IN THE SUPREME COURT OF FLORIDA

MILFORD WADE BYRD,

Appellant,

v. **CASE NO. SC06-539**
L.T. No. 81-CF-010517

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

I. Direct Appeal

This Court's direct appeal opinion in Byrd v. State, 481 So. 2d 468, 469-71 (Fla. 1985) recites the following facts:

> Appellant and his wife, Debra, managed a motel in Tampa. Debra's body was found on the floor of the motel office at approximately 7:00 a.m. on October 13, 1981. An autopsy revealed that Debra had suffered four non-fatal scalp lacerations, four non-fatal gunshot wounds, and scratches and bruises on the neck. The pathologist determined that the cause of death was strangulation and that death had occurred between 9:00 p.m. on October 12 and 3:00 a.m. on October 13.
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> During interrogation on the morning of October 13, appellant told police that, on the night of the murder, he had gone to a gym and then to two bars. He stated that he returned home to the motel around 6:45 a.m., found his wife's body and called the police. Later that morning appellant requested that a desk clerk at the motel contact a life insurance company with reference to an insurance policy on Debra's life. Appellant was the sole beneficiary of the $100,000 policy. Five days later, on October 19, appellant personally carried a copy of Debra's death certificate to the insurance company and twice inquired as to how long settlement of the policy claim would take.
>
> Ronald Sullivan, a resident of the motel, was arrested for violation of parole on October 27 and was subsequently charged with Debra's murder. After interviewing Sullivan the police decided that they had probable cause to arrest appellant. At 2:30 a.m. on October 28, the police arrived at the appellant's residence at the motel where they awoke appellant and arrested him for the first-degree murder of his wife. Although the arresting officers had no arrest warrant when they went to appellant's residence, it is undisputed that they had probable cause to arrest appellant. One of the arresting officers knocked on appellant's door, identified himself to appellant through a window, and mentioned that he had previously

spoken to him with regard to the death of appellant's wife. After a few seconds appellant opened the door and stepped back. The detective then took a step inside, placed appellant under arrest for the murder of his wife, and advised him of his rights. In the motel room with appellant was his girlfriend, who was asked by the officers to accompany them to the police station. The woman voluntarily accompanied the officers.

At the police station appellant was again advised of his rights. He signed a written waiver of his rights at 2:55 a.m. Appellant neither admitted nor denied involvement in the crime until approximately 4:40 a.m. when he told the police he would tell them the truth if he could speak privately with his girlfriend. The detectives allowed appellant to spend some time alone with his girlfriend and, when questioning resumed, appellant's girlfriend re-entered the interrogation room and appellant gave a confession.

Appellant testified at trial that, at the time of his arrest, the arresting detectives said they had an arrest warrant. He stated that he opened the door and backed up as the detective stepped forward and arrested him.

When questioned about the murder, appellant stated that he had fallen in love with his girlfriend and that his wife had denied his request for a divorce. He confessed that he had offered Sullivan and Endress, Sullivan's roommate at the motel, five thousand dollars apiece to murder his wife. He also stated that the murder was planned to look like a robbery. Appellant denied, however, that he was present when the murder occurred. After this initial confession, appellant requested permission to use the telephone in the homicide squad room to call his father. Three police officers overheard this conversation and testified that appellant informed his father that, although he had not committed the murder, he had had it done.

Shortly after the telephone call, appellant signed a consent-to-search form for the search of a motel storage room. During the search of the room,

detectives found a hacksaw, drill, solder, and copper and brass filings. Evidence was submitted at trial which indicated that Sullivan and Endress had fashioned a silencer for the murder weapon in the storage room.

Appellant retracted his initial confession two days after having given it and moved to suppress both the confession and the consent to search. The trial court, finding that the confession was voluntarily given and that the consent was valid, denied the motions.

In exchange for a negotiated plea, Sullivan testified against appellant on behalf of the state. Sullivan, who was charged with first-degree murder, testified that the state had offered him a term of probation in exchange for his truthful testimony. Sullivan stated that appellant had approached Endress and himself about having Debra killed. He also testified that he, Endress, and appellant were present when Debra was murdered; that Endress shot Debra several times and hit her with the gun; and that the three, in turn, had choked her.

The defense produced testimony from three county jail inmates concerning inconsistent statements made by Sullivan while he was in jail. The inmates offered three different statements allegedly given by Sullivan which alternatively placed the blame for Debra's murder on himself, Endress, and unknown armed robbers. A defense motion for a mistrial, based on the state's method of impeaching one of the inmates, was denied.

Appellant testified on his own behalf and denied complicity in the crime. He stated that he had been at two bars the night of the murder. Appellant also testified that his initial confession was given only because of concern for his girlfriend. Attempts to expedite the insurance policy on Debra's life, he explained, were only to enable him to pay the funeral expenses.

At the conclusion of the guilt phase of the trial, the jury returned a verdict of guilty of first-degree murder.

As to the penalty phase, this Court provided the following factual summary:

> During the sentencing phase of the trial, the defense presented two witnesses, appellant and his father. Appellant testified concerning his relationship with his girlfriend subsequent to his wife's death. His father testified as to appellant's non-violent nature and appellant's relationship with his wife. The jury returned an advisory recommendation of the death penalty.
>
> After the jury had given its recommendation, the trial judge heard testimony from two experts in the field of psychiatry concerning appellant's mental state at the time of the crime. The witnesses stated that appellant was not under the influence of any extreme mental or emotional disturbance, was not acting under the substantial domination of any other person, was not acting under extreme duress, and was not suffering any mental illness.
>
> The trial judge agreed with the jury's recommendation and imposed the death sentence. The judge found three aggravating circumstances and one mitigating circumstance. The judge specifically found that the crime was committed for pecuniary gain in that appellant murdered his wife so that he could collect the proceeds of the $100,000 life insurance policy; that the murder was especially heinous, atrocious, and cruel; and that the acts of appellant exhibited the highest degree of calculation and premeditation. As a mitigating circumstance, the judge found that appellant had no significant history of criminal activity.

This Court affirmed Byrd's conviction and sentence on November 14, 1985. Byrd v. State, 481 So. 2d 468 (Fla. 1985), cert. denied, 476 U.S. 1153 (1986).

II. Initial Post-Conviction Motion

On May 27, 1988, Byrd filed a "Motion to Vacate the Judgment and Sentence with Special Request for Leave to Amend," pursuant to Fla. R. Crim. P. 3.850, raising nineteen claims. An evidentiary hearing was held on March 22-23, 1989 before the Honorable Richard A. Lazzara. After hearing the testimony presented at the evidentiary hearing and the argument of counsel, the trial court issued an order denying post conviction relief on July 11, 1989.

Byrd appealed the denial of his motion to this Court. On February 20, 1992, this Court affirmed the denial of post-conviction relief. Byrd v. State, 597 So. 2d 252, 254 (Fla. 1992).

Byrd filed a habeas petition in this Court on February 9, 1994. The State filed its response to the petition on May 9, 1994. This Court issued its decision rejecting Byrd's claims on January 26, 1995. Byrd v. Singletary, 655 So. 2d 67 (Fla. 1995).[1]

[1] Byrd filed his initial Federal Habeas Petition in 1992 which was dismissed so that he could exhaust his available state remedies. After filing a second habeas petition in April of 1996, the proceedings were held in abeyance [pending resolution of a relevant case] over Respondent's objection. Byrd's Amended Habeas Petition remains pending in the Middle District.

III. Successive Motion For Post-Conviction Relief

Byrd filed a Successive Motion to Vacate Judgment of Conviction and Sentence on April 19, 2002. On September 25, 2002, the court held an evidentiary hearing in which Judge Alvarez, State Attorney Mark Ober, Judge Lopez, James Endress, and Jeff Walsh testified. As a result of testimony of Mr. Endress regarding alleged improprieties by CCRC investigators to induce Mr. Endress to testify about the credibility of Byrd's co-defendant, Ronald Sullivan, the trial court extended the evidentiary hearing until November 21, 2002. Byrd amended his successive motion on June 9, 2003 based upon the evidentiary hearing testimony. The trial court denied Byrd's Amended, Successive Motion for Post-Conviction Relief on August 1, 2005.

IV. Successive Post-Conviction Hearing Facts

Judge Manual Lopez

County Judge Manuel Lopez testified that he was the primary prosecutor assigned to the Byrd case. (V11, 1531). Mark Ober assisted him in prosecuting the case in 1982. (V11, 1532). Lopez wrote a letter to Judge Alvarez regarding his findings on the sentencing order in November 1982. He noticed an apparent mistake or omission in the order, regarding the court finding three aggravating factors exist and "that mitigating factors exist which would mitigate the sentence." (V11, 1535). He

thought that the statement regarding mitigating circumstances was not correct. He sent a copy of the letter to the court file and Frank Johnson, trial defense counsel. (V11, 1536).

Lopez testified that he did not write a draft of the sentencing order for Judge Alvarez. (V11, 1540). Nor, was Lopez aware of anyone in the State Attorney's Office who might have prepared a draft sentencing order. Id. The Florida Supreme Court's opinion reflected that the trial judge found as a "mitigating circumstance...that appellant had no significant history of criminal activity." (V11, 1541).

Lopez, along with Mark Ober, was also assigned to prosecute the Endress case. He thought that Sullivan's probation revocation hearing and Sullivan's testimony in the Endress case occurred after Byrd was tried. (V11, 1539).

Judge Lopez was recalled to testify in 2004. Judge Lopez testified that when he was a prosecutor on the case they early on decided to offer one of the co-defendants a deal "because we felt that Mr. Byrd was the main mover and shaker in this particular affair." (V12, 1688). Mr. Gonzalez, Endress's attorney, never really responded to the overtures made by his office. Consequently, they approached Sullivan and he agreed to cooperate. (V12, 1688).

A letter regarding a plea offer was introduced into evidence. It reflected an offer to Endress to plead to second degree murder in exchange for a life sentence. (V12, 1689). He never received a response from Endress's lawyer. Id. He never met with anyone to offer Endress a seven year deal. (V12, 1690). Nor, did he have any such conversation about a seven year deal with Endress's father. Id. Judge Lopez was not aware of any additional or extra record consideration offered to Sullivan in exchange for his cooperation. Specifically, Lopez denied knowing of any additional 13 robbery counts that were allegedly disposed of in consideration for Sullivan's testimony. (V12, 1690).

