid recollection of I knew that if I did not put this evidence on this would be very easy for another attorney years down the road to second guess me. And at the time I contemplated putting this evidence on because I thought that there's a probability that he's going to get the death penalty, that this is a very bad case factually, that there's aggravation, and I truly at the time, and to this day, believe that I made the right choice not putting her [Dr. Jacobson] on and I'll tell you really why. The evidence that we had in terms of mental health mitigation I would classify as legitimate, but honestly not the strongest. Why do I say that? I did not have any statutory mental health mitigators. I had obtained the services of a doctor who had a reputation of being defense oriented. She could not give me any statutory mental health mitigators. Why she couldn't you would have to ask her, but I suspect from our conversations the reason being was that Mr. Pagan denied ... involvement in this case. So, when I'm looking at what I'm going to put across I don't have statutory mental health mitigators. ...I have A.D.D., which could be a diagnosis and I agree with you, I didn't have the school records,[15] but I didn't have the strongest indications that he suffered from A.D.H.D., I had no information that, that he did, that he ever had been labeled with that. I had a boarder-line (sic) personality disorder, which to a jury, based on

[15] The Spencer hearing transcript reveals Dr. Jacobson had the records before testifying and used them to support the ADD finding. (ROA.32 3672, 3687, 3694-95; PCR.18 1165-70).

my experience, is not one of the most appealing mental health diagnosis that you could get. I much would have preferred a Bipolar or some type of psychotic disorder. So I don't have the strongest information. However, I would have put her on but for the fact that on the other side I had Dr. Stock and I had his evaluation. And in preparing for today, Mr. Cannon, I did some gainsmanship (sic) in this case. I had her report for a month. I waited until the last possible minute to file the notice of intent under 3.202. I waited until about, to give the State only about 21 days because I knew I had relatively mental, weak mental health mitigation and unfortunately LaPort moved under, under that rule, which was relatively new at the time, to get a doctor appointed. The doctor that he got appointed was a doctor, unfortunately, I was familiar with. When I say unfortunately, he was a doctor who had been in a previous death penalty case of mine. I knew his credentials were stronger than my witness. Why do I say that? I say that because this doctor had worked in like a state hospital in Michigan. He had very strong credentials. He had credentials dealing with a lot of experience in making anti-social personality diagnosis. I believed after taking the deposition, which I took at his house, literally, at the eleventh hour in this case, that he was going to rebut, that he was going to rebut the A.D.D., he was going to rebut the boarder-line (sic) personality disorder. But the worse (sic) thing that he was going to do was he was going to, and I believe that the Court would allow him to, he was going to make a diagnosis of anti-social personality disorder, which based on everything that I had read in all of my experience, was the absolute worse (sic) label that we could be traveling under. And unfortunately it was a, it was a diagnosis that would fit the crime. The jury made a determination. So truly, Mr. Cannon, I weighed everything and there are things that I questioned, believe me, this is the seven/five case, there's not a month I don't think about Mr. Pagan, but this is not a decision that I would take back.

...

A. I was worried about Dr. Stock for two reasons. I was worried that he was an expert who was going to testify more forcefully...to a jury had better

> credentials than my doctor and I was worried about the content of his testimony.

(PCR.17 1130-113).

Had it not been for Dr. Stock, Malnik would have presented Dr. Jacobson to the jury. In Malnik's opinion, Dr. Stock had done a very effective job of showing that the borderline personality disorder was an incorrect diagnosis. Malnik was concerned that Dr. Stock would testify before the jury about the anti-social personality disorder which would put the defense in the position of having to rebut that. (PCR.17 1146-48). In the Spencer hearing, Dr. Jacobson did try to rebut the anti-social personality diagnosis. (PCR.16 1149).

It was Malnik's position:

> A. ... [Dr. Jacobson's] attack, because she, she helped prepare me for Stock's deposition, her attack was basically to say that one of the precursors for anti-social personality disorder is a showing of a conduct disorder. That was going to be the way that we could have tried to rebut it.
>
> ...
>
> A. ... but my feeling with the information that I had at the time was, what I'm going to try to advance is going to be negated and it is going to be negated in a way that's going to put Mr. Pagan in the worse (sic) possible light. So I may be winning technically the battle of the experts, but I've got a jury that's going to be thrown out of concept that they can hammer on and it is going to give Mr. LaPort the opportunity to redo the crime with Dr. Stock, that's what I anticipated happening.
>
> ...

A. No. [Dr. Jacobson] did not believe that there was information to suggest conduct disorder and that was what we tried to do in the Spencer hearing.

...

A. One of the things that, that came out in the deposition of Dr. Stock, and I was present for the interview, was that Mr. Pagan was talking to Dr. Stock about his involvement in gangs and guns. That information I anticipated would have come out in the penalty phase and would have been devastating because whether he was under fifteen, to match the conduct disorder or whether it was after fifteen as far as I was concerned if the jury heard that, that he was involved with gangs and guns, just might as well kiss his case goodbye.

...

A. I think if a jury in this case would have heard that information, that it would have been devastating and that's why I didn't want Stock to take the witness stand because there were things in that interview, and candidly, there were things that Dr. Jacobson did. I think that Dr. Jacobson liked Alex a lot and she was going to do everything that she could do to help his case but Dr. Stock was not and if that information would have come out, in my experience in trying cases, again, I don't claim to be God, God knows we all make mistakes, but I didn't think that kind of information would be helpful to the mitigation presentation, especially when I'm trying to tell the jury that Alex is a good kid and was just lead (sic) astray. For them to hear things like that I thought would have been devastating.

...

A. No, my strategy was to keep as much negative information as I could from the jury. ... I didn't want to give them additional negative information, I didn't want to have a reputable psychologist coming in here explaining Mr. Pagan's conduct in the way most negative to him.

(PCR.17 1149-51).

During the penalty phase before the jury, Malnik presented Pagan's family members, friends, a jail officer, and Pagan's prior penalty phase counsel.[16] The record shows they discussed Pagan's family history, his formative years growing up in the Bronx without a father, but with loving grandparents and sister. Pagan's father, Miguel Pagan, abandoned his children born out of wedlock; he saw them infrequently. Miguel Pagan struck Maria Rivera, Pagan's mother, during the fight which precipitated his abandoning the family. He gave them no financial assistance. Maria Rivera then took up residence in an apartment near her grandmother's home. (TT.30 3479, 3483-85, 3487-90, 3493, 3508, 3535, 3541, 3543-44, 3553-54, 3590-91).

The jury heard Maria Rivera ("Maria") permitted several male criminals/drug dealers ("Poppie Joe", "Yogi" (Frank Sanhino), and "Sammie") to stay with her family and have cocaine present. These men influenced Pagan; he looked on "Poppie Joe" as his father, and visited him in prison. "Yogi" treated Pagan as a brother/son, and when Pagan was 14 or 15 years-old, Yogi suggested Pagan enter the drug trade and run Yogi's business. On occasion, Pagan went out with Yogi. "Sammie" stayed with

[16] These witnesses were: Carmello Miranda (Pagan's uncle), Yolonda Esbro (her son and Pagan were friends); Anthony Penia (friend since third grade); Sharon Livingston (BSO records supervisor-Pagan had no disciplinary reports); Maria Rivera (mother); Provilencia Alasaya (great-grandmother); Mickey Rocque (prior penalty phase counsel); and Evette Pagan (sister).

Pagan's family. Sammie and Yogi were treated like uncles. (TT.30 3479, 3483-85, 3487-90, 3493, 3508, 3535, 3541, 3547-49, 3552, 3559, 3562, 3565, 3568-69). Other men in Maria Rivera's life abused her in front of her children. (TT.30 3545-46, 3592).

The thrust of the penalty phase was that Pagan was a normal, active, fun-loving child, who had a good relationship with his mother, sister, extended family, and friends.[17] He was a good child, close to his grandfather, and helpful to his family, with aspirations of becoming an FBI Agent and going to law school. Pagan protected his younger sister, Evette. When he learned his friend in New York had broken his back, Pagan returned from Florida and visited his friend daily for two weeks. A devastating incident for Pagan was the death of his grandfather, whom he loved. (TT.30 3479, 3483-93, 3497-98, 3508-14, 3518-20, 3522-26, 3535, 3557-58, 3570, 3579, 3591-93).

When just 18 years-old, Pagan was sent to prison for four to five years. Upon his release, he became intoxicated once. (TT.30 3572, 3575). While incarcerated on the murder charges, he and his former penalty phase counsel, Mickey Rocque, became friends. Pagan appeared concerned about Rocque's marital difficulties and family. (TT.30 3587-88).

[17] Upon cross-examination, classmate/friend, Anthony Penia, noted Pagan paid attention to his teachers and listened in class. Pagan appeared careful and organized; he was not distracted easily, nor did he lose things. He was not a discipline problem, but was sociable and controlled his behavior. (TT.30 3529-30).

Dr. Jacobson, additional family members, and a friend were presented during the Spencer hearing.[18] Dr. Jacobson[19] explained she spent 12 hours with Pagan doing testing and interviews. In addition, she reviewed his school records, depositions from the Indecent Assault case, and the probable cause affidavit from the search warrant for this case. She conferred with Malnik regarding Pagan's loss of his grandfather. (TT.32 3667, 3669, 3670-72, 3694-95, 3702-03, 3712-14, 3734-35).

Dr. Jacobson found Pagan had a full scale IQ of 107, but had a Borderline Personality Disorder and an Attention Deficit Disorder (ADD); Pagan was impulsive.[20] School records supported the ADD finding, a disorder for which Pagan was never treated. There was no evidence of a psychosis in February, 1993. Dr. Jacobson disagreed with the State's expert regarding his finding

[18] The defense presented: Dr. Jacobson, Doris Barbades (aunt), Miguel Pagan (father); and Cynthia Valera (friend).

[19] She was a licensed clinical psychologist since 1989 (eight years by time of trial), with specialized training in personality disorders, who had testified in eight to ten capital cases for both the State and defense. (TT.32 3667-72).

[20] With respect to ADD and the hyperactivity component, Dr. Jacobson stated: "The borderline -- the early first five years of life are critical in the development of the borderline personality disorder. He would have had the presence of A.D.D. during that time. ... So the presence of A.D.D. certainly exacerbated the parental pattern for borderline personality disorder. I believe they kind of worked on each other, and it's hard to tease them apart because A.D.D. was there from, I believe, the begining (sic) or certainly early enough on. ...You know, whether there was hyperactivity to what extent there was hyperactivity can only guess from the school records and Alex's description." (TT.32 3701-02).

of an Anti-social Personality Disorder. Dr. Jacobson expounded upon the research involving crimes committed by those with ADD. It was her opinion Pagan was developmentally and psychologically immature and had a deprived childhood. (TT.32 3675, 3684-87, 3692, 3697-3701, 3717-34, 3737-56).

