IN THE SUPREME COURT OF FLORIDA

MARK ALLEN GERALDS,

Appellant,

v. CASE NO. SC06-761

STATE of FLORIDA,

Appellee.
_______________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR BAY COUNTY, FLORIDA

ANSWER BRIEF

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PRELIMINARY STATEMENT

References in the State's brief will denominated as follows:

Vol. __ , PCR __ : Post-Conviction Record.

R.(G.P.): Guilt Phase Record of Geralds' 1990 Trial.

R.(P.P.): Penalty Phase Record of Geralds 1993 Resentencing Hearing

INTRODUCTION

Mark Allen Geralds was convicted for the first-degree murder of Tressa Pettibone. On direct appeal, this Court affirmed Geralds

conviction; however, this Court also found that, during the penalty phase hearing, the trial court impermissibly allowed the prosecution to question a mitigation witness regarding Geralds' prior nonviolent felony convictions; and therefore, remanded the proceedings for a second penalty phase hearing.

During his resentencing hearing, the jury, by a 12-0 vote, again recommended a death sentence for Geralds. The trial court determined that the aggravating circumstances presented outweighed the mitigating circumstances and sentenced Geralds to death for the murder of Pettibone.

Geralds now challenges the saliency of his capital sentence. A post-conviction evidentiary hearing was conducted wherein Geralds brought forth a series of claims challenging the constitutional basis of *both* his conviction and sentence. Geralds argued, among other things, that: 1) the prosecution withheld potentially exculpatory evidence in contravention of *Brady v. Maryland*, 373 U.S. 83 (1963); 2) his trial and penalty phase counsel, Joe Adams, failed to provide was constitutionally effective representation as understood by the tenets of *Strickland v. Washington*, 466 U.S. 668 (1984); 3) forensic evidence linking Geralds to the crime should be questioned; and 4) that alternative suspects were not actively pursued once law enforcement's focus became centered on Geralds.

The post-conviction court rejected all of Geralds' claims; he now brings this appeal, essentially arguing that court decision was

not supported by competent and substantial evidence. The State respectfully disagrees; and, as the record amply demonstrates, Geralds claims of error are without merit.

PROCEDURAL BACKGROUND AND HISTORY

As previously noted, Geralds was convicted and sentenced to death for capital murder. The underlying facts and procedural history are more fully explained in both this Court's direct appeal opinion and, in its subsequent opinion following Geralds' resentencing:

> The convictions arise from events occurring on February 1, 1989, when eight-year-old Bart Pettibone arrived home from school and found his mother, Tressa Lynn Pettibone, beaten and stabbed [**2] to death on the kitchen floor. There were two stab wounds on the right side of Tressa Pettibone's neck and one fatal stab wound on the left side. The wounds were consistent with a knife found in the kitchen sink. The medical examiner found a number of bruises and abrasions on the head, face, chest, and abdomen of the victim caused by some form of blunt trauma. The examiner also determined that the victim's wrists had been bound with a plastic tie for at least twenty minutes prior to her death.
>
> Blythe Pettibone, the victim's daughter, testified that several items of jewelry were missing from the home. Among these were a herringbone chain necklace and a pair of red-framed Bucci sunglasses. Kevin Pettibone, the victim's husband, testified that his wife's Mercedes automobile was missing. The automobile was later found in the parking lot of a nearby school. Cash in the amount of $ 7,000 hidden in the house was not taken.
>
> Mark Geralds was a carpenter who had worked on the remodeling of the Pettibones's house. About one week prior to the murder, Tressa Pettibone and her children encountered Geralds in a shopping mall. Tressa Pettibone mentioned that her husband was out of town on business. [**3] Later, Geralds approached Bart at the video arcade. He asked when Bart's father would be back in town and when Bart and his sister left for and returned from

> school during the day.
>
> Other circumstantial evidence linked Geralds to the crime: (1) at 2:00 p.m. on February 1, 1989, Geralds pawned a gold herringbone chain necklace. Serology testing revealed a stain on the necklace to be blood compatible with the victim's blood type and inconsistent with Geralds's; (2) Douglas Freeman, Geralds's grandfather, testified that on occasion Geralds would come by his house to take a shower. Freeman testified that Geralds came by at 11:30 a.m. on [*1159] February 1, 1989, and asked to shower because he had been working on a fiberglass boat, a reason he had given in the past. When he left, Geralds stated that he was taking a pair of sunglasses to some friends; (3) Vickey Ward testified that Geralds gave her a pair of red Bucci sunglasses in late January or early February, 1989; (4) a pair of Nike shoes was seized from Geralds's residence. Evidence indicated that they could have made the tracks on the floor in the Pettibone house; (5) the plastic tie recovered from the victim's wrist matched the ties found [**4] in Geralds's car.
>
> The jury found Geralds guilty of first-degree murder, armed robbery, burglary of a dwelling, and theft of an automobile. The jury recommended death for the homicide. The court concurred, finding no statutory or nonstatutory mitigating factors and four aggravating circumstances: (1) the homicide occurred during a burglary; [2] (2) the homicide was committed to avoid arrest; [3] (3) the homicide was especially heinous, atrocious, or cruel; [4] and (4) the homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. [5] The court sentenced Geralds as a habitual felony offender for the noncapital felonies.