Only two people were authorized by the State Attorney's Office to enter into plea negotiations in the Endress case: "Mr. Ober and myself." (V12, 1700). It was a death case; he would not have made any negotiation unless he cleared it with Mr. Ober or Mr. Salcines. (V12, 1700-01). Judge Lopez reviewed a note from the prosecutor file dated 4/19. According to these notes the offer to Mr. Sullivan was that he pled guilty to second degree murder in exchange for probation and truthful testimony. (V12, 1702). "The state will nol pros the grand theft. On the robbery, if he passes a polygraph, the state will drop the robbery. If he flunks it, the state can proceed any way

it sees fit and the defendant's passing or failing the polygraph will have no effect on the probation he receives on the murder. That's what my notes reflect." (V12, 1702).

James Endress

James Endress was called to testify as a court witness. He was represented at trial by Norman Canella. (V11, 1544). Sullivan testified against him at trial. (V11, 1544). Endress met an investigator from CCRC, Jeff Walsh, in February 2002. (V11, 1544). Endress testified that he met with [CCRC] investigator Walsh on two occasions. He told Walsh that Sullivan lied at his trial. (V11, 1547). It was Endress's understanding that it would benefit Byrd if he testified that Sullivan lied during his own trial. (V11, 1548). When Walsh left, Sullivan understood that he would return after talking to Byrd and his counsel about a mutually beneficial proposal. (V11, 1548). Endress testified: "I agreed to admit the fact that Sullivan - - did, in fact, lie on the stand, had lied against me and that if all, you know, Byrd's remedies and et cetera had failed and before he was executed, that I wanted his word that it would be an affidavit disclaiming my part of the murder." (V11, 1548). It was Endress's understanding that Walsh was going to relay that proposal to Byrd. (V11, 1548). Walsh returned within a week to relay Byrd's response. Byrd

agreed to the proposal, and Walsh said that "if all else failed, that he would exonerate me from this crime." (V11, 1549).

At some point, Endress changed his mind, deciding to admit his role in the crime with Byrd and Sullivan. Endress testified how he came to that decision:

> The fact that I've grown. You know, I'm not a teenager anymore. And I raised kids now. I have my own children. And in teaching them what's right and wrong, you know, I, myself, you know, have to teach them accountability for doing wrong. And I, myself, am at peace with my - - my part of this crime. So, therefore, I have not a problem basically admitting that I did have a part in this crime and I deserve to be where I am.

(V11, 1549-50). Endress decided to come clean even though he thought he might receive some benefit if Byrd's conviction was reversed. Endress could have followed in his "footsteps" since his conviction also relied upon Sullivan's testimony. (V11, 1561). Endress was at peace now with his role in the crime and admitted he deserved to be punished for it. (V11, 1550).

Endress was acquainted with Sullivan and gave him a ride to the Econo Lodge Hotel where Mr. Sullivan stayed with his girlfriend. (V11, 1550). He visited him there on several occasions and even stayed there some nights. He became acquainted with Byrd and his wife who managed the hotel. (V11, 1551). At some point Byrd approached him and asked if knew anyone who could kill his wife. (V11, 1551). He said at first

he did not know but that he would talk to Sullivan about it. (V11, 1551). "At that point Sullivan and I pretty much never had intentions of doing anything. But being, you know, kind of just a hoodlum is basically what I was, you know, we were - - we were going to see just how far we could milk the whole situation, the room, the money, whatever we could get." (V11, 1551). So, Endress testified, "I told Mr. Byrd, yeah, you know, that Sullivan and I would do it." (V11, 1551). Byrd offered Sullivan and Endress "ten thousand dollars" to do it. (V11, 1551).

Byrd provided Sullivan and Endress money to purchase a gun. Endress testified that he went across town and bought a gun on the street. Endress learned how to make a silencer from a machinist and he built one for the gun. (V11, 1551). At that point, he and Sullivan were milking Byrd for money, taking twenty dollars here and there, keeping the extra money for the gun. Byrd also let Sullivan stay at the hotel for pretty much nothing. (V11, 1552). Byrd wanted the murder to take place when he was not there. Byrd would plan trips to build his alibi, but, Endress and Sullivan did not commit the murder. (V11, 1552). They always had an excuse for not following though and murdering Byrd's wife. (V11, 1552). Endress said that that

from the beginning, “we really never had any intention of doing anything.” (V11, 1553).

On the evening of the murder, Byrd went to a bar with his girlfriend. Byrd expected Sullivan and Endress to murder his wife that evening when he was gone. However, they did not murder her. Endress testified that he went to bed, only to be woken up “physically” by Byrd. (V11, 1553). Byrd dragged them both outside with the gun. Endress testified that Byrd was a weightlifter and a “big guy.” (V11, 1553). “He was furious and he said we’re going to do this right now.” (V11, 1553). They had “pretty much drug him for months.” He gave the gun to Sullivan and said “let’s go right now.” (V11, 1554).

They went to the office which was right next to the apartment where Byrd lived with his wife. Byrd went in the apartment and “he told her to come out.” (V11, 1554). She came out and they began arguing. At that point, Sullivan raised the gun and shot her. Id. “She was screaming. The gun – she wasn’t killed by the gun. And I was in limbo as to run. And he went - - Sullivan went to hitting her and then I ran and Byrd came out behind me and told me to get my ass back in there.” (V11, 1554). Endress testified that he went back into the room next to the office, he was afraid that Byrd had another gun. (V11, 1554). Byrd went back behind the counter and was choking

his wife; he called out to Sullivan to help. Endress testified that he was forced behind the counter to participate. He put his hands on her, guessing that he was made to participate so that they were all involved. (V11, 1555). Sullivan still had the gun, but, it was empty. Endress explained that they only had four or so shells and that they had previously fired it to test the silencer. (V11, 1555).

After it was "done" Byrd took the green money bags from behind the counter to make it look like a robbery. (V11, 1555-56). Byrd had blood all over him and was washing his hands. Meanwhile, Byrd told Sullivan he was "out of here." (V11, 1556). Endress testified that the victim's Doberman pinscher, a trained attack dog, was going crazy barking in apartment. (V11, 1556). It was late and Mrs. Byrd was done for the night, so the dog, normally in the office, was in the apartment. (V11, 1556). Byrd washed up, went in the apartment, got some clothes and came out to the parking lot. Byrd and Endress left in Byrd's car to dispose of the gun and Byrd's bloody clothes. (V11, 1557).

Endress explained the lie he mentioned earlier regarding Sullivan's testimony, was that he said "I was the one that had the – took the gun and shot Debbie." (V11, 1553). "You know, in other words, he was - - he lessened his guilt so to speak." (V11, 1553). Sullivan did not, however, lie about Byrd's

involvement in the murder. Byrd physically strangled Debbie. (V11, 1558).

After he was arrested, a Detective Peakerton interviewed Endress and mentioned something like 13 robbery cases. However, Endress explained that it was just an interrogation tactic, to talk to him. None of these were ever prosecuted and he was never arraigned on robbery charges. (V11, 1560). He did recall something about Sullivan being accused of a robbery and that would not surprise him at all. (V11, 1565). However, Endress did not recall anything about Sullivan pulling a gun on a motel night clerk. He was aware that Sullivan possessed the gun they obtained for the murder most of the time. (V11, 1565). Endress denied that he was involved in a robbery with Sullivan on September 26th, 1981. (V11, 1565).

Endress did believe that Sullivan was a suspect in a series of robberies. (V11, 1568-69). However, the only thing that Sullivan ended up being charged with was second degree murder and he got probation. (V11, 1569).

Endress testified that his father told him that he was offered a seven-year plea agreement in exchange for testifying against Byrd. However, Endress claimed that his first lawyer, Henry Gonzalez, never relayed that offer to him. (V11, 1573). He was never given an opportunity to consider a plea agreement.

(V11, 1573). He only recently learned of the seven year offer. Previously, Endress testified he was only aware of an offer of a "life sentence." (V11, 1578). Endress admitted he never talked to an assistant state attorney regarding this 7 year offer or, even his own attorney. (V11, 1587). His only source for that information was his father. (V11, 1587).

Addressing an affidavit prepared by CCRC investigator Walsh, Endress admitted he said that Sullivan lied at his trial. However, Endress explained that some of it was "surmised" because Walsh did not "offer a lot of conversation." (V11, 1578). "I don't - - Sullivan was a liar and I don't know about this crime. And he surmised and he put some words in my mouth and that's what I meant by misrepresentation." (V11, 1579). Endress did tell Walsh he did not want to be involved. Id. On the first visit, Endress asked Walsh to approach Byrd with the following proposal: "If Byrd was going to be put to death, Byrd would sign an affidavit "exonerating me from this crime." (V11, 1581). Walsh said that he could not answer that question during the first visit. He said he would have to see Mr. Byrd and bring the answer back. (V11, 1581). When Walsh returned, he had the answer back from Byrd. (V11, 1581).

When prosecutor Vollrath came to see him, Endress testified that he told her Sullivan was an admitted perjurer who lied at

his trial, but, that he didn't want to go into any details. He wanted to talk to his lawyer, testifying: "I wasn't going to volunteer a lot of information." (V11, 1583).

Endress testified that he did not consider his cooperation just part of making a "parole pitch." (V11, 1584). However, Endress did testify that "it can be" of "possible" benefit. (V11, 1584). After talking to his wife and lawyer, Endress testified his lawyer, Norman Canella, told him to give honest testimony but that it was against his father's wishes. (V11, 1584). This has brought up everything over again and that he was going "against my own family that stood beside me through this whole time to snow speak and tell what really happened." (V11, 1585).

Endress testified that he was up for parole in 18 months and he was hopeful that he would be paroled. (V11, 1574). The State did not tell him that they would be in a position to help him with his parole. (V11, 1575). They said that "there's nothing they can do to help me." (V11, 1575). He came forward because he did not want to be known as the trigger man. (V11, 1576). Ten minutes prior to the 2002 hearing, Ms. Vollrath met with Endress and asked him to testify "truthfully." You, know, just she wanted me to tell the truth and that's what I did." (V12, 1803).