Also Dr. Jacobson noted Pagan's family history, including abandonment by his father, physical/emotional abuse by his mother, suicide gestures, various injuries and broken arms. She reported Pagan had his first marijuana "joint" on his twelfth birthday, supplied by his "psychological father." Pagan did not have a normal childhood; there was deprivation and inconsistent parenting - his mother was mean one moment, and the next, telling him he was the man of the house. His role models were socially inappropriate. (TT.32 3679-82, 3694-3700).

Doris Barbadas reported at the Spencer hearing that Pagan's father had little to do with his son. Pagan was a funny, loving child, but exposed to criminals and drug dealers by his mother. These criminals would stay in his home and he idealized them. The children visited one of these men, whom they considered their father, while he was in prison. (TT.32 3760-64, 3772).

According to Miguel Pagan, he left for the Merchant Marines before Pagan was a year old and did not stay with his family much after returning from duty. Yet, he spent time with his children afterwards, had a good relationship with Pagan, and

supported them financially. Later, due to problems with Maria Rivera, Miguel stopped seeing the family, moved to Florida without telling them, and had no contact for three to four years. One summer, Pagan spent time with his father. They continue to visit now that Pagan is in jail. Pagan never had a father figure. (TT.32 3779-82, 3785-91).

When Pagan was 23 years-old, he became involved with Cynthia Valera and they co-habitated for three or four years. In 1992, before they moved in together, Pagan was drinking daily, maybe a bottle of rum every other day. Once he was so drunk he nearly fell from the third story, and on another occasion he ran after a train. Pagan had cut his arm and face while drunk and complained nobody loved him. (TT.32 3797-3803).

During the **evidentiary hearing**, Pagan's new clinical neuropsychologist, Dr. Dee, noted that comments contained in Pagan's school records were consistent with a "history of Attention Deficit Disorder." (PCR.19 1327). He offered that Pagan had a full scale IQ of 120, but the memory scale test indicated cerebral damage or memory impairment and because it was in the normal range, but the IQ was in the superior range. This, Dr. Dee opined, might impact Pagan by making it more difficult for him with "new learning" and that "impaired memory functioning" will manifest itself as forgetfulness, i.e., may forget where he is going, or "increased impulsivity and

irritability." Yet, in response to the question how this impairment might affect Pagan, Dr. Dee thought it would be difficult to know how memory impairment affected Pagan's behavior during the crime, but attempted to suggest the crimes were not sophisticated and were poorly carried out to suggest impulsivity. (PCR.19 1317-22, 13267, 1338-45).

Detracting from Dr. Dee's opinion is his belief that there was impulsivity in the crimes because **he did not see** "any particular reason these people needed to be killed." He then admitted "I don't know all of the details of the crime, only what I've read from the court, you know, files and people's comments on it." (PCR.19 1335). Dr. Dee admitted he did not know that the trial evidence showed that Pagan had voiced his intent to kill all in the home even before being dropped off at the crime scene. Likewise, Dr. Dee did not know that before entering the victims' home, the co-defendant had told Pagan not to kill the children although he stated he was aware Pagan had said, just before shooting the six-year-old boy, "Shortie, if you live through this make sure you go to school everyday so you don't have to grow up to be like me." Dr. Dee's stated **"**I don't know that [the crime facts] are relevant to the conclusion that I make**."** **(**PCR.19 1335-38). Clearly, this weak testimony does not establish either deficient performance or prejudice arising from Malnik's representation as required by Strickland.

Pagan's second new mental health expert was Dr. Cunningham[21] whose testimony was limited to what he believed the defense did incorrectly. (PCR.19 1472). The essence of his testimony was a disagreement with counsel's strategy. The doctor believed that more emphasis should have been placed on showing how Pagan reached the point in his life to commit murder. Dr. Cunningham's focus was on Pagan's history and damaging developmental experiences and suggested the factors he would have offered were: (1) multi-generational family dysfunction; (2) sexual abuse;[22] (3) community violence; (4) incarceration in adult prison when young; (5) no post-prison intervention programs; (6) chronic tension between parents; (7) incarceration of father for drugs; (8) Pagan's alcohol/drug abuse; and (9) Attention Deficit Disorder. (PCR.19 1385-90).

A review of the above evidence establishes Malnik conducted a proper investigation under Wiggins. He contacted family and friends, developed a history of Pagan's background from these witnesses, and did further investigation based upon their reports. Malnik obtained information from Pagan's schools, his prior criminal history, and noted he had had no hospitalizations of any significance. Further, Malnik reviewed the competency

[21] Unlicensed in Florida, he was found an expert in forensic and clinical psychology, but **not** Florida mitigation. (PCR.19 1472).
[22] Dr. Cunningham did not know if Pagan discussed with his other doctors the alleged sexual encounters he had with women, three or more years his senior. (PCR.19 1385-90).

evaluation of Dr. Rich and obtained a mental health expert, Dr. Jacobson, for mitigation and the penalty phase.[23] Malnik provided her with pertinent information he gathered and the doctor considered this information along with Pagan's interview and test result. Afterwards, Malnik discussed the evaluation with Dr. Jacobson and obtained her assistance in preparing for the State's mental health expert, Dr. Stock.

Malnik's penalty phase representation was constitutionally proper. In order to prove ineffectiveness in this area, there

[23] Dr. Jacobson was appointed in October, 1996 some five months before the March, 1997 penalty phase. Pagan has failed to show that Dr. Jacobson did not have all of the materials and information she needed to conduct a proper evaluation. In fact, none of Pagan's new experts have opined about any mental disorders not uncovered by Dr. Jacobson. Instead, Dr. Dee noted there was memory deficiency, but he could not tie it to the crime and Dr. Cunningham would have preferred that Malnik have focused on Pagan's historical development and that Dr. Jacobson not have been presented to avoid a "battle of the experts." Such cumulative evidence and/or disagreement with strategy are not sufficient to label counsel ineffective. It is well settled counsel does not render ineffective assistance by not placing before the jury cumulative evidence. Rutherford v. State, 727 So.2d 216, 225 (Fla. 1998)(finding evidence offered at postconviction hearing was cumulative to that presented during penalty phase, thus, claim was denied properly); Van Poyck v. State, 694 So.2d 686, 692-94 (Fla. 1997) (finding defendant failed to prove ineffective assistance where life-history account argued for on postconviction was, in large part, cumulative); Woods v. State, 531 So.2d 79, 82 (Fla. 1988) (reasoning "jury, however, heard about Woods' [psychological] problems, and the testimony now advanced, while possibly more detailed than that presented at sentencing, is, essentially, just cumulative to the prior testimony. More is not necessarily better."); Card v. State, 497 So.2d 1169, 1176-77 (Fla. 1986) (holding counsel cannot be deemed ineffective for failure to present cumulative evidence).

needs to be an almost total abdication of counsel's duty to investigate mitigation. See Rompilla v. Beard, 545 U.S. 374 (2005) (finding ineffective assistance because counsel had court records available to him showing additional mitigation leads, but failed to read files); Wiggins, 123 S.Ct. at 2542 (finding counsel ineffective where there was a complete abandonment of representation, where counsel did not investigate or present mitigation, but merely accepted presentence report). Counsel **is not** ineffective merely because, years later, one can point to something different or more that could have been done. Chandler v. United States, 218 F.3d 1305, 1312-14 (11th Cir. 2000).

Also, State v. Coney, 845 So.2d 120 (Fla. 2003) is instructive because it shows what constitutes ineffective assistance of penalty phase counsel, and thus, by contrast shows Malnik rendered constitutionally competent assistance. In Coney, counsel failed to obtain the assistance of a mental health professional until just days before the penalty phase began. Further, the experts hired were confused about the purpose of their evaluation, actually believing they were looking for aggravators or mitigators, then eventually conducting a competency examination, instead of one for mitigation. Id. at 127. Here, Malnik had reviewed/assessed the competency evaluation conducted by Dr. Rich leading him, prior to trial, to obtain the appointment of Dr. Jacobson for mitigation and mental

health evaluations. Malnik supplied his expert with supporting background information. Dr. Jacobson, unlike the doctors in Coney, had conducted eight to ten capital penalty phase evaluations before working on Pagan's case. Also in Coney, the postconviction mental health experts opined about "extensive evidence of mitigating circumstances," Id. at 127, yet here, Pagan's new doctors did not develop any mitigation not substantially produced at trial or in the Spencer hearing.

Further, in Coney, this was penalty phase counsel's first capital case, and he found his client difficult to handle. In contrast, this was Malnik's seventh capital case in his 14 years practicing criminal law. Also, Malnik and Pagan developed a good relationship which facilitated good communication between them as well as with family members and friends. Of import, Coney refused to talk about the penalty phase and death penalty resulting in counsel not discussing these matters with his client. Coney, 845 So.2d at 129. Such was not the case with Pagan and Malnik. While counsel for Coney knew of the prior violent felonies, he did not discuss them with counsel or review the prior records. Id. Here, Malnik not only discussed the prior violent felony cases with Pagan, but obtained the actual Public Defender's files, including all discovery.

Of particular import, the counsel in Coney did not secure a mental health doctor for his client until after conviction, even

though he was aware there would be only a two week recess between the guilt and penalty phases. Further, he supplied the doctors with little or no background information and failed to explain to the doctors the purpose of the evaluation. Malnik, on the other hand, investigated the penalty phase before and during the trial, obtained Dr. Jacobson's appointment before trial, knew she was versed in capital mitigation cases, gave her background information, and any delay in her earlier appointment was with the knowledge that there would be an approximate three month recess between guilt and penalty phases. Moreover, Dr. Jacobson's evaluation occurred in January 1997, and Malnik used some "gamesmanship" in withholding disclosure of this expert until the last minute, although the State secured its own expert later. It also appeared important to this Court when reviewing Coney that the attorney did not understand the law regarding mental health mitigating evidence. Again, in contrast, Malnik, not only had conducted capital trials, but he had worked for the Capital Collateral Regional Counsel in death penalty litigation, and had attended at least two "Life Over Death" seminars where the focus was on capital litigation.

Other differences between Coney and the instant matter are that Coney's counsel: (1) failed to present any mental health testimony; (2) "hastily obtained fragmented testimony from family members and friends"; and (3) the new doctors opined

about significant mitigation. Here, Malnik offered Dr. Jacobson[24] in the Spencer hearing to avoid damaging testimony coming before the jury,[25] such as an anti-social personality

[24] As Malnik explained in the evidentiary hearing, he decided not to put Dr. Jacobson before the jury because the mitigation was not the strongest, he did not have any statutory mental health mitigation, and the States' expert was prepared to label Pagan as anti-social which is a devastating diagnosis to have the jury learn. (PCR.17 1123-25, 1130-35, 1143-51). The best Malnik had by way of mental mitigation was the ADD diagnosis, which he thought would be better understood by the court, than the jury, as it did not help explain, and in fact was inopposite to the crime facts. Further, as feared by Malnik, Dr. Stock could have discussed his interview with Pagan which disclosed involvement in gangs and with guns. This would have been devastating in Malnik's estimation, irrespective of the fact that Pagan was older than fifteen at the time. For these reasons, Malnik chose not to put this information before the jury. This decision was a deliberate, conscious, strategic choice, well thought out in advance and after consideration of the State's evidence and mental health expert, as evidence by the trial transcript where Malnik disclosed to the court, at the time of the penalty phase, that Dr. Jacobson would not be called. This strategic decision was confirmed and adopted by Pagan. (TT.30 3532-33, 3580-81). Such is the epitome of competent representation. "[C]alling some witnesses and not others is 'the epitome of a strategic decision.'" Chandler, 218 F.3d at 1314 n.14 (citation omitted).