Geralds v. State, 601 So. 2d 1157, 1158-59 (1992).

This Court affirmed Geralds' conviction, determining that the evidence presented clearly supported the verdict rendered. However, this Court remanded for a new penalty phase based on the prosecution's attempts to impeach a mitigation witness testifying on

Geralds' behalf; specifically, this Court determined that the prosecution improperly referenced - without having first established a predicate - Geralds' prior non-violent felony convictions. *Id.* at 1161-62.

Accordingly, Geralds was granted a second penalty phase hearing. As the Florida Supreme Court observed:

> Geralds was convicted and sentenced to death in February 1990 for the first-degree murder of Tressa Lynn Pettibone. On appeal, this Court affirmed Geralds' conviction but, due to trial court errors, remanded for resentencing and a new penalty phase [**2] hearing. *See Geralds v. State, 601 So. 2d 1157 (Fla. 1992).* [1]
>
> > 1 The facts surrounding the murder are detailed in our original opinion. *See Geralds, 601 So. 2d at 1158-59.*
>
> After the new penalty phase hearing, the jury recommended death by a twelve-to-zero vote. At sentencing, the trial court found the following aggravating factors: (1) the murder was committed during the commission of a robbery and/or burglary; [2] (2) the murder was especially heinous, atrocious, or cruel; [3] and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. [4] The court found the statutory mitigator of age [5] but afforded it little weight. The defendant was twenty-two years old at the time of the offense. As for non-statutory mitigation, the trial court found the following but gave them "very little weight": (1) defendant's love and concern for his daughter and former wife; (2) defendant came from a divorced family and was unloved by his mother; and [**3] (3) defendant's antisocial behavior and bipolar manic personality. The trial court determined the aggravating factors outweighed the mitigating factors and sentenced Geralds to death.

Geralds v. State, 674 So. 2d 96, 98 (1996).

Following his resentencing hearing, Geralds raised ten claims before this Court, challenging the propriety of his death sentence:

> The ten claims are as follows: (1) the trial court abused its discretion in denying his motion for continuance to secure Dr. William Sybers as a witness; (2) the prosecutor's cross-examination of appellant about his conversation at the mall with the victim's family, the sunglasses he gave to a friend, and a necklace he pawned, was beyond the scope of direct examination; (3) the trial court abused its discretion by allowing Dr. James Lauridson, a pathologist who had not performed the victim's autopsy, to testify as to the manner and cause of death of the victim; (4) the trial court erred in refusing to instruct the jury that prior convictions for non-violent felonies are not aggravating circumstances; (5) there was sufficient evidence presented at the trial concerning the statutory mitigator of extreme mental or emotional disturbance for the jury to be instructed on it; (6) the jury instruction on the cold, calculated, and premeditated aggravator is unconstitutional; (7) the jury instruction on the heinous, atrocious, or cruel aggravator is unconstitutional; (8) there is not competent and substantial evidence to support the trial court's finding of the heinous, atrocious, or cruel aggravator; (9) there is not competent and substantial evidence to support the trial court's finding of the cold, calculated, and premeditated aggravator; and (10) death is a disproportionate sentence.

Geralds, 674 So. 2d at 98 n. 6.

This Court rejected each of Geralds' claims, except for his claim challenging the applicability of the CCP aggravator. Nevertheless, the trial court's finding regarding the CCP aggravator was found to be harmless given that two very substantive statutory aggravators were also found applicable: 1)the murder was Heinous, Atrocious, or Cruel (HAC), and 2) the murder was committed during the commission of a burglary.

Thereafter, Geralds brought numerous claims seeking post-conviction relief. Geralds argued: (1) Fla. Stat. §119.19 and Fla. R. Crim. P. 3.852 is facially unconstitutional; (2) Bay County Circuit Court's General Jury Qualification Procedure violated Geralds' Fifth, Sixth, and Fourteenth Amendment rights; (3) he was denied an impartial jury due to pretrial publicity; (4) he was denied fair adversarial testing because his trial counsel was ineffective and the State failed to disclose exculpatory material (5) his counsel had a conflict of interest; (6) the State violated the tenets of *Brady v. Maryland*; (7) the prosecution raised improper arguments before the jury which, nevertheless, should have been objected to by Geralds counsel; (8) newly discovered evidence demonstrated that Geralds conviction was in contravention of the Eighth and Fourteenth Amendments; (9) Florida's Death Penalty statute is facially unconstitutional; (10) Florida improperly allows a jury to recommend a sentence of death by a mere majority vote; (11) his counsel failed to adequately prepare mitigation evidence; (12) he did not receive an adequate mental health evaluation; (13) impermissible hearsay evidence was presented during his resentencing hearing; (14) the CCP aggravator and related sentencing instructions are constitutionally vague; (15) the jury was improperly instructed regarding the HAC aggravator; (16) the trial court improperly found that the murder occurred