James Endress was recalled to the stand by Byrd in 2004 and testified that his parole was denied. (V12, 1795). He testified that in 2002 he talked to prosecutors three times. At first, he said he had nothing to say "unless you got some go home papers." (V12, 1796). They said, we "can't do that" or "that wasn't going to happen." (V12, 1797). Endress said that he was not going to testify. During the second meeting, they said they'd bring him back. Next thing Endress testified, he was brought back to county jail. (V12, 1797).

Once he was brought back, he talked to Ms. Vollrath, who asked him if he talked to his attorney, Norman Cannella. (V12, 1799). Endress talked to Cannella who had read Byrd's brief and said that "Byrd didn't have a chance in hell and this was my only opportunity to help myself." (V12, 1800). That same day, Endress met with Ms. Vollrath and he told her that he had done some twenty years, that he had a wife and kids. Vollrath said the best that "we'd ever be able to do would be to speak in your behalf at your parole hearing." (V12, 1800-01). To Endress, that was nothing guaranteed; the parole commission would do "what they want to do." (V12, 1801).

After the hearing, Endress wanted some clarification because he had nothing in writing and "no promise." (V12, 1801, 1805). He wrote Cannella a letter and asked him to solidify

something.[2] His wife also called Ms. Vollrath and Mr. Ober and it was Endress's understanding that "the worst that they would do was to take a neutral stance and do nothing to harm me." (V12, 1802). Endress wanted the State to live up to its agreement or intention, stating: "As much as, you know - - I mean if you tell me something, that's what I expect." (V12, 1808-09). On the day of the hearing, Endress finally learned what the State's position would be on his parole hearing: "They got me 20 years." (V12, 1811). They opposed his parole. (V12, 1812).

When asked about being questioned on robberies after his arrest, Endress testified: "I do remember being asked about a robbery." (V12, 1818). When asked if Sullivan was questioned about a robbery or 13 robberies, Endress testified: "Supposed -

[2] Prior to hearing additional testimony in a bifurcated evidentiary hearing, the State brought to the court's attention a letter sent to the State by James Endress. In the letter, Endress asked the State for a couple of things, a letter from the victim's family stating no objection to release upon parole eligibility, and, help setting up a special interview to set up a presumptive parole date. (V12, 1669). None of those "things had been done by the State Attorney's Office. (V12, 1669). At that point, no decision on the State Attorney's Office's part had been made on whether or not to send a letter detailing what testimony Endress gave during the post-conviction hearing. (V12, 1670). In response, Mr. McClain stated that the letter indicates Endress is seeking something in exchange for his testimony but, McClain stated: "[A]s Ms. Vollrath has indicated, I have no indication that the state ever agreed or promised him or anything like that. And, in fact, the letter seems to be consistent with there was no agreement, but I want to try it anyway now to get some benefit." (V12, 1670).

- I remember something about a robbery. I mean that's how I knew him. I mean that's what he did. You know, burglary and stole, so." (V12, 1819). When asked if someone from law enforcement asked him about Sullivan's other cases, Endress replied: "Not - - I don't remember." (V12, 1819).

On cross-examination, Endress admitted that in a deposition in 2004 he stated that "[n]othing was promised to me in exchange for my testimony at that time." (V12, 1820). Further, in the deposition, Endress admitted he said "[n]othing was promised to me ever." (V12, 1821). Then, he admitted that when meeting a detective from the State Attorney's Office, he understood, "there was no deal for me to testify." (V12, 1822). In deposition, Endress answered "yes" when ASA Vollrath stated: "And did I tell you that there was going to be no possibility of assisting you in terms of your sentence?" (V12, 1822). Finally, at the end of his deposition, Endress admitted "I've never had a deal of any kind of any nature." (V12, 1824). Endress also admitted at the previous evidentiary hearing that nothing had been offered to him by the State Attorney's Office in exchange for his testimony. (V12, 1824).

Endress admitted that he testified truthfully during the [2002] evidentiary hearing. (V12, 1824). Endress acknowledged that his letter to Norman Cannella did not reference any deal or

offer in exchange for his testimony. (V12, 1825). Endress admitted the State mentioned he testified during the evidentiary hearing in a "menial way" but that he was called as a court's witness and the State had "no interest in me, didn't want any more from me." (v12, 1826). What the State said during the parole hearing "was pointedly outright not favorable." (V12, 1835). Notwithstanding, his previous statements, Endress testified that he thought they had an understanding that "they would speak favorably on my behalf, right." (V12, 1828). Endress explained: "I mean it wasn't promised. They just said that's the best they could do." (V12, 1828).

Endress testified that he did not pull a knife on Mary Jane Taylor. (V12, 1832). Endress testified that he did not recall any pending charge for that crime and that this was the "first I've heard of it." (V12, 1832).

CCRC Investigator Jeff Walsh

Investigator Jeff Walsh testified that he is employed by CCRC doing capital post-conviction investigation. He was asked by Mr. McClain to speak to Byrd's co-defendants. (V11, 1591-92). He spoke with Endress in February of 2002 at Zephryhills Correctional Institute. (V11, 1591). He interviewed him for an hour the first time he met him. Endress was reluctant to talk to him. It appeared he wasn't present, "so he really couldn't

tell me much." (V11, 1592). Walsh testified that Endress told him that Sullivan lied at his trial and that it was his understanding that Sullivan did the same thing at Byrd's trial. (V11, 1592). Endress told Walsh that he was innocent and that he refused to testify. (V11, 1593). Endress told him that he was hopeful to get parole and was interested in "taking care of himself." (V11, 1593-94). Walsh talked to him about executing an affidavit, but, Endress did not want to do that. (V11, 1594).

Walsh admitted that he returned to prison a few days later to talk to Endress. The reason for that second visit, according to Walsh, was "[t]o tell him that you [McClain] were going to plead the information in court." (V11, 1594). When asked if Endress ever indicating he wanted some sort of agreement with Byrd, Walsh testified: "No. I don't believe so." (V11, 1594). Walsh testified that he never met with Byrd but that Endress was curious to know what "Mr. Byrd had told me and would say about the incident." (V11, 1594). Endress never told Walsh he was a participant in the crime. (V11, 1596).

Walsh said that he did not talk to Byrd but did speak to Mr. McClain before going back to see Endress. Walsh did deny seeing Byrd to relay any offer, and, explained why he came back to see Endress a few days after the first meeting. When asked

if he normally went back to tell a witness what action the defense was taking in a particular case, Walsh testified: "It depends. I mean, he was pretty curious. He wanted to know." (V11, 1597). He did not "believe" he talked with anyone other than McClain between the first and second visits with Endress. (V11, 1597). Walsh testified he did not keep any notes of his conversations in this case. (V11, 1597-98).

Judge Dennis Alvarez

Trial judge Dennis Alvarez testified that he presided over the Byrd case back in 1982. (V11, 1501). He reviewed a letter received on December 13, 1982, from an assistant state attorney relating to his sentencing order in the Byrd case. (V11, 1504). His findings in support of Byrd's death sentence were made in November of 1982. (V11, 1504). Judge Alvarez testified that he personally drafted the sentencing order in this case. (V11, 1512). He had no assistance from anyone in drafting the order. (V11, 1514). It was his work and his thought process in drafting the order. (V11, 1514). A letter from Mr. Lopez revealed a scrivener's error in his sentencing order, drawing attention to a word missing from the order. Alvarez testified: "I left out the word "no" with regard to mention of mitigating circumstances. (V11, 1515). Consequently, he corrected the error. (V15, 1515). In response to collateral counsel's

questions regarding imposition of the death sentence for Byrd when Sullivan received an incredible amount of consideration, Judge Alvarez testified:

> I didn't impose the death penalty because of Mr. Sullivan. I imposed the death penalty because there was overwhelming evidence of -- Mr. Byrd's involvement in this murder and also the fact that If I recall correctly, the jury recommended twelve zero for the recommendation for the death penalty which I consider also a -- a -- the jury's recommendation.

(V11, 1518)

Clarence Love

Clarence Love, an inmate at Martin Correctional Institute, testified that back in 1981 he was arrested and placed in the Hillsborough County Jail. (V12, 1672). While there, Love claimed he met Byrd, Endress, and Sullivan. (V12, 1673). Love had no conversation with Byrd about his case. He met Sullivan, but, claimed that Sullivan and he did not really have a conversation about the case. Sullivan allegedly told Love, "I killed the "B" and I'm not going to get any time at all." (V11, 1673). He claimed to have quite a few conversations with Endress about the case. As a result, Love contacted the State Attorney's Office. (V12, 1674). He did that a very long time ago. At first, they sent someone over to talk to him, and eventually brought him to the State Attorney's Office. He did recall a deposition being conducted but did not recall

specifically who attended it. (V12, 1675). He had a chance to review the deposition regarding what Endress told him in jail. (V12, 1675). After giving a depo, Love claimed he met Endress at the Reception Medical Center at Lake Butler. (V12, 1676). He could not say exactly when this meeting occurred. (V12, 1677). He said I knew that you "was going to testify." "You did what I wanted you to do." And, "I told you I wasn't going to get any time out of that." (V12, 1677). Love thought perhaps that Endress manipulated him, "and used me to say what he wanted me to say." (V12, 1678).

On cross-examination, Love was confronted with his deposition, wherein he stated what Sullivan told him: "I had just moved out of the cell with Endress. He said, well, that's the son of a bitch that's turning state's evidence against me. He said he didn't kill nobody. Him and Wade Byrd did it. He said they're lying on me and I said, well, yeah. And he said, well, you know, it's a two sided story." (V12, 1678-79). Asked if he recalled that conversation with Sullivan, Love testified: "It's a possibility it could have been made. I'm not going to deny that I didn't." (V12, 1679). Love testified that Endress never told him what he said was false, but led him to believe that. (V12, 1680).