[25] The reference to age appears to be related to the age component in the anti-social personality disorder. Clearly, Malnik felt that allowing the jury to hear the label of anti-social applied to Pagan would be very damaging, even though an argument could have been made, and was made to the court at the Spencer hearing, that Pagan was not anti-social. The issue is twofold, anti-social is a very bad label, but even if it could be rebutted because Pagan was not involved with gangs and guns before he was fifteen, clearly, those are destructive activities for any teenager and young adult, especially one convicted of murder. Permitting the jury to hear such information, when a more positive picture is being drawn by the defense, only harms Pagan. The seven-to-five vote for death may have been due in large part to Malnik's strategy of withholding Dr. Jacobson from the jury. Malnik presented a person, who in spite of being surrounded by drug dealer/criminals and abandoned by his father,

designation[26] as found by the State's expert, and had obtained a reasonable and well supported history from family members and friends well before the start of the penalty phase. Pagan's new doctors did not testify to any significant mitigation which had

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was a loving, caring person who grieved for his grandfather, comforted his seriously injured friend, and loved his family. Clearly, allowing the jury to hear about substance abuse problems, involvement in gangs, use of guns, and the finding by a well respected psychologist that Pagan was anti-social, would do nothing to mitigate the cold, calculated and premeditated murders, but instead would detract significantly from the positive character Malnik tried to portray. Neither deficiency nor prejudice of Strickland has been shown.

[26] This Court has acknowledged that anti-social personality disorder is "a trait most jurors tend to look disfavorably upon." Freeman v. State, 858 So.2d 319, 327 (Fla. 2003). Without question, shielding the jury from highly damaging mental health testimony is a valid, professional strategy. See Burger v. Kemp, 483 U.S. 638, 792 (1987)(finding counsel's decision not to present defendant or psychologist for fear of very negative evidence on cross-examination was reasonable); Darden v. Wainwright, 477 U.S. 168, 186 (1986)(same); Henry v. State, 862 So.2d 679, 686 (Fla. 2003) (same); Rutherford v. State, 727 So.2d 216, 223 (Fla. 1998) (same); Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997) (same); Bryan v. Dugger, 641 So.2d 61, 64 (Fla. 1994) (same); Ferguson v. State, 593 So.2d 508, 510 (Fla. 1992); State v. Bolender, 503 So.2d 1247, 1250 (Fla. 1987) (holding "[s]trategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected"). The Eleventh Circuit Court of Appeals likewise recognizes that a decision to forego mental health evidence through an expert is appropriate after investigation and analysis of evidence. See Davis v. Singletary, 119 F.3d 1471, 1476 (11th Cir. 1997); Spaziano v. Singletary, 36 F. 3d 1028, 1039 (11th Cir. 1994); Grayson v. Thompson, 257 F.3d 1194, 1227 (11th Cir. 2001); Glock v. Moore, 195 F.3d 625, 638 (11th Cir. 1999); Mills v. Singletary, 63 F.3d 999, 1025 (11th Cir. 1995); Marek v. Singletary, 62 F.3d 1295, 1300 (11th Cir. 1995); Lambrix v. Singletary, 72 F.3d 1500, 1504 (11th Cir. 1996); Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995); Hance v. Zant, 981 F.2d 1180, 1184 (11th Cir. 1993); Card v. Dugger, 911 F.2d 1494, 1511 (11th Cir. 1990).

not been uncovered by Malnik. He rendered professional, constitutional representation, by conducting a reasonable investigation, from which he strategized not to call Dr. Jacobson or place negative aspects of Pagan's character before the jury. Malnik's representation was constitutional under Strickland. See, Coney, 845 So.2d at 127-133.

As reasoned in Henry v. State, 862 So.2d 679 (Fla. 2003):

> We have stated that defense counsel's reasonable, strategic decisions do not constitute ineffective assistance if alternative courses have been considered and rejected. *State v. Bolender*, 503 So.2d 1247, 1250 (Fla. 1987). A reasonable, strategic decision is based on informed judgment. See *Wiggins v. Smith*, 539 U.S. 510, ----, 123 S.Ct. 2527, 2538, 156 L.Ed.2d 471 (2003) (finding counsel's decision "to abandon their [mitigation] investigation at an unreasonable juncture ma[de] a fully informed decision with respect to sentencing strategy impossible"). Accordingly, we determine not whether counsel should have presented mental health mitigation but whether counsel's decision not to present such evidence was a reasonably informed, professional judgment. *See id.* at 2536 (where petitioner claimed counsel were constitutionally ineffective for failing to investigate and present mitigating evidence, stating "our principal concern ... is not whether counsel should have presented a mitigation case" but "whether the investigation supporting counsel's decision not to introduce mitigating evidence ... was itself reasonable.").

Henry, 862 So.2d at 685.

Further, Pagan has not shown that had Dr. Jacobson been presented to the jury, a life sentence would have been rendered, nor has he shown that her psychological examination was so "grossly insufficient" and she "ignore[d] clear indications of

either mental retardation or organic brain damage." Absent such evidence, Pagan is not entitled to a new sentencing. State v. Sireci, 502 So.2d 1221, 1224 (Fla. 1987). Had Dr. Jacobson been offered, the jury would have learned of Pagan's anti-social personality disorder and his involvement in gangs and with guns. As Malnik noted, such would have been devastating to Pagan given the cold, calculated, and premeditated manner this armed robbery and murder/attempted murder of a drug dealer's family was accomplished. The fact remains that the aggravation of: (1) prior violent felony; (2) felony murder; and (3) CCP; remain. Nothing undermines these factors or the sentencing court's conclusion, after hearing both Drs. Jacobson and Stock, that each aggravator alone outweighs the mitigation. (TR.6 1125).

Pagan also submits that Dr. Jacobson did not conduct a competent evaluation because she did not interview his family and friends personally and Malnik did not turn over information to her. (IB 8-59). However, contrary to Pagan's allegations, the record shows Malnik interviewed family/friends, and Dr. Jacobson interviewed Pagan, conferred with Malnik, and received supporting background information about the case. Pagan has not shown that mitigating factors were left undeveloped by Dr. Jacobson due to her failure to interview witnesses personally. More important, he has not shown that Dr. Jacobson's evaluation was erroneous or that a life sentence would have resulted had

personal interviews been conducted. Sireci, 502 So.2d at 1224.

Similarly, the constitutionality of penalty phase counsel's reasoned decisions is not undermined, merely because Pagan has now found new mental health experts to opine about different aspects of his mental condition and/or to offer a new approach to presenting his family history. See Jones v. State, 855 So.2d 611, 618 (Fla. 2003) (finding no ineffectiveness where new doctors conflicted with original experts); Asay v. State, 769 So.2d 974, 986 (Fla. 2000) (opining "court correctly found that trial counsel conducted a reasonable investigation into mental health mitigation evidence, which is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert."); Elledge v. Dugger, 823 F.2d 1439, 1446 (11th Cir.) (same), modified on other grounds, 833 F.2d 250 (11th Cir. 1987).

Moreover, the postconviction evidence was cumulative to that presented at trial; the "new" evidence and/or approach to presenting mitigation would not have produced a life sentence had such been given to the jury. Pagan has shown no prejudice arising from Malnik's representation.

The "childhood deprivation" mitigator[27] found by the

[27] The jury was advised of the dysfunction of Pagan's immediate family, abandonment by his father, and mother's poor parenting skills. At trial, Pagan offered that he was an abused child based on incidents where his mother may have been strict or gave

sentencing court rests upon the same evidence from which Dr. Cunningham would have this Court find generational dysfunction, community violence, and tension between parents.[28] See Rutherford, 727 So.2d at 225 (finding postconviction evidence was cumulative to that presented during penalty phase, thus, claim denied properly); Woods, 531 So.2d at 82 (reasoning "jury, however, heard about Woods' [psychological] problems, and the

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inconsistent direction. All Dr. Cunningham suggested was that additional history of dysfunction in Pagan's extended family and in prior generations should have been produced. However, the court found under the "catchall" statutory mitigator "childhood deprivation" based on the factors: (1) being raised in single family household with little contact with biological father; (2) father-figure was convicted felon whom Pagan visited in prison, and other male role models were criminals grooming Pagan for their drug business; and (3) Pagan witnessed domestic violence in his home. Further, the evidence offered by Dr. Cunningham was not significantly different than that presented by Dr. Jacobson. Moreover, there were many family and friends who testified that Pagan was a happy, loving child who had the love of his family, especially his grandfather and uncle, Carmello Miranda. Counsel may not be faulted because the trial court had rejected the defense evidence, and the new doctor has stressed other areas of Pagan's life while choosing to ignore the more favorable aspects.

[28] The jury heard Pagan grew up in the Bronx and Spanish Harlem in the presence of drug dealers and criminals. This evidence would be supported by the admission of criminals and drug dealers into Pagan's family home and their recruitment of Pagan into their drug trade. Also, the fact Pagan's parents were separated and domestic violence was witnessed would support the family tension and community violence. All of this is included in "childhood deprivation." Moreover, the jury was informed that there were threats made against Pagan's family necessitating one of Maria Pagan's friends involved in crime to hire an armed bodyguard who lived in the Pagan home. (TT.30 3565-66). Merely renaming the same evidence does not create a new mitigator or prove deficiency or prejudice under Strickland.

testimony now advanced, while possibly more detailed than that presented at sentencing, is, essentially, just cumulative to the prior testimony. More is not necessarily better.").

The pith of Dr. Cunningham's complaint is that a more detailed, family history should have been given to the jury. It matters not how far back Pagan's family was dysfunctional; it matters not that his ancestors experienced dysfunction in their families; it matters not how his parents came to create a dysfunctional family. The question is what Pagan experienced; was he subjected to a dysfunctional family, or as this Court found "childhood deprivation." Surely, if his ancestors came from dysfunctional homes, yet were able to provide a functional, loving environment for him, the family ancestry would offer nothing by way of mitigation. Unless Pagan's environment was dysfunctional, his ancestry, would not speak to "any aspect of [Pagan's] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." See Lockett v. Ohio, 438 U.S. 586 (1975) (defining mitigation).