during the commission of a felony; (17) the introduction of nonstatutory aggravators impermissibly tainted the penalty phase hearing; (18) the jury instructions read during the penalty phase hearing improperly shifted the burden to Geralds to prove that his death sentence was improper; (19) the penalty phase hearing's jury instructions were improper because they appeared to dilute the jury's sense of responsibility; (20) he is innocent; (21) the Florida Supreme Court erred by failing to remand for resentencing after strking the CCP agravator; (22) he was denied a proper direct appeal because no accurate transcript of his trial exists; (23) the jury was improperly instructed that it could consider Geralds' flight as evidence of guilt; (24) the cumulative effect of errors denied Geralds a fair adjudication; (25) Florida's ethic rules improperly prevented Geralds' counsel from questioning jurors; (26) Florida's method of execution - lethal injection - is unconstitutional.

Pursuant to an order dated February 12, 2003, the post-conviction trial court addressed Geralds' claims. The court denied Geralds an evidentiary hearing as to claims: (1), (3), (4) (in part), (5), (7), (8) (in part), (9), (10), (11) (in part), (12) (in part), and (13) through (26). The trial granted an evidentiary hearing as to claims: (2), (4) (in part), (6), (8) (in part), (11) (in part) and (12) (in part). The remaining claims were considered

within the context of the evidentiary hearing.

POST-CONVICTION EVIDENTIARY HEARING

Geralds called his aunt Shelia Freeman (IAC witness) to testify. Freeman testified that on February 1, 1989, she was at the home of her parents; Geralds came to the house during the morning - he stated that he needed to take a shower (Vol. XX, PCR 2223). She did not notice any blood on Geralds' person that morning (Vol. XX, PCR 2224). She stated that prior to Geralds' trial, she was never contacted by his trial counsel; moreover, she was never called as a witness at the trial by Geralds counsel (Vol. XX, PCR 2224).

Freeman conceded that her father (whose house she was visiting on February 1, 1989) was called to testify at Geralds' trial (Vol. XX, PCR 2225).

Joe Grammer, the Assistant State Attorney responsible for prosecuting Geralds was called to testify (Vol. XX, PCR 2227). When asked about the State's theory of the case, Grammer stated that it was "murder committed during burglary and robbery" (Vol. XX, PCR 2230). Grammer noted that his responsibilities under *Giglio v. United States*, 405 U.S. 150 (1972) required, among other things, that he not present false testimony (Vol. XX, PCR 2231). Apparently, a list of items that had been stolen from the Pettibone house was shown to Grammer while he was testifying; Grammer stated

that none of the listed items were in the possession of Geralds when he arrested (Vol. XX, PCR 2235-36).

Grammer was also asked about the trial testimony of Billy Danford, who was the owner of a pawnshop; and, the individual to whom Geralds sold Tressa Pettibone's herringbone necklace. Grammer was asked whether he (Grammer) was aware that Danford had previous encounters with law enforcement, given that Danford had testified at Geralds' trial that he did not have a criminal record (Vol. XX, PCR. 2246-53). Grammer indicated that he was not aware that Danford had any type of criminal record (Vol. XX, PCR 2253). Grammer acknowledged that there were some latent fingerprints from Pettibone's stolen Mercedes which could not be linked to Geralds (Vol. XX, PCR 2295). Some hair fiber evidence found in the Mercedes could not be linked to Geralds (Vol. XX, PCR 2296).

On cross-examination, Grammer stated that he was cognizant of his responsibility to provide discovery to the defense (Vol. XX, PCR 2299). He noted that all the discovery that was provided to the defense did not necessarily become a part of the court files (Vol. XX, PCR 2301). Grammer did not believe that he had knowingly presented false or misleading testimony (Vol. XX, PCR 2302). It was the policy of the office to disclose all *Brady* related information (Vol. XX, PCR 2303). Grammer noted that Geralds' trial attorney, Bob Adams, represented Geralds both in his original trial and at

Geralds' resentencing (Vol. XX, PCR 2315), and he further testified that Adams was well-respected (Vol. XX, PCR 2313). In the nearly two decades since his conviction, no direct evidence has been brought to bear which would call into question Geralds' culpability (Vol. XX, PCR 2315-16).

On redirect examination Grammer noted that other suspects were investigated prior to Geralds' arrest (Vol. XX, PCR 2322).