State Attorney Mark Ober

Mark Ober was on the Byrd case from the beginning when it came to the State Attorney's Office. (V12, 1705). He had no conversations regarding a plea offer to Endress other than noting that the State Attorney was emphatic in not offering him anything. (V12, 1706-07). Since Endress's attorney, Gonzalez, was very difficult to get a hold of, they ended up resolving the case with Ronald Sullivan. (V12, 1708). He had no conversation about a potential seven year deal with Endress's father. (V12, 1708). Ober did not recall giving Sullivan any consideration or clearing any criminal cases other than the two cases that were in fact, disposed of. (V12, 1710). He did not recall Sullivan having 13 pending robbery investigations. (V12, 1710).

Ober examined a police report dated December 17, 1981, the handwritten portion read that Sullivan could show us where Endress told him he threw the gun. Sullivan also said that "he could give us Wade and Endress real good." (V12, 1720). This report was written by Detective Mike McCallister, a Tampa Police Homicide Investigator. (V12,1720).

Although Tom Davidson, another prosecutor took the Byrd case to the Grand Jury, Ober and Lopez had "almost exclusive contact with the case." (V12, 1724-25). Consequently, while it was possible Tom Davidson took some unilateral action without

Ober knowing about it, Ober did not believe that he actually did. Ober testified: "But I don't believe that to be the case." (V12, 1726). When it came to Sullivan, Ober testified that he and Lopez were the primary decision makers. (V12, 1726).

When recalled in 2004, Ober testified he had great autonomy at the State Attorney's Office when it came to dealing with individuals but "would deal with attorneys." (V12, 1706). He had no conversations regarding any offer to Endress of a seven-year sentence in exchange for his cooperation in the Byrd case. (V12, 1706). In fact, Ober testified that the State Attorney was emphatic in "not offering him anything." (V12, 1707). Ober did a culpability analysis of the three parties in the murder, Byrd, Sullivan and Endress. (V12, 1707). Ober testified: "Mr. Byrd was most culpable and Mr. Endress was second. Mr. Sullivan was third." (V12, 1707).

Gonzalez, who represented Endress, had previously approached Ober in an attempt to resolve the case. But, to Ober's recollection, they did not have any "meaningful conversation." (V12, 1708). At some point, Ober and Lopez decided it was time to resolve the three cases and attempted to contact Mr. Gonzalez. Ober made repeated attempts to contact

Gonzalez at his Miami office. Those attempts were unsuccessful and they "resolved the case with Ronald Sullivan." (V12, 1708).

Ober testified that he had no knowledge of any cases, other than the two previously disclosed, that were disposed of though an agreement with Sullivan. (V12, 1710). He did not recall any agreements for clearly "13 robberies." (V12, 1710). At the time he testified during the evidentiary hearing, Ober did not have any independent recollection of charges that might have been facing Sullivan. (V12, 1727). However, he did know that the facts of this crime "as it relates to Mr. Byrd [were] especially egregious." (V12, 1727). He knew that Mr. Sullivan "had some baggage" but did not "remember what it was." (V12, 1728).

Mr. Cannella had some contact with Ober and Lopez and when he was with the State Attorneys, suggested that they let Endress plead to something other than first degree murder. (V12, 1730). They were uncomfortable with such comments and went to the State Attorney who advised them not to resolve the case against Endress by plea.[3] (V12, 1730).

[3] When asked about other cases Endress might have had pending at the time of trial, Ober replied there was some mention of him having another case pending but did not "remember." (V12, 1871). Defense counsel showed Ober a document to refresh his recollection, which Ober said showed an attempted burglary, and that had a letter of release. (V12, 1871). [Def Exhibit 21, 13]

Ober testified that he was concerned about possible misconduct on the part of CCRC or representatives of CCRC in this case. His concern was based upon a previous State Attorney investigation in the Holton case which addressed allegations of "wrong doing" on the part of representatives of CCRC. (V12, 1844). Consequently, he was interested in an allegation Endress made regarding the conduct of CCRC in the Byrd case. (V12, 1844).

Mr. Ober recalled a conversation with Ms. Vollrath in which she said the most the office can do is write a letter informing the parole commission that he had in fact testified against Mr. Byrd. (V12, 1847). Mr. Ober would not disagree with Ms. Vollrath's statement that after the evidentiary hearing, she related a conversation with Mr. Endress stating the most the office would do is send a letter, informing the commission of his testimony. (V12, 1848).

After Endress testified, Mr. Cannella contacted him regarding this case. A letter Endress sent after he testified in 2002 reflects that he was seeking a deal or agreement from the State Attorney's Office regarding his upcoming parole hearing. (V12, 1850). Ober told Mr. Cannella that he would tell the parole commission that Endress had in fact testified against Mr. Byrd on September 2nd. (V12, 1850). Ober never

told Cannella that his office would make a favourable recommendation for his release. (V12, 1850).

Ober did have some recollection of returning a phone call to Karyn Endress. Ober told Karyn that he did recall her husband testified during the post-conviction hearing and that he was in a position, if requested, to inform the parole commission of his participation. (V12, 1853). Ober knew that the conduct of Endress and Byrd "was very egregious." (V12, 1853).

Ober did not tell Karyn Endress that the worst the state would do was remain neutral at the parole hearing. (V12, 1854). Mr. Ober had regular contact with the victim's family. (V12, 1855-56). Ober explained the victim's sister's position: "She had indicated that her mother had died during the course of -- since her daughter's death and that her mother had -- had lived a very sad existence since her daughter's death which I had anticipated her saying because I knew how devastated the family was by this event." (V12, 1859-60). Ober never told Karyn that the State Attorney's Office would recommend parole. (V12, 1856).

Karyn Endress

Karyn Endress was called to testify by Byrd in the 2004 evidentiary hearing. She testified that her husband testified in the Byrd post-conviction hearing a couple of years ago.

(V12, 1775-76). She has been married to Endress for five years. (v12, 1776). At the end of January 2004, she placed calls to the State Attorney's Office. (V12, 1776). She called Ober and Vollrath to determine what their position was on her husband's parole hearing. (V12, 1777). She did not know if they would say anything favourable to her husband. Her husband was "hoping" they would say something favourable during the parole proceeding. (V12, 1777). Ms. Vollrath told Karyn that she would have to talk to Ober. In looking at her e-mails, Karyn testified that Ms. Vollrath said they would stick to their word and let the parole commission know of her husband's cooperation. (V12, 1778). In talking to Mr. Ober, he said the worst they would do is "nothing." (V12, 1779).

Norman Cannella was her husband's attorney twenty five years ago. (V12, 1781). She believed that Cannella told her husband it would be in his best interest to testify truthfully during the evidentiary hearing. (V12, 1782). To her knowledge, that is what her husband did during the 2002 evidentiary hearing. (V12, 1782). Endress told Karyn that he believed that testifying in the 2002 evidentiary hearing would be viewed favourably by the parole commission. (V12, 1783). Karyn admitted that she was never informed of any agreement between the State Attorney's Office and her husband prior to his

testifying in 2002. (V12, 1784-85). As far as she knew, it was Norman Cannella who told her husband that if he testified truthfully during the evidentiary hearing that it would be viewed favourably by the parole commission. (V12, 1785).

Karyn testified that when the State Attorney's Office opposed her husband's parole, she was disappointed and dissatisfied with the office. (V12, 1788). Her husband's new release date is 2023. (V12, 1788). While she was not aware of any agreement, Karyn thought the prosecutor's "word" meant that the parole commission "would be made aware that my husband basically cooperated." (V12, 1790). At the parole hearing, a prosecutor from the office actively spoke against her husband. (V12, 1790). She thought if they said they would remain neutral, they should have kept their word and "remained neutral." (V12, 1791). Karyn explained: "The – remaining neutral was a conversation I had with Mark Ober. That wasn't any agreement that was made with my husband." (V12, 1791). In fact, prior to the January 2004 phone call, she did not know what their position would be. That is why she called Ms. Vollrath and Mark Ober. (V12, 1792).

Norman Cannella, Sr.

Norman Cannella Sr. testified that he was Endress's attorney when he went to trial in 1983. (V12, 1874). He did

not have any recollection of a post-conviction hearing in September of 2002. (V12, 1876). He did recall meeting with Endress in prison in Zephryhills, but, did not know exactly when it occurred. He thought he did it prior to October 2002. (V12, 1877). Mr. Cannella testified that he had no contact with either Sharon Vollrath or Mark Ober prior to meeting Endress sometime in 2002. (v12, 1877). He met with Endress without charge for the father, with whom he had maintained a relationship over the years. (V12, 1879). Cannella's recollection was vague regarding his jail conversation in 2002, but, knew that Endress was interested in furthering his chances for parole. (V12, 1879). When asked if Endress was "obsessed" with getting out, Cannella testified: "Oh, I think he was. I know that if I were there, I'd be obsessed with getting out." (V12, 1880). When asked what advice if any he gave to Endress, Cannella replied: I – I think we may well have discussed the fact that if he was inclined to testify in Mr. Byrd's proceedings that he indeed should do that." (V12, 1882). Although Endress Sr. did not want his son to testify, Cannella told him if he was inclined to testify, do so. Cannella explained: "I didn't feel that it would harm him in any way as long as his testimony was truthful." (V12, 1883). He had no communication with anyone from the State prior to seeing Endress

in jail. (V12, 1883). He never reached any agreement with the State prior to meeting Endress. Specifically, he never had any agreement with the State regarding a favourable parole recommendation. Nor, did Endress ever tell him of such an agreement with the State. (V12, 1884).

Cannella had contact with Ober after the 2002 hearing, and, had a brief conversation. (V12, 1880). However, having known Ober for a very long time he testified: "I assure you without hesitation I never asked Mr. Ober to do anything on behalf of Mr. Endress. I never asked him to intercede. I never asked him to make a statement." (v12, 1881). Cannella explained that his representation of Endress ended long ago and he did not consider him a client. (V12, 1881). After receiving calls from Ms. Endress, Cannella referred Endress to an attorney who recently retired from the parole commission as a person who might be able to assist "in securing some audience or some position with the parole commission." (V12, 1882).

Any additional facts necessary for resolution of the assigned errors will be discussed in the argument, i*nfra*.

SUMMARY OF THE ARGUMENT

ISSUE I—-Appellant's claim that the State violated Byrd's due process rights by taking inconsistent positions in his trial and Sullivan's subsequent probation revocation hearing on an unrelated charge is procedurally barred. This claim was not made below and was not addressed by the trial court.