Here, Pagan received the equivalent of a mitigator termed "dysfunctional family" when the court found "childhood deprivation" in mitigation based upon his broken home, contact with criminals, inferior male role models. Moreover, the three aggravators found in this case would outweigh any cumulative or

even any new evidence of dysfunction. See Tompkins v. Dugger, 549 So.2d 1370, 1373 (Fla. 1989)(finding no prejudice in failure to present additional evidence of abused childhood and substance addiction where evidence, even if admitted, would not have affected outcome of penalty phase as it would have been outweighed by three aggravators, including HAC and two prior violent felony convictions).[29]

With respect to the allegation of "sexual abuse" (PCR.19 1386), Pagan did not prove he told Malnik or Dr. Jacobson of these events. Counsel is not ineffective because Pagan opted not to disclose these alleged encounters. Squires v. State, 558 So.2d 401, 402-03 (Fla. 1990) (noting counsel's decisions circumscribed by defendant's admissions and evidence). Also, it has not been shown that adding this mitigator would overcome the

[29] Pagan was almost 24 years-old when he committed the instant crimes. In Tompkins v. Moore, 193 F.3d 1327, 1337 (11th Cir 1999), the court stated: "Evidence of physical abuse while a youth is admissible at sentencing, but Tompkins was twenty-six years old when he committed this capital offense. We have previously held that at least where there are significant aggravating circumstances and the petitioner was not young at the time of the capital offense, "evidence of a deprived and abusive childhood is entitled to little, if any, mitigating weight." *Francis v. Dugger*, 908 F.2d 696, 703 (11th Cir. 1990) (petitioner was thirty-one years old at the time of the capital offense); *accord Mills v. Singletary*, 63 F.3d 999, 1025 (11th Cir. 1995) ("We note that evidence of Mills' childhood environment likely would have carried little weight in light of the fact that Mills was twenty-six when he committed the crime."); *Bolender v. Singletary*, 16 F.3d 1547, 1561 (11th Cir.1994) (same holding where petitioner was twenty-seven years old at the time of the capital offense)."

three strong aggravators found here and would have resulted in a life sentence as required for relief under Strickland.[30] The sentencing judge, considering the postconviction claims involving sexual abuse, rejected relief. Pagan has not carried his burden of proving this was erroneous on the facts or law. Relief was denied properly and should be affirmed.

Also, the jury was aware that from the age of 19, Pagan an adult, was incarcerated for felonies, aggravated battery with a weapon and indecent assault. It is only reasonable to assume that incarceration would be in an adult facility. Such factor, if at all mitigating, was known to the jury. Whether or not there were post-incarceration programs for Pagan, who was a multiple-felon, does not satisfy the Strickland prejudice prong. As noted above, each aggravator alone outweighed the mitigation, thus, there is no reasonable probability that noting the lack of a program for released felons would result in a life sentence.

While neither the court nor jury was told of Miguel Pagan's drug addiction and related crimes,[31] the jury was aware that male

[30] Prior violent felony and CCP aggravtors are weighty. See Rivera v. State, 859 So.2d 495, 505 (Fla. 2003); Porter v. State, 788 So.2d 917, 925 (Fla. 2001).

[31] As Mainik admitted: "Maybe, maybe Alex at the time was not aware that his father had a criminal history or had a substance abuse problem, but I do know that [Dr. Jacobson] had roughly four to eight hours of clinical interviews with him so she could better speak to what she knew. But I can say that I did not know." (PCR.18 1179).

role-models in Pagan's life were involved in drug usage and trade. As such, whether his father was involved in drugs would be cumulative evidence. Further, the testimony was that Pagan spent little time with Miguel, thus, diminishing any mitigating value. Whether or not Pagan was aware of Miguel's drug abuse at the time of the crime, and whether it could be considered new evidence would not satisfy Strickland. Clearly, if Pagan did not inform his attorney of this fact or did not know of his father's activities, no deficiency or mitigating value can be shown. Similarly, if Pagan were aware, but had little to no contact with his father, which has been the defense theme, i.e., abandonment by father, then there would be little to no mitigating value and again neither deficiency nor prejudice under Strickland. None of the above scenarios warrant relief.

As far as Pagan's own drug/alcohol abuse, Malnik was attempting to show Pagan in a favorable light and did not want to give the jury more negative information.[32] Such was the basis

[32] Malnik's stated reason for not bringing out much information about Pagan's drug/alcohol usage was:

> Well, the picture that I was trying to paint of Alex, I don't think it was a, a distorted picture, you emphasize certain things, was, was positive, was positive attributes about him. The fact that he really had a lot, had a lot and has a lot of good in him. I wasn't trying to elicit negative type of things. I was really trying to humanize him to make them feel that this is somebody that doesn't deserve to die. Because one of the things that I did in the closing, I'm sure I did this in the voir dire, it was

for not presenting Cynthia Valera before the jury. Clearly, Malnik made a strategic decision not to press this information before the jury. This decision was made upon investigation of Pagan's alcohol/drug use, with the conscious, reasoned strategy in mind to put Pagan in the most favorable light for the jury.[33] Such is professional representation. See Occhicone, 768 So.2d at 1048 (holding strategic decisions do not amount to ineffectiveness "if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct").

The final mitigation area offered by Pagan is the ADD finding. This disorder was found by Dr. Jacobson and presented during the Spencer hearing. As a result, the sentencing court found ADD to be mitigation, therefore, making its presentation in this case cumulative evidence, unsupportive of the

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> kind of a set-up, was to really argue that the death penalty should be reserved for the worst of the worst and unfortunately this is probably one of the worst kind of crimes. But my argument was that he was far from the worse (sic) person. So, I wasn't, I wasn't going to elicit negative things about him in the penalty phase because that would have been somewhat inconsistent with that strategy.

(PCR.18 1235-36).

[33] Moreover, the defense was that Pagan did not commit these murders, thus, his drug or alcohol abuse would have little impact, especially where there was no testimony the crimes were committed under the influence of either substance. Not presenting this evidence could not be considered deficient nor prejudicial in light of the strong aggravation present.

ineffectiveness claim. To the extent Pagan argues the ADD should have been presented to the jury, the State has outlined above Malnik's strategy in this area, namely, why Dr. Jacobson, with arguably weak non-statutory mental mitigation was reserved for the Spencer hearing to preclude the State from presenting Dr. Stock to the jury with his finding that Pagan had an anti-social personality disorder, was involved in a gang, and with guns. The State reincorporates that analysis here. The Strickland standard for ineffective assistance has not been met. This Court should affirm the denial of postconviction relief.

ISSUE III

COUNSEL RENDERED EFFECTIVE ASSISTANCE REGARDING CHALLENGING PAGAN'S PRIOR INDECENT ASSAULT CONVICTION.

In Claim XIII of his postconviction motion, and again here, Pagan asserts Malnik rendered ineffective assistance because he failed to investigate or present evidence to rebut an indecent assault conviction used to support of the prior violent felony aggravator. Pagan claims Philip Howard and Evette Pagan could have been called as well as presenting testimony of Pagan's alleged sexual abuse by older women.[34] (IB 86-89). According to

[34] Pagan did not testify at the evidentiary hearing, thus, as noted in answer to Issue II, he has failed to prove that he told Malnik or Dr. Jacobson of the alleged sexual abuse he experienced at the hands of older women. Counsel cannot be faulted when his client withholds evidence. See Squires, 558 So.2d at 402-03 (noting counsel's decisions circumscribed by defendant's admissions and evidence). Disagreeing with

Malnik, he investigated the indecent assault case involving the victim, Linda Berry ("Berry"), in fact he had the Public Defender's file on the matter, read all the witnesses' testimonies and/or statements, and discussed the matter with Pagan. Upon the evidentiary hearing record, the court correctly rejected the claim based on the finding Malnik had investigated this matter, and made reasoned strategic decisions. The factual findings are supported by the evidence and the law was applied appropriately. The denial of relief should be affirmed.[35]

In denying relief, the trial judge reasoned:

> The Defendant claimed his counsel was ineffective because he failed to call mitigation witnesses regarding the facts of the prior violent felony aggravator, in violation of the United States and Florida Constitutions. (Defendant's motion at 43-45)....
>
> The Defendant argued that his counsel was ineffective for failing to call Phillip Howard to testify about the indecent assault conviction in order to mitigate the prior violent felony aggravator. (Defendant's Motion at 43-44). During the evidentiary hearing, Malnik explained how the presentation of Howard as a witness would not have been to the

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counsel's strategy to keep the indecent assault testimony to a minimum, and opting in hindsight, to suggest Pagan's alleged sexual abuse should be explored to explain the indecent assault does not establish ineffective assistance. See Stewart v. State, 801 So.2d 59, 65 (Fla. 2001) (finding "[c]laims expressing mere disagreement with trial counsel's strategy are insufficient.")

[35] The standard of review for ineffectiveness claims following an evidentiary hearing is *de novo*, with deference given the factual findings. Freeman, 858 So.2d at 323. The State reincorporates the general discussion of the law governing ineffectiveness claims provided in Issue II, supra.

> Defendant's advantage, as Malnik did not want to highlight the incident and make it the focus of the case. (E.H. v.2 130-31, 189-94). Further, the testimony at the evidentiary hearing established that Malnik investigated the prior violent felony conviction, took steps conducive to presenting favorable evidence and to limit as many of the negative aspects and effects of this case. This Court finds that counsel's performance was not deficient, was a reasonable strategic decision, and therefore, does not meet the requirements of Strickland. *See Stewart v. State*, 801 So.2d 59 (Fla. 2001). Therefore, this Court finds that the Defendant's Claim XIII is **DENIED**.

(PCR.4 655-56).

The record reflects Malnik[36] had the original defense counsel's file[37] and gathered from it the most favorable data. While he agreed it might have been helpful to offer a witness to impeach Berry, he noted such would create a problem he wanted to avoid, namely, allowing the indecent assault to become a feature of the trial. (PCR.17 116). Also, absent Berry stating she would have recanted completely, Malnik did not believe having Pagan's sister or friend testify about hearsay matters[38] (neither

[36] Malnik offered insight into his strategy considerations stating: "The problem that I felt that I had, and I think if you see what I did throughout this whole thing was I didn't want to make that incident the focus of, of the case. I didn't want to highlight the incident;" and absent Berry recanting, Malnik could not claim Pagan was innocent given the certified conviction. (PCR.17 1160-61).

[37] Malnik had the prior violent felony files from the Public Defender which showed Pagan was on probation at the time of the indecent assault for which he pled guilty and received a much lower than guidelines sentence. (PCR.18 1219-1224).

[38] The core of Howard's testimony related to the indecent assault was hearsay as he was not present at the time of the incident.

having been present for the assault) would under cut Pagan's confession and guilty plea. Further, while Howard and Evette could have testified, they faced credibility challenges given Evette was a loving sister, and Howard was a friend. Although Malnik did not talk to these witnesses about their statements, he read the files. He did not attempt to mitigate the indecent assault because the only eye-witnesses were Pagan and Berry.