David Meadows was called to testify. In 1989, at the time of the murder, he worked at a manager for a Panama City bar, LaVela (Vol. XX, PCR 2325). Meadows remembered meeting Geralds in 1989, given that Geralds was a friend of William Pelton -- an individual working on a construction crew which was renovating the bar (Vol. XX, PCR 2326). Meadows noted that employees did not adhere to a rigid time schedule (Vol. XX, PCR 2327-28). Meadows recalled Geralds hanging around while Pelton worked (Vol. XX, PCR 2329). Meadows acknowledged that he was not contacted by anyone affiliated with Gerald's legal representation until post-conviction proceedings had been initiated.

On cross-examination Meadows acknowledged that the general manager for the construction renovation project was Gregg Toriac, and Toriac would have been the appropriate individual to contact regarding Pelton and Geralds' work history (Vol. XX., PCR 2332).

James Appleman was called. Appleman was the State Attorney for

the Fourteenth Judicial Circuit, and served as the lead prosecutor both at Geralds' trial and his resentencing (Vol. XX., PCR 2333). Appleman could not recall the specific jury qualifications procedures that were in place during Geralds' case (Vol. XX., PCR 2334). Appleman acknowledged that he was aware of the State's constitutional responsibilities under *Brady* and *Giglio* (Vol. XX., PCR 2336). Appleman acknowledged that such duties included disclosing all potentially exculpatory information contained in his case file (Vol. XX., PCR 2381).

Appleman was asked about the 1990 deposition of Billy Danford, the pawn shop broker whom Geralds dealt with (Vol. XX., PCR 2347); Appleman was specifically questioned about Danford's previous testimony that he did not have a criminal record; when, in fact, this appeared untrue, as Danford had previously been charged with "failing to record a transaction by a pawn broker" (Vol. XX., PCR 2349). Appleman was further queried regarding whether other potential suspects, such as William Pelton, were pursued by law enforcement prior to the apprehension of Geralds (Vol. XX., PCR 2354-55).

Appleman conceded that he had difficulty recalling various details surrounding the case - including information contained in investigative reports (Vol. XX., PCR 2353-57, 2361, 2367). Appleman acknowledged that there were fingerprints located in the

Pettibone home which could not be matched to Geralds, nor anyone in the Pettibone family (Vol. XX., PCR 2373-74).

On cross-examination, Appleman agreed that the State had a continuing duty to provide *Brady*-related evidence to Geralds' represetatives (Vol. XX, PCR 2382).

Mike Stone was called. Stone testified that he is a personal injury and criminal defense attorney, practicing in Bay County, Florida (Vol. XXI, PCR 2403). He was formally employed with the Public Defenders Office (Vol. XXI, PCR 2404). He noted that between 1982 and 1992, when he was employed in the Public Defender's Office, he had participated in "dozens" of capital cases (Vol. XXI, PCR 2404). For a short period of time in 1989, Stone was responsible for representing Geralds (Vol. XXI, PCR 2405), and noted that Geralds' case generated a great deal of media attention (Vol. XXI, PCR 2406).

However, Stone stopped representing Geralds because of the existence of a conflict - an individual working in the Public Defender's Office was a friend of Tressa Pettibone's family (Vol. XXI, PCR 2405). Moreover, he explained that he stopped working with the Public Defender's Office because of a controversy involving a former medical examiner named William Sybers (Vol. XXI, PCR 2407). Sybers was under investigation for the murder of his wife, within the same time period that Stone was representing individuals

being prosecuted by the State Attorney's Office (Vol. XXI, PCR 2407). Stone was troubled by the fact that Sybers was being investigated by the State Attorney's Office, but was nevertheless still being used as a witness by the State Attorney's Office in other cases (Vol. XXI, PCR 2408).

Stone asserted that, as an experienced capital litigator, he was cognizant of his responsibilities to investigate potential grounds of mitigation, including: securing a psychological evaluation; interviewing friends and family members; and investigating school records (Vol. XXI, PCR 2421-22). Stone also noted that he had drafted a manual detailing how attorneys should proceed in a capital trial (Vol. XXI, PCR 2422-23).

On cross-examination, Stone observed that in cases where Dr. Sybers had performed the autopsy on the victim, Sybers' past would likely be an issue (Vol. XXI, PCR 2425). Stone noted that in some cases it is harder to secure mitigation witnesses (Vol. XXI, PCR 2428). Stone said that strategic choices must often be made, and that he and his co-counsel did not always agree regarding trial strategy (Vol. XXI 2429).

Lisa Johnson, Geralds' sister, was called to testify (Vol. XXI, PCR 2431). She noted that Geralds was a playful child (Vol. XXI, PCR 2432). Johnson provided that Geralds did not perform well in school (Vol. XXI, PCR 2433). Moreover, she recalled that Geralds

engaged in more reckless-type behavior as he got older (Vol. XXI, PCR 2434). Johnson believed that Geralds took the divorce of his parents - which occurred when he was 15 or 16 - rather hard (Vol. XXI, PCR 2435). In the years subsequent to their parents' divorce, Johnson noticed a change in Geralds' demeanor -- observing that he became more withdrawn and had mood swings (Vol. XXI, PCR 2436-37).