ISSUE II—-Appellant failed to present any favorable, undisclosed evidence during the hearing below to support his Brady and/or Giglio claims. Nor, did appellant present any competent evidence to suggest, much less establish that his counsel's performance was constitutionally deficient.

ISSUE III—-The evidence introduced below clearly refutes appellant's claim that the prosecutor wrote the sentencing order or that improper communication occurred between the prosecutor and trial judge.

ARGUMENT

ISSUE I

WHETHER BYRD WAS DEPRIVED OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE PROSECUTION PRESENTED THE TESTIMONY OF CO-DEFENDANT SULLIVAN AGAINST BYRD AND THEN ARGUED LESS THAN A YEAR LATER IN SULLIVAN'S PROBATION REVOCATION PROCEEDING FOR AN UNRELATED CHARGE THAT SULLIVAN WAS NOT CREDIBLE? (STATED BY APPELLEE)

Byrd argues that the State committed a Due Process violation by relying upon Sullivan's testimony to commit Byrd and then one year later, prosecuting Sullivan for violating his probation and in the process, attacking Sullivan's credibility. However, this claim was never made to the trial court below, in either Byrd's Successive Motion for Post-Conviction Relief, or, his Amended, Successive Motion for Post-Conviction relief. (V2, 324-348). Consequently, there is no ruling from the court below to review on appeal. Since the claim was not presented to the trial court below, he is procedurally barred from raising the claim here. Green v. State, 2008 Fla. LEXIS 137 (Fla. January 31, 2008)("This claim is procedurally barred because it was neither raised in Green's 3.851 motion nor addressed by the trial court.").

Byrd attempts to excuse his procedural default by arguing that his claim is based upon Bradshaw v. Stumpf, 545 U.S. 175 (2005) which was released after the evidentiary hearing in this

case, but, before the court had issued its final order. (Appellant's Brief at 64). Appellant's position lacks any merit because Stumpf did not articulate a new rule of law relevant to any issue in this case. Indeed, the Court in Stumpf concluded that it was premature to rule on a due process claim relating to sentencing on the prosecutions taking inconsistent positions with regard to Stumpf and his codefendant. In his concurring opinion, Justice Thomas observed "[t]his Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based upon inconsistent theories." Stumpf, 545 U.S. at 190 (Thomas, concurring). Stumpf did not announce a new rule of law which would excuse his failure to raise this issue in a timely fashion.

In addition to failing to raise the issue in the trial court, had Byrd raised the issue, it would have been untimely. See Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997)(To qualify as newly discovered evidence, the asserted facts must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence [and] to prompt a new trial, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.")(citations omitted). The underlying factual basis for

Byrd's claim, tenuous though it may be, is that the State took inconsistent positions in two different court proceedings with regard to Sullivan's credibility. Byrd was aware of, or, had access to Sullivan's probation revocation in time to litigate a related issue in his 1988 post-conviction proceeding.[4] Consequently, it cannot be considered newly discovered evidence. His belated attempt to litigate the issue in a successive motion for post-conviction relief should not be countenanced.

Finally, aside from being procedurally barred from review, Byrd's claim lacks any merit. The State never took an inconsistent position with regard to Byrd's role in the murder of his wife. He was the instigator of the victim's death and directly participated in her murder. Byrd argues, without any precedent to support him, that since the State relied upon Sullivan's testimony, at least in part to convict Byrd [along with other evidence, including Byrd's confession], that the

[4] Byrd claimed that the State had some undisclosed agreement to assist Sullivan in his parole revocation proceeding. The trial court disposed of this claim below, stating, in part: "This Court is also convinced that at the time of the Defendant's trial the State of Florida had no agreement to assist Mr. Sullivan with regard to his parole violation status and that the decision to send a letter on his behalf came only after the trial of the Defendant when Mr. Sullivan's attorney requested such a letter. (E.H.T., V.I, pp. 98-100 and 118) Moreover, any effort on the part of the State of Florida to assist Mr. Sullivan as to his parole status occurred after the Defendant's trial and prior to co-defendant Endress' trial as part of a plea negotiation for Sullivan's testimony against this co-defendant. (E.H.T., V.I, Pg. 144)." (PCR-V2, 348).

State somehow committed a due process violation when it subsequently sought to revoke Sullivan's probation based upon his commission of an unrelated drug offense. In the process of revoking his probation, the prosecution, unremarkably, attacked the credibility of Sullivan. However, the prosecutor never argued that Sullivan lied when he testified against Byrd and described Byrd's leading role in the murder. Thus, Byrd has never shown that the State took an inconsistent position with respect to the content or veracity of his testimony in the instant case regarding the victim's murder.

The Supreme Court in Stumpf did not even recognize a due process violation where the State takes inconsistent positions in the co-defendant's trials. Consequently, his attempt to extend Stumpf to this situation, that once a co-defendant testifies, the State cannot, in an unrelated criminal proceeding, argue that the testifying co-defendant is less than credible. If Byrd's rather absurd argument is accepted, once a co-defendant testifies, the State cannot prosecute that individual for any subsequent offenses without jeopardizing a co-defendant's conviction.

In sum, Byrd has not established the State took an inconsistent position with respect to his role in his wife's murder. Nor, did the State attack Sullivan's veracity with

regard to Byrd's role in his wife's murder in any subsequent legal proceeding. Consequently, even if this issue was not procedurally barred, it is nonetheless, patently without merit.

ISSUE II

WHETHER BYRD WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL BECAUSE EITHER THE STATE FAILED TO DISCLOSE EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE AND/OR DEFENSE COUNSEL UNREASONABLY FAILED TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE? (STATED BY APPELLEE)

Perhaps recognizing the paltry evidence he was able to produce during the evidentiary hearings to support his newly discovered evidence claim in his successive motion for post-conviction relief, Byrd initially attempts to relitigate his previous Brady, Giglio, and Ineffective Assistance of counsel claims. Indeed, the majority of his argument under Claim II addresses claims raised in his initial motion for post-conviction relief. Counsel apparently attempts to obfuscate the thin basis for his present claims by failing to clearly delineate those claims litigated in the present successive motion from those previously made and rejected in his first motion for post-conviction relief. The trial court rejected his attempt to relitigate claims previously raised and rejected regarding Sullivan's credibility, stating, in part:

> In ground 1 A, Defendant claims that the State failed to disclose the existence of a December 17, 1981 police report which shows that Sullivan had told police officers that he could help them get Defendant and Endress "really good." Defendant claims that, despite this police report, Mr. Sullivan testified at his trial that he had not given a statement regarding this case until April 19, 1982. Defendant further

alleges that the State allowed Defendant to testify that he had not spoken to police officers until April 19, 1982, and that the State used this fact to bolster Mr. Sullivan's testimony even though they knew it was false.

However, Defendant previously alleged in his 1988 Motion that the State withheld exculpatory evidence. The 1988 claims included an allegation that the State withheld the December 17, 1981 police report. (See Supplement to Motion to Vacate Judgment and Sentence, pages 36-37, attached). The Court denied this claim because the prosecutors did not know about the report and the State had given the defense everything in its possession. The Court further found that even if Defendant had access to this report during trial, the Defendant failed to show that there was a reasonable probability that the utilization of its contents would have produced a different result. (See Order Denying Defendant's Motion for Post Conviction Relief, attached). The Supreme Court of Florida affirmed the denial of Defendant's Motion on February 20, 1992. (See Mandate, attached). Since this claim was raised and addressed in a previous motion for post conviction relief, this issue cannot be litigated in a second 3.850 motion. Marek v. Singletary, 626 So. 2d 160, 162 (Fla. 1993).

Moreover, any claim that the State used the fact that Sullivan had not given a statement regarding the case until April 19, 1982 to bolster Sullivan's credibility should also be denied as successive. Defendant previously raised this allegation in his 1988 Motion for Post Conviction Relief. (See Supplement to Motion to Vacate Judgment and Sentence, page 10-11, attached). The Court denied this claim because any allegation regarding improper prosecutorial argument could have been raised on direct appeal. (See Order, page2). The Supreme Court of Florida affirmed on February 20, 1992. (See Mandate, attached). Since this claim was raised and addressed in a previous motion for post conviction relief, this issue cannot be litigated in a second 3.850 motion. Marek, 626 So. 2d at 162. As such, no relief is warranted on ground 1A.

(V6, 825-26).

Byrd does not even acknowledge, much less attempt to overcome the clear procedural bar found by the trial court below.[5] His allegations were without merit when they were litigated in his first motion for post-conviction relief. The claims do not gain strength from repetition. Jennings v. State, 782 So. 2d 853, 858 (Fla. 2001)(affirming denial of Brady claim in a successive motion as procedurally barred where the claim was previously raised and rejected in defendant's previous 3.850 motion)(citing Mills v. State, 684 So. 2d 801, 805 (Fla.

[5] It is unclear why Byrd realleges his previously rejected claims regarding the prosecutor receiving money from his brother-in-law for a civil case referral. This Court explicitly affirmed rejection of this issue on appeal from the denial of his first motion for post-conviction relief, a fact that Byrd conveniently omits from his mention of the issue. This Court stated:

> We find that the circuit judge took particular care in setting forth his findings after noting that he considered (1) the evidence and testimony introduced at the defendant's trial, (2) the evidence and testimony presented at the evidentiary hearing, and (3) the law submitted to the court by counsel. After a careful review of the record in this case, we find that the findings and holdings of the trial judge are clearly supported by the record. We specifically agree that the record supports the trial court's conclusion that the assistant state attorney had no knowledge that he was going to receive a referral fee from his brother-in-law. Further, we find that the record supports the trial court's finding that there was no nondisclosure of information known by the prosecution at trial.

Byrd v. State, 597 So. 2d 252, 255 (Fla. 1992)

1996)(finding Brady claim procedurally barred where defendant raised same claim in previous rule 3.850 motion).