Howard, 15 years-old at the time of the indecent assault, testified that at that time, 13 year-old Berry had a crush on Pagan and wanted to date him. (PCR.18 1270-75, 1280). When Berry found out Pagan was dating someone, she said she would get even with him. (PCR.18 1273). On the day they went to a Miami fair, Pagan was unable to go because of his house arrest and Berry was going to go with other friends. Upon their return, Berry's brother Mark became upset after talking to his sister noting that Pagan had kissed her. It was not until a few days later that Howard learned Pagan was being charged. (PCR.18 1274-76). From Chris Sanders (double hearsay), Howard learned Berry had told Sanders she had gone to Pagan's home where they had started kissing, then it stopped after she said "no." Howard admitted that on April 7, 1988 he had given a statement to an investigator regarding the March 13, 1988 incident wherein he reported Berry's comment she would get back at Pagan which he perceived as a joke by a little girl. He noted that he had seen Berry the day after the incident and she was upset and crying. (PCR.18 1279-51). This evidence is not the sort which would undermine/mitigate the prior violent felony aggravator. It would, however, have allowed the State to show that Howard did not believe Berry's "threat" and that she was, in fact upset and crying after the incident, not gleeful with sweet revenge. The inference could have been drawn by the State that such were not the actions of a 13 year-old child who had gotten her revenge, but those of one who had been assaulted. Furthermore, it would have merely prolonged and made a feature of the fact Pagan, a 19 year-old man under house arrest, committed a sex act upon the 13 year-old sister of a friend. Malnik had successfully informed the jury of the consensual aspects of the sexual conduct without belaboring the point further or allowing the State to put on the more damaging testimony Malnik feared.

While others could have shed some light on what happened before or after the incident, it was basically a “he say she say situation."[39] In Malnik's estimation, calling Howard would not have been to Pagan's advantage, and in any case, the State had the certified copy of the conviction/guilty plea. (PCR.17 1159-62). See Strickland, 466 U.S. 690-91 (opining “[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.”).

Further, Malnik successfully put before the jury Pagan's entire statement regarding the indecent assault which could be read as exculpatory in that Pagan was claiming a consensual encounter even though he admitted to intercourse. Malnik feared challenging the indecent assault too aggressively because such would open a Pandora's box to allow the State to bring out damaging facts of the crime itself and point out Pagan pled guilty. The "strategy was to limit this as much as possible, [the prosecutor's] obviously was to inflame" - to show Berry was a virgin. (PCR.18 1219-24).

[39] Malnik explained "What it meant was that there were no witnesses to this...other than Mr. Pagan and, and Ms. Berry. So in and of itself there's certainly some reasonable doubts and the unfortunate thing for Mr. Pagan was, I'm sure when this case came up he was looking at a probation violation. So it seemed to me like it was a defensible case that unfortunately...from reading the P.D. file, that he probably had to plead guilty to." (PCR.18 1219-1224).

As the court found, Malnik investigated the prior violent felony conviction, took steps to present evidence favorable to Pagan, limited the more negative aspects of the case, with the understanding that presenting additional information would allow the prosecution to delve into the matter further and present Pagan as one who pled guilty to the charge. Malnik did not highlight the conviction, but rebutted it by showing Pagan's somewhat exculpatory police statement, while keeping the jury from knowing the victim was a virgin and that Pagan had pled guilty. (PCR.17 1158). Counsel's strategy and actions were not deficient; he investigated the matter and made reasoned strategic decisions there from. Pagan's present disagreement with Malnik's strategy does not establish the representation fell below the professional norm. Stewart, 801 So.2d at 65 (finding disagreement with prior strategy insufficient); Occhicone, 768 So.2d at 1048; Chandler, 218 F.3d at 1312-14 (finding claim meritless simply because one can point to something different or more that could have been done).

Even if the indecent assault could have been mitigated or excluded, the prior violent felony aggravator remained proven by four other convictions.[40] Hence, the result of the sentencing

[40] (1) two counts aggravated battery with deadly weapon; (2) attempted murder of Latasha and Lafayette Jones; (3) murder of Freddie Jones; and (4) murder of Michael Lynn. (TR.6 1115).

would not have been different. Pagan has offered nothing to undermine those convictions. The Relief was denied correctly.

ISSUE IV

THE COURT CORRECTLY DENIED THE BRADY CLAIM RELATED TO KEITH JACKSON'S PLEA IN AN UNRELATED CASE (restated).

Pagan asserts it was error to deny relief on his Brady claim (Claim I below). Contrary to this, the record supports the ruling and refutes completely the claim that Jackson's Dade County plea deal was suppressed. Relief must be denied.[41]

In summarily denying relief, the court concluded:

> As the State has correctly asserted, since the evidenced was not suppressed, the Defendant did not establish a *Brady* violation. (State's Response at 16-17). This Court also finds that the claim is legally insufficient[42] because the Defendant failed to plead what "favorable evidence" was allegedly withheld. The record reflects that references to Keith Jackson's Dade County case can be found throughout the pre-trial records, including November 10, 1993 Defense Motion to Set Bond (Appendix to State's Response, Ex. 11 ¶¶ 14-20); April 15, 1994 Defense Motion to Suppress Physical Evidence (Appendix to State's Response, Ex.

[41] A summary denial of relief will be affirmed where the law and competent, substantial evidence support the findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998). "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." Lucas v. State, 841 So.2d 380, 388 (Fla. 2003) (citation omitted). See State v. Coney, 845 So.2d 120, 134-35 (Fla. 2003).

[42] This claim was insufficiently pled because Pagan failed to plead what favorable evidence was withheld. While he complained that the plea terms were withheld, he failed to state he was unaware of Jackson's Dade case or the terms. He did not offer that the plea was exculpatory or how he was prejudiced.

> 12 ¶¶ 5-8, 10, 35); September 16, 1994 Defense Motion in Limine to Admit Evidence Under Florida Statute 90.404(2) (Appendix to State's Response, Ex. 12 at 2); October 13, 1994 Defense Motion in Limine to Introduce "Williams Rule" Evidence (Appendix to State's response, Ex. 14 ¶¶ 3-5); January 17, 1995 Defense Notice of Reciprocal Discovery Submission (Appendix to State's Response, Ex. 15; May 22, 1995 State's Supplemental Discovery (Appendix to State's Response, Ex. 16); November 12, 1996 Defense Motion in Limine to Cross-Examine State Witness (Appendix to State's Response, Ex. 17 ¶¶13, 5, 7-10); December 3, 1993 Arthur Hearing transcript - deposition of Keith Jackson submitted (T. 259, 292-93); April 29, 1994 Suppression Hearing - testimony of Detective Peluso linking Jackson and Willie Graham to Dade case (T. 577, 590, 626, 632, 634); May 22, 1996 State's Supplemental Discovery Notice (Appendix to State's Response, Ex. 16); and the November 11, 1996 discussion on the Dade case. (T. 1396-1404).
>
> Furthermore, this Court finds that the Dade County charges were discussed during the opening statements and during Jackson's testimony on cross-examination. (T. 1471-72, 3116, 3132-32, 2137, 3139, 3163). Therefore, the Defendant's Claim I is **DENIED**. *See Thompkins v. State*, 872 So.2d 230, 239 (Fla. 2003). This Court adopts the State's Response relating to this claim, a copy of which is attached hereto as Exhibit A (See State's Response at 16-18).

(PCR.4 642-43).

As noted in Way, 760 So.2d at 911, evidence is not suppressed where it is available equally to the defense and State or where the defense was aware of the evidence and could have obtained it. Such is the case here. The record is replete with evidence the defense knew of Jackson's Dade case and plea

as it used the evidence to argue motions,[43] cross-examined Jackson on the matter,[44] and argue the matter before the jury[45].

[43] Defense counsel, Dennis Colleran admitted during the October 13, 1994 Reverse Williams Rule hearing that he traveled to Dade County and "rummaged through" the Jackson file and copied some deposition taken in that case. (State's Appendix Ex. 10 at 12, 17 - Motion to supplement the record pending). Also, in the hearing, counsel relied upon depositions given by Detective Peluso and Wanda Jackson, Jackson's wife, who discussed the Dade case. See also (1) 11/10/93 - Defense Motion to Set Bond (Ex. 11 ¶¶14-20); (2) 4/15/94 - Defense Motion to Suppress Physical Evidence (Ex. 12 ¶¶5-8, 10, 35); (3) 9/16/94 - Defense Motion in Limine to Admit Evidence Under Fal.Stat. 90.404(2) (Ex. 13 at 2); (4) 10/13/94 - Defense Motion in Limine to Introduce "William's Rule" Evidence (Ex. 14 ¶¶ 3-5); (5) 1/17/95 - Defense Notice of Reciprocal Discovery Submission (Ex. 15); (6) 5/22/95 - State's Supplemental Discovery which provided "1. Regarding Keith L. Jackson - please be advised that he was rearrested on the Dade County-Armed Robbery and Attempted Murder charge which also involved Willie Graham and David Bonelli. The Dade County State Attorney's Office advises that Mr. Jackson entered a plea to the charges and agreed to cooperate with them, if necessary. Mr. Jackson according to their agreement may be sentenced within a range from five (5) years probation to ten (10) years in prison within the discretion of the presiding Judge, Victoria Platzer." (Ex. 16); (7) 11/12/96 - Defense Motion in Limine to Cross-Examine State Witness (Ex. 17 ¶¶13, 5, 7-10); (8) 12/3/93 - Arthur Hearing transcript - Depositions of Keith Jackson submitted (TT.1 259, 292-93); and (9) 4/29/94 - Suppression Hearing - Testimony of Detective Peluso linking Jackson and Willie Graham to Dade case (Exhibits 11 - 17 in the State's Appendix to its Response pending supplementation of the record and TT.1 259, 292-93, 577, 590, 626, 632, 634). On November 11, 1996, just prior to opening statements, the parties discussed the terms of the recent plea agreement and argued whether there had been a decision in the Dade case. (TT.13 1396-1404).

[44] When Jackson was cross-examined by the defense, the Dade attempted murder was discussed, including the fact Jackson was arrested with Graham, had spent eight months in jail before the charges were dropped, and following the murders in this case, the Dade charges were resurrected. (TT.26 3116, 3131-39, 3163).

[45] In the defense opening, counsel referenced the Dade case where Graham and Jackson shot a drug dealer, and later "charges are still pending against" Jackson. (TT.13 1471-72, 1476).

In fact, Pagan admitted in his postconviction motion that the "state did notice the defense of this deal through supplemental discovery." His only complaint there was the State "did not give the full extent of the deal." (PCR.1 149 ¶10).

Below, Pagan claimed Jackson's plea, notes (as yet unidentified) on his performance, and violations noted, but not filed, were suppressed. However, given the vast amount of information Pagan had on Jackson's case and plea agreement, he has not established suppression of evidence. In fact, defense counsel admitted looking through Jackson's Dade file previously, thus, with due diligence, Pagan could have obtained the documentation he desired directly from the source, i.e., Dade County and law enforcement contact, Detective Starkey as counsel had "rummaged through" the Dade case file at least once before (State's Appendix, Ex. 10 at 12, 17 motion to supplement record pending) and had obtained Detective Starkey's deposition, thus, could have contacted the officer directly to investigate any alleged plea agreement violations. Based on this, there was no suppression as defined by Brady. See Tompkins v. State, 872 So.2d 230, 239 (Fla. 2003) (rejecting Brady claim as counsel knew of report); Way, 760 So.2d at 911 (requiring proof defendant did not have and could not have found evidence with use of due diligence before violation would be found).