Johnson testified that when Geralds was arrested in 1989, she was contacted by Geralds' then-attorney, Bob Adams (Vol. XXI, PCR 2438). Apparently, Adams wanted Johnson to provide any information relevant to Geralds' upbringing for mitigation purposes(Vol. XXI, PCR 2438). Johnson asserted that she only met Adams one time (Vol. XXI, PCR 2439). Johnson was not called to testify at his original penalty phase hearing, nor was she called to testify at his resentencing hearing (Vol. XXI, PCR 2439).

Johnson was briefly cross-examined. She acknowledged that she had been to her brother's trial, and to his resentencing hearing, every single day (Vol. XXI, PCR 2440).

Vicki Ward, a long-time family friend of Mark Geralds was called to testify (Vol. XXI, PCR 2441). Ward remembered Geralds as a fun-loving child, who grew more withdrawn following the divorce of his parents (Vol. XXI, PCR 2442). Geralds apparently expressed to Ward that the divorce of his parents was difficult on him (Vol. XXI, PCR 2443-44). Ward also noted that she observed Geralds' mood

swings (Vol. XXI, PCR 2443). Ward testified during Geralds' first trial in 1990; but, she did not testify at his resentencing hearing in 1993 - because of difficulties associated with her pregnancy at the time (Vol. XXI, PCR 2444).

Ward stated that she only met Geralds' trial attorney, Bob Adams, when she testified on Geralds' behalf at his 1990 trial (Vol. XXI, PCR 2445). Ward stated that she had not discussed issues related to Geralds' childhood with Adams (Vol. XXI, PCR 2445). She would have been willing to testify regarding potentially mitigating aspects of Geralds' life had she been asked to (Vol. XXI, PCR 2445).

On cross-examination, Ward conceded that she was very emotional when she testified in 1990 (Vol. XXI, PCR 2446). She further conceded that she was aware that Geralds had previously been involved in stealing automobiles (Vol. XXI, PCR 2446); and, she later learned that Geralds had been arrested on various other occasions (Vol. XXI, PCR 2447).

Stuart James, a forensic scientist was called (Vol. XXI, PCR 2448). James was offered as an expert in "bloodstain pattern interpretation[,] crime scene reconstruction, and examination of physical evidence" (Vol. XXII, PCR 2478). James testified regarding the responsibilities of a forensic scientist (Vol. XXII, PCR 2481). James further noted that procedures must be put in place to insure that the crime scene does not become contaminated, nor evidence

altered (Vol. XXII, PCR 2481).

James was first contacted regarding Geralds' case in January of 2002 (Vol. XXII, PCR 2482). James testified that he reviewed, among other things, police and autopsy reports, crime scene photographs, and trial transcripts (Vol. XXII, PCR 2482). James also reviewed trial testimony of blood splatter expert, Jan Johnson (Vol. XXII, PCR 2483-84). James acknowledged that he agreed with some aspects of Johnson's trial testimony, including, the location within Tressa Pettibone's home as to where the altercation with her assailant started;further, James agreed with Johnson's testimony regarding the fact that Pettibone's body was dragged through the home and turned over (Vol. XXII, PCR 2484). James also disagreed with aspects of Johnson's earlier trial testimony, including Johnson's testimony that Pettibone was kneeling when she bled on her kitchen floor (Vol. XXII, PCR 2484).

James provided a detailed explanation regarding the administration of tests to assess the presence of blood on a particular sample (Vol. XXII, PCR 2486-89).

James was shown various photographs of the crime scene. Specifically, James was asked about a photograph which appeared to depict two different types of shoe prints (Vol. XXII, PCR 2492). James believed that shoe prints at the crime scene were significant (Vol. XXII, PCR 2494). James was asked whether he was aware: that

a palm print was discovered on the Pettibone's kitchen floor which could not be identified; and, whether he was aware that Pettibone apparently had hair in her hands which did not belong to Geralds (Vol. XXII, PCR 2495-96). James believed the hair evidence was significant (Vol. XXII, PCR 2496). Finally, he noted that he usually does not testify as a defense expert witness (Vol. XXII, PCR 2496).

On cross-examination, James was shown Defense Exhibit 36, which was a microanalysis report which he previously reviewed (Vol. XXII, PCR 2498). James conceded that the report did not state that Pettibone had unidentified hair strands in her hands; rather, the microanalysis report merely indicated that Pettibone had debris in her hands that could not be identified (Vol. XXII, PCR 2498). James acknowledged that he had not seen all of the photographs that had been admitted into evidence at Geralds' trial, related to the footprints discovered at the crime scene (Vol. XXII, PCR 2499).

James further admitted that he had not been to the crime scene (Vol. XXII, PCR 2502); and, he noted that it was an appropriate law enforcement technique to use Luminol to detect the presence of blood at the crime scene (Vol. XXII, PCR 2504).