Brady or Giglio Claims Based Upon Uncharged Robberies

After referring to Sullivan's probation revocation hearing testimony and other information known to collateral counsel prior to Byrd's initial motion for post-conviction relief, Byrd finally mentions the claim upon which his successive motion was largely based, that Endress, who was previously unavailable to testify, indicated that Sullivan lied. (Appellant's Brief at 81). However, he omits the rather significant point, that when Endress testified during the post-conviction hearing, he entirely supported Sullivan's testimony with regard to Byrd's role in the murder. Endress testified that it was indeed Byrd who hatched the plan to kill his wife and was the primary actor in achieving her death. (V11, 1551-53). Moreover, Endress's testimony potentially implicated some questionable and potentially embarrassing conduct on the part of the CCRC investigator in this case.[6]

[6] Endress essentially testified that the investigator put words in his mouth and attempted to have him sign an affidavit. (V11, 1577). Investigator Walsh was asked to relay an offer to Byrd to help him, in exchange for Byrd's agreement to exonerate Endress. Walsh returned a few days later to inform Endress that Byrd agreed to the deal. While Walsh denied attempting to broker a deal, his explanation for returning to see Endress in prison a few days after the initial meeting was highly suspect:

Rather than focus on what Endress testified to regarding Byrd's role in the murder, collateral counsel focuses almost entirely on Endress's unsupported responses to leading questions, wherein he stated it would not surprise him if Sullivan had been suspected of, or had even committed some 13 robberies. (Appellant's Brief at 81-82). The problem for the appellant is that he presented no credible evidence to establish that Sullivan received "more consideration than he testified to."[7] (Appellant's Brief at 82).

"To establish a Brady violation, a defendant must show [the following]: 1) evidence favorable to the accused, because it is either exculpatory or impeaching; 2) that the evidence was suppressed by the State, either willfully or inadvertently; and 3) that prejudice ensued." Guzman v. State, 868 So. 2d 498, 508 (Fla. 2003)(citing Jennings v. State, 782 So. 2d 853, 856 (Fla. 2001)). "The test for prejudice or materiality under Brady is whether, had the evidence been disclosed, there is a reasonable

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"I mean, he was pretty curious. He wanted to know." (V11, 1597).

[7] Appellant did not make this claim in his initial successive motion, he simply morphed cross-examination of Endress to support a new claim once it was clear that his initial claim based upon newly discovered evidence and Endress, fell completely apart in a rather drastic manner. Endress, far from casting doubt upon Sullivan's testimony, actually corroborates Sullivan's testimony with regard to Byrd's leading role in his wife's murder.

probability of a different result, expressed as a probability sufficient to undermine confidence in the outcome of the proceedings." Id. (citing Cardona v. State, 826 So. 2d 968, 973 (Fla. 2002). The determination that suppressed evidence was not material under Brady is subject to *de novo* review on appeal.

> "In reviewing a trial court's application of the above law to a rule 3.850 motion following an evidentiary hearing, this Court applies the following standard of review: As long as the trial court's findings are supported by competent, substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.' 695 So. 2d at 1251 (footnotes omitted)(quoting Jones v. State, 591 So. 2d 911, 915, 916 (Fla. 1991), and Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984)).
>
> Melendez, 718 So. 2d at 747-48 (quoting Blanco v. State, 702 So. 2d 1250, 1251 (Fla. 1997)) (emphasis added).

Swafford v. State, 828 So. 2d 966, 977-978 (Fla. 2002). With these principles in mind, it is clear that the trial court properly denied appellant's claim below.

In rejecting this claim, the trial court stated, in part:

> In ground 1 A of Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend and for Evidentiary Hearing, Defendant alleges that at the September 25, 2002 evidentiary hearing, Mr. Endress testified that when he was originally interrogated in October of 1981, law enforcement officers accused him of committing robberies with Mr. Sullivan and that Mr. Sullivan had thirteen (13) pending robbery charges against him. Defendant claims that this new testimony reveals that Mr. Sullivan received additional

consideration for his testimony in the form of other uncharged crimes and that the jury should have been aware of this additional consideration. Defendant further claims that this new evidence corroborates Defendant's trial defense that Mr. Endress and Sullivan had a history of robberies, and that they robbed and killed the victim and then tried to shift the blame to Defendant.

The record reveals that there was testimony from Mr. Endress that he was originally questioned about committing robberies with Mr. Sullivan and that Mr. Sullivan had thirteen (13) pending robbery charges. However, Defendant has offered no other evidence or documentation in support of this claim. (See September 25, 2002 Transcript, pages 79-81, attached).

Moreover, at the February 10, 2004 hearing, Mr. Lopez gave the following testimony:

> Q: Also during the previous evidentiary hearing, testimony was elicited that Mr. Sullivan received greater consideration for his testimony against Mr. Byrd than what was indicated in the record on appeal. Specifically, were you aware of whether any additional 13 robbery counts were disposed of by the State Attorney's Office in consideration for Mr. Sullivan's testimony?
>
> A: No, not that I'm aware of. (See February 10, 2004 transcript, pages 28-29, attached).
>
> Moreover, at the same hearing Mr. Ober gave the following testimony:
>
> Q: Are you aware of any additional consideration granted to Mr. Sullivan in response for his testifying to the — for the state of case clearing, any agreements on 13 robberies that would be additional to the two cases that were disposed of?
>
> A: I don't recall that. I don't recall that.
>
> Q: Okay?
>
> A: I know that Mr. Sullivan, between trials, had violated his probation and I do have recollection of that.
>
> Q: But you don't have any recollection of pending 13 robbery investigations going on when he testified for the state?
>
> A: I really don't.

> (See February 10, 2004 Transcript, pages 47-48, attached).
>
> Considering the above testimony and the lack of contrary documentation, Defendant has failed to substantiate the existence of the alleged thirteen (13) pending robbery charges against Mr. Sullivan or that the State was aware of any additional pending robbery charges against Mr. Sullivan. Therefore, Defendant has failed to establish that the evidence was suppressed by the State, either willfully or inadvertently, as required by Brady. Likewise, since Defendant has not substantiated the existence of the thirteen (13) other robberies, Defendant has failed to show that the jury should have been made aware of such alleged additional consideration.
>
> As to Defendant's allegation that the alleged undisclosed thirteen (13) robberies would have corroborated his defense that Mr. Endress and Mr. Sullivan had a history of committing robberies together, and that Mr. Endress and Mr. Sullivan robbed the victim and killed her, and then tried to shift the blame to Defendant, this allegation can likewise be denied. Since Defendant has failed to establish the existence of the alleged thirteen (13) other robberies, or that the State was aware of the alleged robberies, Defendant has failed to prove that the State committed a Brady violation because he failed to establish that the State suppressed evidence.

(V6, 808-10).

As noted by the trial court, Collateral counsel's leading questions of Endress did not establish the existence of "13 pending robbery" charges against Sullivan, much less establish the existence of an agreement with the State to dispose of those charges in exchange for his testimony against Byrd.[8] See Vining v. State, 827 So. 2d 201, 208 (Fla. 2002)(affirming trial

[8] Mark Ober testified he did not recall giving any consideration to Sullivan or clearing any criminal cases other than the two cases which were, in fact disposed of. (V12, 1710).

court's conclusion that Vining failed to establish prejudice from withheld items "because Vining did not show any inconsistencies between the times and the trial testimony nor did he show how the items could have been used to impeach the witnesses."). Collateral counsel simply asserted into a question of Endress, facts which he clearly did not prove during the hearing below. Indeed, such a hearsay statement would not even be admissible at trial, much less suffice to show that the State committed a Brady or Giglio violation which could result in the reversal of appellant's conviction or sentence. Wood v. Bartholomew, 516 U.S. 1, 6 (1995)(Evidence which is not admissible is not "evidence" at all). Mere suspicion of criminal activity or even an active investigation of criminal activity does not generally constitute admissible evidence in a criminal trial. Breedlove v. State, 580 So. 2d 605, 609 (Fla. 1991). That Sullivan may have been investigated for, or implicated in, unrelated crimes does not constitute relevant impeachment material in this case. See Sanchez-Velasco v. Moore, 287 F.3d 1015, 1032 (11th Cir. 2002).

Finally, although the trial court did not address the timeliness of appellant's claim below, it is clear this claim could have been raised in Byrd's initial motion for post-conviction relief. See Gudinas v. State, 879 So. 2d 616, 618

(Fla. 2004)(noting that "Gudinas does not now explain why this argument was not previously raised" and finding the issue "procedurally barred as not being properly raised as a claim within a successive 3.851 motion."). The rather unremarkable claim that Sullivan may have committed additional robberies is clearly untimely. Indeed, appellant as much as acknowledges this fact when he asserts the following in his brief: "When Mr. Byrd alleged in **1989 collateral proceedings** that 'other uncharged crimes' were not pursued against Sullivan in return for his testimony, the trial prosecutors testified that they were unaware of any other uncharged crimes involving Sullivan." (Appellant's Brief at 82 n.33)(emphasis added). Appellant never even attempted to carry his burden of showing this claim could not have been raised at some point prior to the instant motion. See Van Poyck v. State, 961 So. 2d 220, 224 (Fla. 2007)("Rule 3.851(d)(1) bars a postconviction motion filed more than one year after a judgment and sentence are final" unless "the movant alleges that 'the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence.'" (quoting Fla. R. Crim. P. 3.851(d)(2)(A)). Consequently, in addition to being without merit, the instant claim is also untimely.

Appellant cryptically mentions that Endress was implicated in another robbery by referencing an exhibit containing Mary Taylor's allegation that Endress robbed her at knife point. However, it must be remembered that Endress did not testify during Byrd's trial. Impeachment of him on an uncharged collateral crime, has no bearing on the fairness of Byrd's trial. LeCroy v. Sec'y, Fla. Dep't of Corr., 421 F.3d 1237, 1268 (11th Cir. 2005)(impeachment material for non-testifying witness was not material under Brady). Byrd does not even attempt to fit this exhibit within the framework of some cognizable post-conviction claim like Brady or Giglio.[9] Indeed, when asked about whether or not he committed the robbery, Endress denied it. (V12, 1832). Endress testified that he did not recall any pending charge for the robbery and that this "was the first I've heard of it." (V12, 1832). Consequently, appellant failed to prove that Endress received any benefit for

[9] This Court stated that to establish a violation of Giglio v. United States, 450 U.S. 150 (1972), the defense must establish the following: "1) that the testimony was false; 2) that the prosecutor knew the testimony was false; and 3) that the statement was material." Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001). (string cites omitted). "Further, we have repeatedly emphasized that [t]he thrust of Giglio and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and the prosecutor not fraudulently conceal such facts from the jury." (string cites omitted). "[T]he false evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Guzman v. State, 868 So. 2d at 506.

his testimony during the post-conviction hearing, much less any benefit at the time of Byrd's trial [and since Endress did not testify during appellant's trial, any benefit would be irrelevant].