No prejudice has been shown as Pagan's counsel brought out

the fact Jackson was charged with an attempted homicide in Dade. Any other information could have been gleaned from the file to show Jackson as not credible would not have changed the outcome of the trial as other testimony linked Pagan to the January burglary and February homicides including Quezada's account, Pagan's admissions, and the Jones' jewelry found in Pagan's apartment. Pagan, 830 So.2d at 803-04. There is no reasonable probability of a different result had additional evidence of Jackson's plea or performance been disclosed. Reed v. State, 875 So.2d 415, 430-31 (Fla. 2004); Guzman v. State, 868 So.2d 498, 507-08 (Fla. 2003) (rejecting Brady claim as counsel impeached witness thus, disclosure of payment of reward to witness would not have resulted in different outcome).

ISSUE V

RELIEF WAS DENIED PROPERLY ON PAGAN'S CLAIM OF A GIGLIO VIOLATION ARISING FROM KEITH JACKSON'S TESTIMONY ABOUT HIS DADE CHARGES (restated).

Pagan submits Claim II of his motion was sufficiently pled, thus, it was error to summarily deny his Giglio v. U.S., 405 U.S. 150 (1972) claim related to the State's failure to correct Jackson's testimony regarding the Dade charges/deal and for not investigating the full extent of the plea deal. (IB 91-92). The court found in the alternative; Pagan did not plead the case sufficiently because he did not plead each prong of Giglio, and

the record established Jackson's deal was discussed at trial.[46] This Court should affirm.[47]

> To establish a *Giglio* claim, it must be shown that (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *Suggs v. State*, 923 So.2d 419, 426 (Fla. 2005). The third element of *Giglio* differs from the prejudice or materiality prong of *Brady* in that "once a defendant has established that the prosecutor knowingly presented false testimony at trial, the State bears the burden to show that the false evidence was not material." *Guzman*, 868 So.2d at 507. This requires the State to prove that the presentation of false testimony was "harmless beyond a reasonable doubt," *id*. at 506, or in other words, that "there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla. 1986), cited in *Guzman v. State*, No. SC04-2016, 941 So.2d 1045, 1050 (Fla. Jun. 29, 2006). When reviewing these claims on appeal, we apply a mixed standard of review, deferring to the trial court's findings of fact but determining *de novo* whether the facts are sufficient to establish the elements required in each claim....

Ponticelli v. State, 941 So.2d 1073, 1088 (Fla. 2006).

As he did below, Pagan points to only the discrepancy

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[46] In rejecting Pagan's Giglio claim, the court stated:
... In his Motion, the Defendant argued that Keith Jackson's charges were reinstated before 1996, but the State misled this Court, the jury and counsel because the State did not want the defense to learn of the charges or Jackson's deal with the State (Defendant's Motion at 10). In response, the State argued that the Defendant's claims are conclusory, and the Defendant has not shown that the statements were "material." Further, this Court finds that a review of the record reveals that Jackson's plea deal was discussed during the trial. (T 3080-92). Therefore, this Court finds that the Defendant has not established a *Giglio* violation, and therefore, the Defendant's Claim II is DENIED. The Court adopts the reasoning in State's Response relating to this claim (See State's Response at 22-27). (PCR.4 643-44).

[47] A summary denial will be affirmed where the law and competent substantial evidence supports it. Diaz, 719 So.2d at 868.

between Jackson's statement that his Dade charges were reinstated in 1996 and the fact he was re-arrested in 1995.[48] The record establishes the parties knew of the plea terms, the jury was informed of such, and the State did not preclude Pagan from discussing the facts of Jackson's employment or the Dade case, given that the Dade charges were pending. Respecting the date of Jackson's arrest/reinstatement of the charges, the date was inaccurate, yet, the defense knew this by May 22, 1995 via the filing of the State's Supplemental Discovery, and could have impeached Jackson with this matter if it were material. Further, the evidence above and beyond Jackson's account established Pagan was guilty beyond a reasonable doubt. The record conclusively refutes Pagan's claim of a Giglio violation and establishes beyond a reasonable doubt that any "error" between allowing Jackson's testimony that the Dade charges were reinstated in a 1996 as opposed to 1995 to stand uncorrected was

[48] Pagan re-prints his allegation that the State did not want the jury to learn Jackson: (1) was facing a life sentence; (2) had answered questions differently in his Dade case deposition; (3) was working for the State in Broward; (4) parameters of the Dade plea deal; (5) Dade case involved an incident where drugs were stolen, the victim was kidnapped and shot; (6) had co-defendants in the Dade case; and (7) entered into a plea deal in exchange for his testimony against the co-defendants. However, again, Pagan points to no facts to support his alleged "insight" into what the prosecutor desired. In fact, as will be evidence from the State's references to the record, each allegation is refuted as the information either was given to the jury or Pagan's own records refute his allegations. Additionally, to the extent Pagan is re-raising his claim of a Brady violation, the State reincorporates its answer to Issue IV.

not material; it did not contribute to the conviction.

Pretrial, Pagan was denied permission to discuss Jackson's Dade case because there were no charges pending. However, on May 22, 1996, the State notified Pagan of the re-instituted Dade charges (State's Appendix Ex. 16, supplement pending).[49] Before opening statement, the fact the Dade charges were reactivated and Pagan's ability to discuss them was revisited. The court agreed the matter could be discussed. (TT.13 1395-1404).

Pagan selectively represents Jackson's testimony. When the direct examination is put into context, clearly, the jury was aware of Jackson's Dade case, his plea, co-defendants, and agreement to testify for the State. The record reveals:

> Q. [By State] Now, I want to take you back to February of 1992, February 25th. Did you have occasion to be arrested on that date?
>
> A. [By Jackson] Yes.
>
> Q. And who did you get arrested with?
>
> A. Willie Graham.
>
> Q. Anybody else?

[49] On **May 22, 1995**, the State filed "State's Supplemental Discovery" which provided "1. Regarding Keith L. Jackson - please be advised that he was rearrested on the Dade County-Armed Robbery and Attempted Murder charge which also involved Willie Graham and David Bonelli. The Dade County State Attorney's Office advises that Mr. Jackson entered a plea to the charges and agreed to cooperate with them, if necessary. Mr. Jackson according to their agreement may be sentenced within a range from five (5) years probation to ten (10) years in prison within the discretion of the presiding Judge, Victoria Platzer."

A. David Benelli.

Q. Where did that occur? What county?

A. Dade County.

Q. Did the Dade County's State Attorney's Office file some charges against you?

A. Yes.

Q. What were the charges that were filed against you?

A. Attempted first degree murder and armed robbery.

Q. Did you spend any time in jail as a result of those charges?

A. 8 months

Q. And were you released from custody after eight months?

A. Yes.

Q. What happened to the charges?

Q. They were, they said they were dropped, the charges were dropped but we had six months, they had like a couple of months to reinstate those charges.

Q. Okay. Now, did the charges ever get reinstated?

A. Yes.

Q. When did they get reinstated?

A. This year.

Q. 1996?

A. Yeah.

Q. Now, as a result of those charges did you obtain a lawyer?

A. Yes, I did.

Q. Okay. And have you entered a plea to those charges?

A. Yes, I did.

Q. What was the plea you entered?

A. Guilty.

Q. And are you now awaiting sentence in that case?

A. Yes.

Q. And are you in custody in jail or are you out on your own?

A. I’m out on my own recognition. (sic)

Q. And did the State Attorney’s Office arrange with you and your lawyer for you to become a witness in that case?

A. Yes.

Q. When you entered your plea, were you given any idea as to whether or not you were going to prison or what your potential sentence might be as a result of your plea to those charges?

A. They told me what my potential sentence might be.
Q. What is that?

A. Five years probation to ten years imprisonment.

Q. Okay. Now, in January and February of 1993, were those charges pending against you?

A. Not that I knew of, no.

Q. In other words, at that time were you under the impression that it had been dropped?

A. Yes.

Q. Were you surprised when they were reinstated in 1996?

A. Yeah.

(TT.25 3080-82). To the extent Jackson did not mention a re-arrest or re-opening before 1996, such is not material. As Pagan admits, via Exhibits A and B of his postconviction motion, the Dade plea was ratified on December 19, 1995 and showed Jackson was not facing a life sentence. (PCR.2 214-17). Also, the sentencing did not take place until April 27, 1997, almost two months after Pagan's penalty phase, and Jackson received 10 years probation. (PCR.2 219-27). The jury knew Jackson: (1) had active Dade charge; (2) faced 10 years in prison; (3) was charged with Graham; and (4) agreed to testify against his Dade co-defendants. Likewise, there was no suppression of the Dade crime facts as defense counsel discussed them in opening statement. (TT.13 1471-72). The difference between a 1995 and 1996 reinstatement/re-arrest is not material and harmless beyond a reasonable doubt. There is no reasonable probability this insignificant point caused the jury to convict. The result of the trial would not have been different had the jury known that Jackson's re-arrest took place in 1995 not 1996 or had the Dade facts been discussed in more detail especially in light of the strong evidence linking Pagan to the instant murder, as provided by his admissions to Quezada and discovery of the victims'

jewelry in his apartment. Pagan, 830 So.2d at 803-09. (TT 1553-72, 1833-52; 2122-2279, 2314-28, 2399-2422, 2453-2663).

With respect to the passing allegation the State suppressed information about where Jackson worked and that he gave different answers previously (IB 91 ¶6), Pagan offers the Dade deposition. (PCR.2 228-73). The deposition reveals **it was Jackson's counsel**, Lorna H. Owens, who objected to discussions about Jackson's work after Jackson had disclosed he worked at the Boys and Girls Club of Broward County, not the "State" as is commonly understood in criminal cases. To the extent Pagan's record could be construed as precluding the court from considering Jackson's Dade deposition, such was excluded *sua sponte* by the court only until counsel served the State with the material. (State's Appendix Ex. 10 at 12, 17-supplement pending). If there is another basis for Pagan's claim, he failed to identify it below or here, thus it is waived. Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) (finding notation to issues without elucidation insufficient). Even if the court should not have found the matter legally insufficient, the denial was correct as the record establishes beyond a reasonable doubt the discrepancy between telling the jury an attempted murder charge was reinstated in 1996 versus 1995 does not rise to the level of a Giglio violation. A court's ruling will be

upheld if there is an alternate basis, as here, for the ruling. Muhammad v. State, 782 So.2d 343, 359 (Fla. 2001).