James acknowledged that he read transcripts of the original trial in preparation for his testimony at the evidentiary hearing (Vol. XXII, PCR 2511).

On redirect, James stated that he had read a great deal of information in preparation for his testimony at the post-conviction evidentiary hearing (Vol. XXII, PCR 2512).

John Sapp then testified. Sapp had been married to Geralds' mother from 1984 through 1990 (2520); and, during a portion of the marriage, Geralds actually lived with his biological father - rather than with his mother (Vol. XXII, PCR 2521). When Geralds' biological father moved out of state, Geralds lived on his own (Vol. XXII, PCR 2522). Sapp believed that Geralds had a close relationship with his mother (Vol. XXII, PCR 2523).

Sapp stated that he did not have any contact with Geralds attorney either during his original trial, nor during his resentencing (Vol. XXII, PCR 2524). Further, Sapp did not believe that his ex-wife - Geralds' mother — had been contacted by Geralds' attorney either(Vol. XXII, PCR 2524).

On cross-examination, Sapp acknowledged that Geralds' mother had not attended his trial (Vol. XXII, PCR 2524). Sapp observed that Geralds had moved in with his biological father in approximately in 1985 (Vol. XXII, PCR 2525).

On redirect examination, Sapp stated that he was unsure as to whether he would have testified at Geralds' original trial in 1990, given the strained relationship that Geralds had with his biological mother (Vol. XXII, PCR 2525-26).

Kenneth Scott Hobbs, a long-time family friend of Geralds was called to testify (Vol. XXII, PCR 2526-28). Hobbs noted that Geralds' was very rambunctious as a child (Vol. XXII, PCR 2528). Hobbs further observed that as a youth Geralds would often get in trouble; and, he noted, Geralds appeared to have a strained relationship with his mother (Vol. XXII, PCR 2529).

According to Hobbs, he and Geralds became closer friends after Geralds' parents divorce; Hobbs also testified that Geralds was a risk-taking teenager (Vol. XXII, PCR 2530-31). For example, Hobbs testified that as a teen, Geralds would drive his car upwards of 140 miles-per-hour (Vol. XXII, PCR 2534). In hindsight, Hobbs observed that Geralds' behavior as a teenager, was very similar to Hobbs' ex-wife's behavior - who apparently suffered from drug addiction and was bipolar (Vol. XXII, PCR 2533). Hobbs noted that when Geralds lived with his biological father, and the atmosphere in the home was permissive (Vol. XXII, PCR 2531). Hobbs spent less time with Geralds as the two approached their later teens (Vol. XXII, PCR 2533).

Hobbs knew Geralds' friend, William Pelton (Vol. XXII, PCR 2535). Hobbs observed that Geralds and Pelton had similar types of personalities (Vol. XXII, PCR 2535). And Hobbs recalled an incident wherein Pelton engaged in reckless driving maneuvers (Vol. XXII, PCR 2536).

Within the timeframe proximate to Tressa Pettibone's murder, Hobbs was aware that Geralds was living in his car; and, Hobbs also knew that Geralds was working at Club LeVela (Vol. XXII, PCR 2536). Contemporaneous to the murder, Hobbs recalled picking Geralds up from his place of employment, and Hobbs observed that Geralds was acting loud, obnoxious, and very strangely (Vol. XXII, PCR 2537).

Hobbs was called to testify at Geralds' resentencing hearing in 1993 (Vol. XXII, PCR 2537). Hobbs testimony at the resentencing hearing encompassed discussion of his relationship with Geralds (Vol. XXII, PCR 2538). Hobbs stated that Geralds' attorney, Bob Adams, never asked him anything about Geralds' family background (Vol. XXII, PCR 2538). Hobbs affirmed that if he had been asked about Geralds' family background at the resentencing hearing, he would have been willing to do so (Vol. XXII, PCR 2538-39).

On cross-examination, Hobbs conceded that he was the first witness called at Geralds' 1993 resentencing hearing(Vol. XXII, PCR 2539). Hobbs acknowledged that he previously testified that Geralds had acted embarrassingly in public in the weeks before the murder (Vol. XXII, PCR 2540). Hobbs testified that, in his latter teenage years, he stopped associating with Geralds because he was uncomfortable with Geralds' new friends and their lifestyle (Vol. XXII, PCR 2543).

Anthony Swoboda then testified (Vol. XXII, PCR 2544). Swoboda

was a jeweler from whom Geralds had previously bought a gold herringbone necklace (Vol. XXII, PCR 2546). Swoboda recalled that after Geralds had been arrested, a police officer called Swoboda asking about the fact that Swoboda's telephone number had been discovered in Geralds' wallet (Vol. XXII, PCR 2547). Swoboda recalled that the herringbone chain had been purchased "under the table" (Vol. XXII, PCR 2547).

Swoboda testified that he had been contacted by Geralds' attorney regarding the fact the he had sold jewelry to Geralds; however, Swoboda was not subpoenaed (Vol. XXII, PCR 2548). If Swoboda had been subpoenaed he would have been willing to testify at Geralds trial (Vol. XXII, PCR 2549).