The trial court rejected this claim below, stating:

> In ground 1C, Defendant alleges that the State withheld a file regarding Mary Jane Taylor's allegation that Mr. Endress forced his way into her residence at knife point and robbed her. Defendant claims that this evidence would have corroborated his defense that Endress and Sullivan were on a robbery spree and robbed and killed the victim. Defendant alleges that the State did not make this file available until after the September 25, 2002 evidentiary hearing. However, in order to prevail on a claim of newly discovered evidence, Defendant must show that the new evidence "would probably produce an acquittal on retrial." Mills v. State, 786 So. 2d at 549. The same is required in order to prevail on a Brady claim. McLin, 827 So. 2d 948. Defendant has failed to establish that an allegation of an additional robbery committed by a co-defendant, when faced with the contrary evidence of the admission of Defendant's confession would produce an acquittal on retrial. Therefore, Defendant has also failed to establish a Brady violation. Furthermore, as to any claim by Defendant that defense counsel was ineffective for failing to discover or present evidence regarding Mary Jane Taylor's allegation or that this new evidence establishes manifest injustice, these allegations are without merit. In order to prevail on an ineffective assistance of counsel claim, the first prong in Strickland requires that a defendant prove that "counsel's performance was deficient." Since Defendant has failed to show that his counsel was aware of Mary Jane Taylor's allegations, Defendant has failed to show how his counsel was deficient. If counsel was not deficient, it therefore follows that Defendant was not prejudiced. Since Defendant has failed to demonstrate ineffective assistance of counsel, the Court finds

> that this new evidence does not establish manifest injustice. As such, no relief is warranted on ground 1 C.

(V6, 813-14).

The trial court correctly found that the Mary Taylor police report does not tend to exonerate the appellant. Appellant confessed to having hired Sullivan and Endress to murder his wife. Mary Taylor's allegations against Endress, who did not testify during appellant's trial, do nothing to undermine confidence in the outcome of his trial.

Next, Byrd mentions an allegation contained in a police report that Sullivan robbed Benjamin Parry at gunpoint. (Appellant's Brief at 83). However, appellant never called Sullivan to testify below and never proved that Sullivan received any consideration relating to this incident at the time he testified. See Spencer v. State, 842 So. 2d 52, 63 (Fla. 2003) (rejecting ineffectiveness claim where collateral counsel failed to call the allegedly impeaching witness during the evidentiary hearing and noting that reversible error cannot be predicated on "conjecture.")(citing Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974)). Nor, could such evidence, assuming appellant presented competent evidence to establish the offense, which he did not, be admissible in appellant's trial.

Appellant never explains under what basis evidence for an allegation Sullivan or Endress for that matter committed another robbery would be admissible in his trial. Presumably, such evidence might fall under the category of reverse Williams Rule, however, appellant never attempted to meet his burden of showing sufficient similarity for admission of such evidence. See McDuffie v. State, 970 So. 2d 312, 324 n.2 (Fla. 2007)("The defendant must demonstrate a "close similarity of facts, a unique or 'fingerprint' type of information" for the reverse Williams rule evidence to be admissible.")(citing White v. State, 817 So. 2d 799, 806 (Fla. 2002) and State v. Savino, 567 So. 2d 892, 894 (Fla. 1990)). Certainly, the brutal murder for hire at issue in this case was not at all similar to the robberies implicated by the police reports submitted by the appellant wherein no victims were injured.

In conclusion, appellant presented no competent, credible evidence below, to establish that Sullivan received undisclosed consideration for his testimony.[10] The prosecutors testified that the only consideration Sullivan received was that he

[10] Appellant briefly mentions again Sullivan and his prosecution for a subsequent probation violation. This occurred **after** appellant's trial. As explained above under issue one, the fact that Sullivan committed misconduct after he testified in appellant's case, and, the State prosecuted him for it, does not in any way serve to exonerate the appellant.

mentioned at trial.[11] (V12, 1690; 1710). Appellant failed to establish either a Brady or Giglio violation below. As such, the denial of his successive motion for post-conviction relief must be affirmed.

Cumulative Analysis

Appellant next argues that a cumulative analysis of his claims renders the result of his trial unfair or unreliable. However, once again, the majority of his argument has nothing to do with the evidence developed during the hearing on his successive motion for post-conviction relief. Rather, appellant once again mentions the Brady claim based upon a police report containing Sullivan's statement that he "could give us Wade and Indress (sic) really good." (Appellant's Brief at 86). As noted above, this claim was fully litigated in his first motion for post-conviction relief, and was properly found procedurally barred here.

The trial court denied this claim below, stating, in part:

> The previous Brady and Giglio claims Defendant wants to be considered cumulatively with his new claims were raised in Defendant's 1988 Motion to Vacate Judgment and Sentence with Special Request For Leave to Amend. In the 1988 Motion, Defendant also claimed that the State withheld material exculpatory evidence. (See Defendant's 1988 Motion to Vacate Judgment and Sentence with Special Request For Leave

[11] At the time of trial, the jury was aware that significant consideration was being given to Sullivan in exchange for his testimony.

> to Amend, pages 30-32, attached). In his 1988 Motion, Defendant claimed that the State knew, but did not disclose that it had a deal with Mr. Sullivan in exchange for his testimony, that there was evidence that linked other individuals to the crime, and that the State withheld police reports which included exculpatory information regarding Mr. Sullivan.
>
> The Court denied these allegations in its Final Order Denying Defendant's Motion for Post Conviction Relief dated July 11, 1989. (See Order Denying Defendant's Motion for Post Conviction Relief, attached). As to Defendant's allegation that the State had a deal with Sullivan in regards to Sullivan's testimony against Defendant, the Court found that the decision to send a letter on Sullivan's behalf to the parole board came after Sullivan testified against Defendant. In regards to Defendant's allegation that the State withheld information regarding Sullivan's trustworthiness, the Court found that the reports in question were unknown to the prosecutors, and that even if Defendant had access to the reports, Defendant failed to show that their contents would have changed the outcome of the trial. The Court also found that the State had given the defense everything in their possession. The Supreme Court of Florida affirmed the denial of Defendant's claim on February 20, 1992, concluding that there was no violation of Brady, 373 U.S. 83. (See Mandate and Opinion, attached).
>
> "Where individual claims of error are either procedurally barred or are without merit, the claim of cumulative error must fail." Vining, 827 So. 2d 201, 219. Since Defendant has failed to establish any individual instances of Brady or Giglio violations, it follows that there is no cumulative error. As such, no relief is warranted on ground 1F.

(V6, 817-18).

As found by the trial court below, appellant has simply failed to establish any legitimate error or claim in the present proceedings to be evaluated with prior claims. Consequently, appellant's cumulative claim must be rejected.

Appellant mentions the allegation of Sullivan's 13 uncharged robberies, which he characterizes, as "new undisclosed exculpatory" evidence. However, as found by the trial court below, appellant failed to prove this claim, and, it does not constitute exculpatory evidence. Moreover, even assuming that Sullivan actually committed one or more of these robberies, confidence in the outcome of appellant's trial is not undermined. It must be remembered that Sullivan's testimony was corroborated in large part by Byrd's voluntary confession wherein Byrd admitted procuring Sullivan and Endress to murder his wife in exchange for money.

Next, appellant mentions Endress and a so called seven year plea offer. (Appellant's Brief at 87). However, the prosecutors testified that no such plea offer was made to Endress. (V12, 1690; 1707-07) Indeed, Endress admitted that no such offer was made to him by the State. (V11, 1587). Endress only received this information second hand from his father, after his own trial. Id. Thus, it is clear, that no competent evidence of such an offer was introduced during the hearing below. And, assuming *arguendo,* the existence of such an offer, appellant offers no plausible basis for relief. Endress did not testify during appellant's trial and it is simply irrelevant to any material issue.

The trial court resolved this issue against appellant below, stating:

> In ground 1B, Defendant claims that at the September 25, 2002 hearing, Mr. Endress testified that he was offered a seven (7) year sentence to testify against Defendant, and that this offer was refused by his father, and that his father never told him about the seven (7) year plea offer.
>
> Defendant has failed to substantiate this allegation. At the February 10, 2004 evidentiary hearing, Mr. Lopez testified that only he and Mr. Ober were authorized to make plea negotiations, with the consent of Mr. Salcines. (See February 10, 2004 Transcript, pages 3 8-39, attached). Mr. Lopez further testified that he did not "ever recall having a discussion with anyone in the State Attorney's Office regarding offering a potential seven year sentence to Mr. Endress." (See February 10, 2004 Transcript, pages 27-28, attached.)
>
> Mr. Ober also gave the following testimony regarding any seven (7) year sentence offered to Mr. Endress:
>
> Q: Okay. Are you aware of any discussions with either Mr. Lopez or Mr. Salcines regarding potentially offering Mr. Byrd - -
> Mr. Endress, a co-defendant of Mr. Byrd, a seven year sentence?
> A: I had no conversations regarding any offer to Mr. Endress other than to say that at some point the state attorney was very emphatic about not offering him anything.
>
> (See February 10, 2004 Transcript, pages 44-45, attached).
>
> Q: Can you — strike that. Had Mr. Salcines made such an offer, would he have disclosed it to you?
> A: Yes, he would have. Ms. Vollrath, the way that the office operated back in the that period of time, as I've indicted, I had great autonomy. I had a good group of prosecutors that worked with me. We really made these decisions ourselves and then we informed the state attorney. You know, certainly we ran it by him. But to my knowledge, that never happened.