ISSUES VI AND VII

RELIEF WAS DENIED PROPERLY ON CLAIMS OF COUNSEL'S INEFFECTIVENESS, DENIAL OF CONFRONTATION RIGHTS, AND PROSECUTORIAL MISCONDUCT SURROUNDING THE ALLEGED EXCLUSION OF WANDA JACKSON'S DISCOVERY DEPOSITION AND/OR TESTIMONY AS RAISED IN CLAIMS IV, VI, AND VII BELOW (restated).

Here, Pagan asserts his claim of ineffectiveness (Claim IV below) should have been given an evidentiary hearing so he could establish counsel was deficient for not seeking to introduce portions of Wanda Jackson's ("Wanda") deposition once she had been declared unavailable. (IB 93). He also argues that it was improper to summarily deny Claims VI and VII which alleged he was denied the right to confront Wanda when the State filed a Motion in Limine (TR.3 557-79) claiming marital privilege and by directing Jackson to claim the privilege. Contrary to Pagan's allegations, he never claimed in his postconviction motion that the deposition was one to perpetuate Wanda's testimony nor shown where in the record the State was successful in limiting Wanda's testimony, or where he was precluded from calling Wanda to testify. Moreover, the record does not establish that Wanda was declared "unavailable", or that Pagan asked to take her deposition to perpetuate her testimony. Rather, the record shows the State was seeking to preclude Wanda from testifying

about certain statements made to her by her husband, Keith Jackson, under the marital privilege (TR.3 577-79), but that the issue was rendered moot when the defense did not call Wanda to testify. As a result, there was no confrontation clause issue nor was there prosecutorial misconduct as the marital privilege issue was not invoked.[50]

Given that the court never ruled on the marital privilege issues because it never became ripe as Wanda was not called, and thus, was not precluded from testifying by State or judicial

[50] The record reveals the marital privilege issue was not addressed fully because Wanda was never offered as a witness. (TT.26 3167). In fact, on November 4, 1996, this matter was broached by the defense before voir dire, where counsel noted marital privilege had been litigated in Graham's trial and the State had moved to preclude admissions of the husband/wife communications on the basis of privilege and hearsay. Counsel started to make his argument against a similar ruling, however, this Court opted to have a hearing with the witness on the stand when the issue would arise. (TT.8 778-79). On November 11, 1996, prior to opening statements, the parties discussed the State's Motion in Limine (TR.3 577-79) to preclude discussion of communications between Wanda and Jackson. The State made it clear its motion would be applicable only if the defense called Wanda as was done in Graham's trial. (TT.13 1390). The court determined that further testimony was required before ruling, and that evidence could not be discussed in opening statement because there was no predicate for it. Defense counsel recognized that some narrowly construed areas of discussion were permitted in Graham's case, but he did not intend to comment on Wanda in opening. The court noted the only exception to the privilege where a crime was being committed involved the instance where the crime was being committed against the spouse. Defense counsel advised that if he decided to call Wanda he would take up the matter then. (TT.13 1391-92). Because counsel did not seek to introduce Wanda, the marital privilege became moot along with the Motion in Limine. Pagan has not shown where Wanda was declared unavailable or where she was excluded.

action, Pagan has not alleged, nor argued here, how a deposition taken for discovery or to perpetuate testimony purposes would be admissible to impeach Keith Jackson. Further, Pagan has not shown error in the court's determination that there is no prejudice under Strickland. Likewise, given the State's lack of success on its Motion in Limine, the court correctly denied relief on the direct appeal issues of the violation of the confrontation clause and prosecutorial misconduct. The ruling is supported by substantial, competent evidence and the law.[51]

Addressing these claims below, the court concluded :

> **Defendant's Claim IV**
>
> ... The Court finds that the Defendant has not shown that he is entitled to relief under *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires a two-prong analysis, first counsel's performance must have been deficient, and second, that such deficiency must undermine the confidence in the outcome of the proceedings. [c.o] As the State correctly asserts, the Defendant has not shown whether Wanda Jackson's deposition was taken pursuant to Fla. R. of Crim. P. 3190(j), (deposition to perpetuate testimony). If her deposition was not taken pursuant to that rule, a discovery deposition would not have been admissible. The Defendant cannot establish that his counsel's performance was deficient. [c.o.] Moreover, the Defendant has not satisfied the prejudice prong of *Strickland*, and therefore, the Defendant's Claim IV is **DENIED**. This Court adopts the reasoning set forth in the State's Response relating to this claim. (See State's Response at 32-35).
>
> **Defendant's Claim VI**
>
> The Defendant argued that his right to confront witnesses was violated when his counsel failed to

[51] Summary denial of relief will be affirmed where the law and evidence supports the court's findings. Diaz, 719 So.2d at 868.

cross examine Keith Jackson or Wanda Jackson concerning statements made by Keith Jackson. The Defendant claimed that this alleged failure by his attorney violated the Sixth and Fourteenth Amendments to the United State's Constitution, and the corresponding provisions of the Florida Constitution. (Defendant's Motion at 20). ...

The State counter-argued that the Defendant's claim is legally insufficient, as the Defendant does not specifically state how counsel's alleged errors were prejudicial.[52] Additionally, the State correctly asserts that the Defendant's allegations are conclusory, at most. Moreover, in this claim the Defendant intertwined an argument of alleged trial error, which should have been raised on appeal, and is therefore barred. Merely claiming that Wanda Jackson had knowledge of Keith Jackson's involvement in the offense is insufficient. Further, this Court finds that the Defendant has not demonstrated how the statements could have been admitted through a hearsay exception (State's Response at 37-39). Therefore, this Court finds that the Defendant's Claim VI is **DENIED**. The Court adopts the reasoning in the State's Response relating to this claim. (See State's Response at 37-39).

Defendant's Claim VII

The Defendant argued that the State committed prosecutorial misconduct by directing Keith Jackson to invoke the marital privilege and by doing so, the State violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. (Defendant's Motion at 23).

The State responded that this claim is without merit, as the Defendant cannot show where in the instant record the State successfully invoked the marital privilege at trial. (Response at 39-41 and

[52] All Pagan claimed below was that counsel should have cross-examined Jackson on certain topics given Wanda's deposition. Yet, Pagan never explained how Jackson could have been impeached with Wanda's deposition. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) (opining conclusory allegation of ineffective assistance do not require an evidentiary hearing).

> cases cited therein). Additionally, the record reveals that the issue was not fully addressed because Wanda Jackson was never offered as a witness (T. 3167). The State also correctly explained what occurred at the "Graham" trial" and in the instant trial. (see, State's Response). This Court finds that the Defendant cannot rely on a moot claim for relief. Therefore, this Court finds that the Defendant's Claim VII is DENIED, and the Court adopts the reasoning in the State's Response relating to this claim. (See State's Response at 39-42).

(PCR.4 646-49)

Initially in Claim IV below, the State argued the matter was conclusory as Pagan failed to identify where in the record or under what circumstances Wanda was declared unavailable, thus, it was left unexplained how counsel was deficient. (PCR.4 695-96). It was Pagan's claim Wanda's deposition should have been used to impeach Jackson. Yet, as the State pointed out, Pagan failed to identify where in the record, by allegation or citation, he had sought and was granted leave to perpetuate Wanda's testimony. (PCR.4 698). Citing to Smith v. State, 606 So.2d 641, 644 (Fla. 1st DCA 1992), the State noted discovery depositions, which is all Pagan alleged he had, were not admissible as substantive evidence. Hence, counsel could not be deemed deficient for not seeking to admit the inadmissible. (PCR.4 698). In the same vein, assuming the court at some point had precluded Wanda from testifying based on marital privilege, then via perpetuated testimony or live, Wanda would not be able to testify regarding those facts deemed privileged. Seeking to

admit a deposition would not overcome the privilege.[53] This supports for the court's denial of the claim.

Moreover, if Pagan had called Wanda or was able to admit her deposition as substantive or impeachment evidence against Jackson, the result of the trial would not have been different. Counsel impeached Jackson with **his** prior statements and involvement in the Dade case. Even had the jury rejected Jackson completely, Quezada's account of the night's events and Pagan's admissions in conjunction with the finding of the Jones' jewelry in Pagan's apartment is overwhelming evidence of guilt. Pagan has not shown that admission of Wanda's testimony would have resulted in a different outcome. Pagan, 830 So.2d at 803-09. (TT 1553-72, 1833-52, 2138-2279, 2314-28, 2399-2422, 2453-2663). The denial of relief must be affirmed.

With respect to Claim VI below, Pagan alleged in part it was error to invoke the marital privilege exception, but he failed to show were in the record this was done. Pagan is procedurally barred from claiming court error here. See Spencer v. State, 842 So.2d 52, 60-61 (Fla. 2003) (issues which could have been or were raised on appeal are barred from collateral review). Moreover, the record refutes that the marital

[53] An erroneous ruling will be upheld if there is an alternate basis for it. Muhammad v. State, 782 So.2d 343, 359 (Fla. 2001) (noting ruling will be upheld even if court ruled for the wrong reasons as long as evidence or alternative theory supports it).

privilege was invoked; instead it shows the matter was tabled until the defense sought to call Wanda, which it never did. (TT.8 778-79; TT.13 1390-92, 1399-1404). His insinuation of error is refuted from the record as he was not stopped from gaining process on Wanda, nor precluded from examining Jackson.[54] His confrontation clause complaints are meritless.

Furthermore, Pagan misses the point completely when he argues he deserved a hearing based on his allegations the State filed a Motion in Limine and that in her deposition Wanda testified her marriage was over. (IB 94-95). Because Wanda was never called at trial, whether the State filed the motion has no bearing on the matter, nor can there be any confrontation cause issue. The motion was never ruled upon as Wanda never testified

[54] Pagan has not shown how counsel could have cross-examined Jackson with statements he allegedly made to Wanda, based upon Wanda's discovery deposition. Such would have been improper impeachment. While a witness may be impeached with **his** prior inconsistent statements; see § 90.608, Fla. Stat. and § 90.614, Fla. Stat. What Wanda reported in her deposition regarding what Jackson said to her would be inadmissible hearsay, and does not fall within a legal exception or constitute proper impeachment on a collateral matter. Similarly, the matters Pagan suggests should have been discussed with Jackson are collateral to the trial issues. Whether Jackson thought he may come into some cash, had a habit of casing drug dealers' homes or had an affair with a drug dealer's wife are not of such a nature as to create a reasonable probability of acquittal even had the jury been so informed. Likewise, had the jury rejected Jackson's testimony completely, the balance of the evidence established the result of the trial was not undermined. Quezada linked Pagan to the murders, and the Jones' jewelry found in his room was further proof of his guilt. (TT 1553-72, 1833-52, 2138-2279, 2314-28, 2399-2422, 2453-2663). Strickland prejudice has not been shown. Relief was denied properly.

because the defense did not call her, thus, there was no State of judicial action to challenge. Pagan makes no attempt to show error in denying relief on the other grounds cited: insufficiency; lack of basis to impeach Jackson with hearsay deposition; and no Strickland prejudice. He has not shown a valid reason to remand for an evidentiary hearing.