On cross-examination, Swoboda again noted that he was not called to testify either at Geralds' original trial, nor at his 1993 resentencing hearing (Vol. XXII, PCR 2550). Moreover, he could not recall when he sold the herringbone necklace to Geralds (Vol. XXII, PCR 2549). Swaboda also did not remember anything distinctive about the necklace; nor did he know how much he had charged for the necklace (Vol. XXII, PCR 2550).

James Beller, a psychotherapist testified (Vol. XXII, PCR 2564). Beller had previously testified at Geralds' resentencing hearing in 1993 (Vol. XXII, PCR 2565). Beller had previously testified in approximately eight or nine capital cases (Vol. XXII,

PCR 2565).

Beller noted that he had been contacted by Geralds attorney Joe Adams (Vol. XXII, PCR 2581). Beller also remembered that his testing of Geralds was somewhat rushed (Vol. XXII, PCR 2581). Geralds did not believe that Adams had provided any substantive materials in preparation for Geralds' psychological evaluation (Vol. XXII, PCR 2581).

Beller previously diagnosed Geralds as being bipolar and having and antisocial personality disorder (Vol. XXII, PCR 2566). Beller described the characteristics of bipolar disorder; noting, for example, that an individual diagnosed as bipolar may exhibit manic or depressive symptoms (Vol. XXII, PCR 2566). He emphasized that diagnosing an individual as being bipolar requires, among other things, "collateral" information (Vol. XXII, PCR 2567). Beller did not have access to such evidence either during his first evaluation of Geralds; nor, did Beller garner this information in preparation for Geralds' 1993 resentencing hearing (Vol. XXII, PCR 2567).

In preparation for the post-conviction evidentiary hearing, Beller evaluated Geralds once again noting that he administered a psychological test to Geralds; and, moreover, he was also able to interview Geralds' family members and one of his friends (Vol. XXII, PCR 2568-69). Specifically, Beller administered a test referred to

as the Psychopathy Check List Revised, a test which gauged "antisocial behavior with attention to psychopathic characteristics" (Vol. XXII, PCR 2568).

In Beller's interviews with Geralds' family members regarding his childhood, Geralds was described as "rambunctious," "reckless," and "impulsive"; and, Beller believed that Geralds likely should have been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) (Vol. XXII, PCR 2569, 2579). Beller testified that Geralds had a familial history of mental illness (Vol. XXII, PCR 2581). Beller also testified that Geralds' "reckless behavior" did not consist of drug or alcohol abuse (Vol. XXII, PCR 2578). Beller noted that a child with undiagnosed ADHD would have difficulties in various aspects of their life, including, in their capacity to plan and organize (Vol. XXII, PCR 2570). According to Beller, individuals with ADHD self-medicate themselves, which can lead to drug and alcohol abuse (Vol. XXII, PCR 2571).[1]

Beller described the traits of an individual with anti-social personality disorder, including, among others: failure to conform to societal norms, repeated acts of deceitfulness, impulsiveness, aggressiveness, and endangering the lives of others via reckless

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[1] Beller also believed that the divorce of Beller's parents had an significant affect on him, and disrupted the structure in his life (Vol. XXII, PCR 2572).

actions (Vol. XXII, PCR 2573). And an individual previously diagnosed with ADHD and/or bipolar disorder, combined with an anti-social personality, could exacerbate the negative symptoms of the individual's anti-social personality disorder (Vol. XXII, PCR 2574). Beller noted that most prisoners suffer from an anti-social personality disorder — though, Beller also noted that every person with anti-social personality does not become a criminal (Vol. XXII, PCR 2575). Beller further observed that the negative symptoms of individuals affected by anti-social personality - provided the individual refrains from substance abuse or other criminality - begin to stabilize as they get older (Vol. XXII, PCR 2575). Similarly, Beller acknowledged that Geralds was a much different individual than when he was evaluated for the purposes of his 1993 resentencing hearing (Vol. XXII, PCR 2575).

On cross-examination, Beller stated that he learned in 1992 of Geralds' familial history of mental illness from Geralds' cousin, Scott Casey (Vol. XXII, PCR 2582-83). Information gleaned from Casey was used by Beller in his report (Vol. XXII, PCR 2583). Beller conceded that in 1992 he would have not been able to administer the Psychopathy Check List Revised, because the test was not available at that time (Vol. XXII, PCR 2583).

Beller acknowledged the Geralds' personality traits could potentially cause him to be destructive to others (Vol. XXII, PCR

2585). In Beller's 1992 report, he described Geralds as "manipulative" (Vol. XXII, PCR 2585).

He noted that one is not born with anti-social personality disorder, but that this disorder develops over the course of one's lifetime; whereas, a bipolar individual is born with the disorder (Vol. XXII, PCR 2588).