> (See February 10, 2004 Transcript, pages 47-48, attached).
>
> Mr. Salcines also testified at a deposition that he did not remember a seven (7) year offer, and that he never made any plea offers to anyone other than an assistant or an attorney representing a defendant. (See Salcines Deposition, pages 6-9, attached). This testimony refutes Defendant's assertion that a seven (7) year plea offer was extended to Mr. Endress through his father. Moreover, Mr. Endress himself testified that no one from the State Attorney's Office ever spoke to him personally regarding a seven (7) year plea offer. (See September 25, 2002 Transcript, page 100, attached). Therefore, Defendant has failed to establish that such an offer was ever extended to Mr. Endress.
>
> Since Defendant failed to substantiate that the State was aware of any seven (7) year plea deal, Defendant has failed to establish that the State committed a Brady violation because he failed to establish that the State suppressed evidence. Moreover, since Mr. Endress did not testify at Defendant's trial, Defendant has failed to show that he suffered any prejudice as a result of any alleged offer.

(V6, 811-12).

Appellant fails to show how the court's adverse factual findings on this issue were incorrect. And, since no error or plausible basis for post-conviction relief can be discerned from the "7 year deal" allegation, it cannot provide support for a cumulative error analysis.[12]

In conclusion, the appellant simply failed to establish any new "undisclosed exculpatory evidence" as a result of litigating

[12] It is unclear why appellant mentions Mark Ober's receipt of cash from his brother in law, but this issue was fully explored in his first motion for post-conviction relief and is procedurally barred here. Byrd, 597 So. 2d at 255.

his successive motion below. In fact, this is a rare case in which the pursuit of the successive motion reveals additional direct evidence of appellant's guilt. Endress, a co-defendant, who was unavailable to testify at the time of Byrd's trial, testified that Byrd approached him and Sullivan with a plan to murder his wife in exchange for money from the life insurance proceeds. Endress confirms Sullivan's testimony that after stringing appellant along for a while, appellant finally initiated and participated in her gruesome murder. (V11, 1551-55). Endress confirmed that it was the appellant who finished off his wife, strangling her. This was the only direct testimony regarding the charged offenses developed below. Consequently, far from casting doubt on the reliability of appellant's conviction, confidence in the proper outcome in this case is increased. See Green v. State, 2008 Fla. LEXIS 137, 12-13 (Fla. Jan. 31, 2008)(no error in considering new evidence of guilt as part of an examination of all the post-conviction evidence to determine if a new trial is warranted.).

Ineffective Assistance of Counsel

Appellant finally argues that if the State did not suppress favorable evidence, then counsel must have been ineffective in failing to uncover it. (Appellant's Brief at 90-93). However, appellant does not bother to tell us what specific evidence counsel should have uncovered, whether it would be admissible and how the absence of such evidence prejudiced him. i.e., the requirements for relief under Strickland. Such a conclusory allegation is not sufficient to preserve the issue for appeal.[13] "This Court has held that vague and conclusory allegations on appeal are insufficient to warrant relief." Doorbal v. State, 2008 Fla. LEXIS 215, 33 Fla. L. Weekly S 107 (Fla. Feb. 14, 2008). As this Court stated in Patton v. State, 878 So. 2d 368, 380 (Fla. 2004):

> "A summary or conclusory allegation is insufficient to allow the trial court to examine the specific allegations against the record." Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998); see also Rumph v. State, 527 So. 2d 270 (Fla. 1st DCA 1988) (finding appellant's 3.850 motion facially insufficient to raise any fundamental error and that the procedural error complained of occurred during trial and should have been raised on appeal from the judgment of

[13] The trial court briefly addressed appellant's ineffective assistance of counsel claim, stating, in part: "Where individual claims of error are either procedurally barred or are without merit, the claim of cumulative error must fail." Vining, 827 So. 2d 201, 219. Since Defendant has failed to establish any individual instances of ineffective assistance of counsel, it follows that there was no cumulative error. As such, no relief is warranted on ground 2B. (V6, 820).

> conviction). Likewise, such a conclusory allegation is not sufficient for appellate purposes. Thus, to the extent that fundamental error is alleged by Patton, the claim is conclusory and facially insufficient.

The only specific argument made by appellant regarding counsel's allegedly deficient performance, is his citation to a Florida Bar disciplinary record for actions occurring after trial counsel's representation of the appellant had concluded. The trial court rejected this issue below, stating, in part:

> In ground 2A, Defendant alleges ineffective assistance of counsel for counsel's recent disbarment in 2002. However, in order to prevail on an ineffective assistance of counsel claim, the first prong in Strickland requires that a defendant prove that "counsel's performance was deficient." 466 U.S. at 686. Here, Defendant has failed to establish any specific instances of ineffective assistance of counsel in Defendant's case resulting in his defense counsel's disbarment. The fact that his counsel was recently disbarred for actions that occurred after 1988 does not establish that counsel's performance was deficient in Defendant's 1982 case, or that counsel's recent disbarment resulted in any prejudice to Defendant's case. Therefore, Defendant has failed to meet the test set forth in Strickland, and has therefore failed to demonstrate ineffective assistance of counsel. As such, no relief is warranted on ground 2A.

(V6, 818-19)

As noted by the trial court, appellant has not carried his burden of specifically pleading and proving deficient performance and resulting prejudice under Strickland. Indeed, appellant failed to call trial counsel to testify below.

Appellant has completely failed to meet his burden of proof and persuasion to overcome the presumption of effective counsel.

ISSUE III

THE SENTENCING JUDGE ERRED BY FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES AND BY FAILING TO DISCLOSE TO MR. BYRD AND/OR HIS COUNSEL THE FACT THAT THE STATE PREPARED THE FINDINGS IN SUPPORT OF THE DEATH SENTENCE.

Finally, appellant maintains that either the State drafted the sentencing order, or, that the State simply sent an *ex parte* letter to the trial judge to point out an error in those findings. He concludes that the existence of a letter sent by one of the prosecutors suggests that the trial judge did not independently weigh aggravating and mitigating factors. The State disagrees.

The trial court rejected this issue below, stating, in part:

> In ground 2, Defendant alleges that the sentencing judge, Judge Alvarez, erred by failing to independently weigh the aggravating and mitigating circumstances and by failing to disclose that the State prepared the findings. The Defendant claims that the Hillsborough County State Attorney's Office had a standard practice of drafting the findings in support of a death sentence on an ex parte basis. The Defendant cites State v. Reichman, 777 So. 2d 342, 352 (Fla. 2000), for the proposition that Florida law requires that the sentencing judge independently weigh the mitigating and aggravating circumstances.

An evidentiary hearing was held on this matter on September 25, 2002. Judge Alvarez testified at the hearing that:

> I went through aggravating circumstances and listed each one. And under each one I gave reasons why I thought aggravating circumstances applied in this particular case and why an aggravating circumstance didn't apply. There was either evidence to that aggravating circumstance or there was no evidence. And if there was no evidence, I stated that there was no evidence.

(See September 25, 2002 Transcript, pages 24-25, attached).

Judge Alvarez further testified that he "had no assistance other than [him]self and [his] notes," and that Mr. Lopez never gave him a draft of a sentencing order in Defendant's case. (See September 25, 2002 Transcript, pages 25-26, attached).

Mr. Ober also testified at the September 25, 2002 hearing that he did not prepare any part of the sentencing order for Judge Alvarez and that he did not know of anyone in the State Attorney's Office that had prepared or helped prepare the sentencing order. (See September 25, 2002 Transcript, pages 52-53). Furthermore, a review of the record reveals a 1982 letter from Mr. Lopez to Judge Alvarez regarding the sentencing order. (See December 8, 1982 Letter from Mr. Lopez to Judge Alvarez, attached). In that letter, Mr. Lopez states "I received a copy of your sentence in the State vs. Milford Wade Byrd case. In reviewing it, I came across a point which may need some clarification." (See December 8, 1982 Letter from Mr. Lopez to Judge Alvarez, attached). The letter goes on the discuss a slight inconsistency in the sentencing order. (See December 8, 1982 Letter from Mr. Lopez to Judge Alvarez, attached). The letter makes it clear that Mr. Lopez had just received the order and seen it for the first time, refuting Defendant's claim to the contrary. The testimony at the September 25, 2002 hearing and the December 8, 1982 letter establishes that Judge Alvarez independently weighed the aggravating and mitigating circumstances and Defendant has failed to provide any evidence to the contrary. Therefore, Defendant's allegation is unsubstantiated and refuted by the record. As such, no relief is warranted on this ground.

> As to Defendant's allegation that Judge Alvarez failed to disclose that the State prepared the sentencing order, because Defendant has failed to show that the state prepared the sentencing order, Defendant has failed to establish that there was anything to disclose. As such, no relief is warranted on ground 2.

(V6, 805-07).

Appellant's initial allegation regarding the sentencing order is simply false. The sentencing judge in this case, Honorable Dennis Alvarez, testified at the evidentiary hearing on September 25, 2002, that he recalled the facts of the case and he personally drafted the sentencing order. (V11, 1512, 1514). Assistant State Attorneys Mark Ober and Manuel Lopez also testified at that hearing. Mr. Ober stated that he had no recollection of the process involved in drafting the order. Judge Lopez denied drafting the sentencing order for Judge Alvarez. It is clear from the testimony given at the evidentiary hearing that the Defendant's allegation is patently false and he is entitled to no relief on this claim.

Appellant points to the existence of the letter and concludes that it was some sort of sinister *ex parte* communication. The existence of the letter proves nothing. The letter simply attempted to point out a scrivener's error in the order. See Tompkins v. State, 872 So. 2d 230, 245 (Fla. 2003)(ex parte communication suggesting the prosecutor actually

drafted the sentencing order did not require a new sentencing where the defendant failed to show he was denied a "detached judge or that" the judge "failed to independently weigh the aggravating and mitigating circumstances."). The record establishes that Judge Alvarez exercised his independent judgment and independently wrote the sentencing order. Consequently, appellant's allegation of error must be denied.

CONCLUSION

In conclusion, appellee respectfully requests that this Honorable Court AFFIRM the denial of Byrd's successive motion for postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE has been furnished by U.S. mail to Martin J. McClain, Special Assistant CCRC-South, 141 N.E. 30th Street, Wilton Manors, Florida 33334; and to Neal Dupree, Capital Collateral Regional Counsel-South, 101 N.E. Third Ave., Suite 400, Ft. Lauderdale, Florida 33301, this 2nd day of May, 2008.

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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