ISSUE VIII

THE SUMMARY DENIAL OF CLAIM VIII REGARDING COUNSEL'S ALLEGED INEFFECTIVE CROSS-EXAMINATION OF DETECTIVE PELUSO WAS PROPER (restated).

Merely referencing pages of his postconviction motion and order denying relief, Pagan asserts he offered evidence which contradicted that presented to the jury, thus, relief should have been granted. His appellate issue is pled insufficiently and should be deemed waived.[55] If the merits are reached, the denial of relief should be affirmed.[56]

In denying relief on Claim VIII below, the judge found:

> ...Defendant's claim is legally insufficient. The Defendant does not set forth any manner in which Detective Peluso could have been impeached by the testimony of Wanda Jackson's deposition. Additionally, the Defendant does not claim how he was prejudiced by the lack of impeachment testimony. Conclusory allegations are legally insufficient on their face and may be denied summarily. [c.o.]

[55] Given Pagan's lack of argument in support of this issue, it should be deemed waived. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990); Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990).

[56] A summary postconviction denial will be affirmed where the law and evidence supports its findings. Diaz, 719 So.2d at 868.

> Further, this Court finds that the Defendant's attempts to revisit the issue of discrepancies between the affidavits for the search, arrest warrants and later known facts are procedurally barred. Claims of ineffective assistance of counsel cannot be used to revisit a prior litigated claim. [c.o.] This Court finds that the Defendant has not met either prong of *Strickland*. Therefore, this Court finds Claim VIII must be **DENIED**, and adopts the reasoning in the State's Response relating to this claim. (See State's Response at 43-47).

(PCR.4 649-50).

In his postconviction motion, Pagan asserted in conclusory terms counsel was ineffective in not attacking the credibility of Detective Ron Peluso ("Peluso") regarding his recording of facts related to him by Wanda.[57] For support Pagan pointed to Wanda's deposition where she refuted certain statements. (PCR.1 166). Pagan failed to offer in which hearing Peluso's credibility should have been challenged or how he could be impeached with Wanda's deposition. Hence, the claim was legally insufficient[58] and meritless. However, if Pagan's focus was on the suppression hearing, the claim is barred as the sufficiency of the warrant was raised and rejected on appeal. Should this

[57] Pagan mis-characterized the contact Peluso and Detective Manzella had with Wanda. (PCR.1 165 ¶3). The record reveals Wanda called the police, but did not wish to give her name; thus, to make communicating easier she was identified as "Mary." When the police arrived at the pre-ordained place to meet "Mary", Wanda identified herself. (TT.4-6 495-500, 573, 583-80).

[58] To the extent Pagan pointed to Wanda's deposition to claim Peluso mis-recorded her, Pagan failed to indicate when and how Peluso should have been impeached. Also, Pagan did not plead prejudice. Conclusory claims are insufficient and may be denied summarily. Freeman, 761 So.2d at 1061.

Court reach the merits, relief was unwarranted as Peluso was questioned thoroughly about his investigation and no prejudice can be shown given the evidence linking Pagan to the crimes including his own admissions.

In the suppression hearing, counsel stressed the various inconsistencies between the affidavits for the search and arrest warrants and the later known facts. This Court found any discrepancies to be minor, and not affecting the warrants.[59] See Pagan, 830 So.2d 806. Pagan challenged three areas of Wanda's deposition which differ from Peluso's police report: (1) discussion of a Ford Granada; (2) whether "Alex" wore baggy clothes; and (3) whether "Alex" and "Shaiquan" (William Graham) were "best friends." (PCR.1 165-66). While he asserted counsel should have questioned Peluso about these alleged discrepancies, he did not show how Peluso could have been impeached with Wanda's deposition. Pagan did not show that any proposed question would have been relevant or not have been hearsay. Hence, Pagan cannot show deficiency. Henry v. State, 862 So.2d 679, 683 (Fla. 2003) (rejecting ineffectiveness claim based on

[59] To the extent Pagan attempted to re-litigate this by pointing out other discrepancies in Peluso's report, the matter is barred. Pagan may not use a claim of ineffectiveness to revisit a prior litigated claim. Rivera v. State, 717 So. 2d 477, 480 (Fla. 1998) (finding it impermissible to recast claim which could have or was raised on appeal as one of ineffective assistance in order to overcome the procedural bar or to relitigate and issue considered on direct appeal); Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995) (same).

fact evidence offered in postconviction claim would have been inadmissible at trial); Floyd v. State, 808 So.2d 175, 193 (Fla. 2002) (finding prejudice not proven by failure to present inadmissible evidence or invalid defense); Card v. Dugger, 911 F. 2d 1494, 1507 (11th Cir. 1990) (noting counsel not ineffective by failing to impeach witness with report if cross-examination used to bring out weaknesses in testimony).

Even if counsel should have presented the differences, no prejudice was shown. With respect to the Granada, Peluso's report states "Vehicle **possibly** a Ford Granada." (PCR.3 404). Such is not diametrically opposite to Wanda's deposition; i.e., that she claimed not to have mentioned a Granada. (PCR.2 323-24). To the extent it is different, it is such a minor point given the testimony of Quezada and Jackson in addition to Jones' jewelry being found in Pagan's room that it cannot be said the failure to question Peluso about the car Pagan possibly used was deficient. (TT 1553-72, 1833-52, 2138-2279, 2314-28, 2399-2422, 2453-2663; 3046-3163). The result of the suppression hearing and trial would not have been different had this point been noted. Jackson described Pagan for the police and drove them to his door. (TT.6 580-93, 596-600). The type of car possibly used would not undermine confidence in the trial.

In the suppression hearing, Peluso testified that Wanda noted Graham wore baggy clothes, but Pagan "usually [wore] nice

clothes." (TR.6 575). There was no basis to challenge Peluso on this point, thus, the record refutes the claim. Any difference between the report and Wanda's deposition was erased based upon Peluso's suppression hearing testimony.

The claim counsel should have challenged Peluso regarding his characterization of the friendship between Pagan and Graham is meritless. Again, Pagan pointed to Wanda's deposition (PCR.2 325) where she stated she did not know **Pagan and Graham** were friends. Yet, Peluso reported: "It was then learned that Willie **Graham and "Alex" were close friends of Keith Jackson**." (PCR.3 404). Peluso was not characterizing the friendship between Graham and Pagan. Not questioning Peluso about how close the parties were does not equate to unprofessional representation. The depth of the friendship as Wanda "knew" it is marginally relevant, if relevant at all, especially in light of the testimony about the numerous contacts Jackson, Pagan, and Graham had surrounding the crimes and Jackson's testimony he knew Pagan for eight years. (TT.21 2456-2663; TT.26 3046-3163). None of the alleged discrepancies rise to the level of Strickland ineffectiveness. Relief was denied properly.

ISSUE IX

THE CLAIM COUNSEL'S CROSS-EXAMINATION OF KEITH JACKSON WAS DEFICIENT WAS DENIED PROPRERLY (restated)

It is Pagan's position the court applied an incorrect standard in denying a hearing for Claim IX below. However, he merely quotes from his motion without noting the standard or where the court erred in its order. The matter is waived under Duest.[60] Even so, for this Court's convenience, the State submits the summary denial was proper as Pagan has not shown his claim was pled sufficiently, and that it was not refuted from the record. Contrary to his allegations, the court applied the correct standard. The ruling is supported by the facts and law.

In denying relief summarily, the trial court reasoned:

> The Defendant argued that counsel failed to cross-examine Jackson about: (1) the facts of his Dade County attempted murder case; (2) motive and ability to commit the instant crimes (prior drug dealing activities); and (3) his relationship with Eric Miller, Anthony Graham, Daryl Featherstone and DeeDee Mosley. *Id.*
>
> This Court agrees with the State that the instant claim is legally insufficient. The Defendant did not allege or explain how linking Jackson to those four people would have furthered his defense. ***Ragsdale v. State***, 720 So.2d 203, 207 (Fla. 1998). A review of the record reveals that counsel did what the Defendant alleges he did not do, with the exception of

[60] Given Pagan's lack of argument in support of this issue, it should be deemed waived. Duest, 555 So.2d at 852; Cooper, 856 So.2d at 977 n.7; Roberts, 568 So.2d at 1255. On review, a summary denial of postconviction relief will be affirmed where the law and competent substantial evidence supports its findings. Diaz, 719 So.2d at 868.

> discussing Featherstone. (See, State's Response, at 47-49, highlighting the relevant portions of the transcript). However, this Court finds that the Defendant has not shown how a discussion of Featherstone at trial would have been important to his defense, and he has not shown how the alleged omission by his counsel prejudiced him. Therefore, this Court finds that the Defendant has not met the *Strickland* prongs. This Court finds that the Defendant's Claim IX must be **DENIED**. The Court adopts the reasoning in the State's Response relating to this claim. (See State's Response at 47-49).

(PCR.4 650-51). The record supports these findings and the denial of relief should be affirmed.

In the order denying relief, the court correctly identified Pagan's allegations. Contrary to Pagan's claim below, œounsel questioned Jackson repeatedly about the Dade case, reminding the jury at each opportunity, Jackson had been arrested with William Graham for an attempted first-degree murder and had pled guilty. (TT.26 3131-39, 3163; TT.27 3226, 3316-28, 3348-49). Also, a link was developed between Jackson and Eric Miller, Anthony Graham, and DeeDee Mosley, who had dated Miller for a period. In fact, the jury was told: (1) it was Miller who told Jackson and Pagan about the victim; and (2) Freddy Jones, took them to Jones' home, characterizing him as big time drug dealer, and suggested $250,000 could be obtained from Jones. This permitted counsel to argue Jackson was a better suspect, one with knowledge and connections to carry out the crime. (TT.26 3048-56, 3064-67, 3110-11, 3140-41; TT.27 3312-18, 3335-36, 3347-48).

Counsel also questioned Jackson about the similarity in his physical characteristics to that of Latasha Jones' description of one of the assailants, and argued Jackson was the possible perpetrator in the instant murders and other crimes given his association with the Graham cousins. Counsel asserted Jackson's alibi, working at the time of the crime, was not solid. (TT.26 3112-15, 3137-41; TT.27 3219-26, 3312, 3320-42, 3347-49). Counsel highlighted inconsistencies in Jackson's statements to show he was not credible and may have been involved in crimes, but was cooperating to put the blame on Pagan. (TT.26 3116-25, 3129-46, 3161-63). The jury rejected this theory.

The record shows counsel did everything Pagan complains about with the exception of discussing Featherstone. Yet, Pagan has not explained how Featherstone is important or how his link to Jackson would cause a different result. Given the overwhelming evidence of Pagan's guilt, Pagan, 830 So.2d at 800-09, (TT 1553-72, 1833-52, 2138-2279, 2314-28, 2399-2422, 2453-2663), the unexplained connection between Jackson and Featherstone would not generate a different result at trial or sentencing. The denial of relief should be affirmed.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Peter J. Cannon, Esq., Office of the Capital Collateral Regional Counsel-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, FL 33619 this 17th day of October, 2007.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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