Beller noted that he had worked in conjunction with Bob Adams on several different criminal cases (Vol. XXII, PCR 2590-91). In all criminal cases where Beller is asked to do an evaluation, he will administer psychological testing to the defendant (Vol. XXII, PCR 2591). He stated that no one prevented him from consulting with others in preparation for the 1993 resentencing hearing (Vol. XXII, PCR 2592).

On redirect examination, Beller provided that it was not his responsibility to conduct a *sua sponte* investigation of Geralds background; indeed, Geralds' trial counsel was responsible for providing background materials and information to Beller (Vol. XXII, PCR 2592). Beller was not aware that, when Geralds was a child, a childhood teacher had recommended that Geralds seek psychological counseling (Vol. XXII, PCR 2593).

On recross examination, Beller acknowledged that he had subjected Geralds to a psychological evaluation in preparation for the post-conviction evidentiary hearing (Vol. XXII, PCR 2597).

Michael Glantz, a private investigator, was called to testify (Vol. XXII, PCR 2599). After, several objections whree raised concerning the prospect of Glantz's potential hearsay-laden testimony, the proceedings where recessed.

Jim Appleman, former State Attorney, was again called, this time by State (Vol. XXV, PCR 2643). He provided that Joe Adams had a good reputation as criminal defense attorney (Vol. XXV, PCR 2644). Appleman noted that Adams was a worthy adversary (Vol. XXV, PCR 2645).

On cross-examination, Appleman provided that he had previously tried cases against Adams; and, Appleman was not aware if Adams was suffering from any medical infirmities during the time he was representing Geralds (Vol. XXV, PCR 2646).

Joe Grammer, Assistant State Attorney, was called to testify. Grammer was involved in the prosecution of Geralds during both his original trial and during his resentencing hearing (Vol. XXV, PCR 2648). Grammer stated that it is his normal practice to divulge all discovery to the defense (Vol. XXV, PCR 2648). He acknowledged that it is the practice of the State Attorney's Office to maintain its case files for a long period of time in all felony cases - particularly in homicide cases (Vol. XXV, PCR 2649); and Geralds case file had been maintained since 1989 (Vol. XXV, PCR 2651).

Grammer noted that a prosecutor's case file contains, among

other things, items received from law enforcement, copies of depositions, and victim information; Grammer further noted that evidence is not retained in the prosecution's case file (Vol. XXV, PCR 2649).

As to the prosecution of Mark Geralds, Grammer had responsibility for maintaining the case file in that case, and all information contained in the file - absent Grammer's handwritten work product notes - were disclosed to the defense (Vol. XXV, PCR 2650). Specifically, the State's case file regarding Geralds included, among other documents: police reports, lab reports, copies of subpoenas, and deposition transcripts (Vol. XXV, PCR 2652).

Grammer reviewed and discussed numerous items germane to Geralds' claims that the State violated the tenets of *Brady v. Maryland* (Vol. XXV, PCR 2653). For example, Grammar was shown several exhibits which had been admitted during Geralds earlier criminal proceedings, which seemed to clearly evidence the State's compliance with Geralds' discovery requests (Vol. XXV, PCR 2654-2677).

For example, Grammer acknowledged that, among other discoverable materials disclosed to the defense were: FDLE crime scene investigation reports, autopsy reports, various handwritten notes, statements provided by members of the Pettibone family,

statements from various witnesses, school records, serology analyst reports, witness lists, and investigative reports (Vol. XXV, PCR 2656-89).

On cross-examination, Grammer stated that had disclosed the entirety of the Geralds case file to the defense (Vol. XXV, PCR 2689). Grammer could not explain why apparently certain pages were missing from within the case file (Vol. XXV, PCR 2701).

On redirect Grammer again asserted that the normal course of practice was to disclose all discoverable evidence to the defense; further, he was not cognizant of any additional documents or reports or discovery that had not already been disclosed (Vol. XXV, PCR 2713-14). It was the practice of the State Attorney's Office to disclose all lab reports (Vol. XXV, PCR 2716).

The State rested (Vol. XXV, PCR 2719).

Geralds called a mitigation witness named Shawn Shores (Vol. XXV, PCR 2730). Shores had dated Geralds for four and a half years, while the two were in high school (Vol. XXV, PCR 2732). She described Geralds as a "gentleman" when they dated (Vol. XXV, PCR 2733). Shores noted that Geralds had a difficult relationship with his mother (Vol. XXV, PCR 2733-34). Shores further observed that Geralds had a good relationship with his sister, Lisa; and that Geralds had a poor relationship with his brother Michael (2735). Shores testified that Geralds' parents' divorce when he was

a teenager had an impact on him (Vol. XXV, PCR 2736). Following the divorce, Geralds lived with his father for a period of time (Vol. XXV, PCR 2737).

Shores did not trust Geralds' friend, Mark Pelton (Vol. XXV, PCR 2739). She believed that Geralds was a "follower" of Pelton.

Shores had no idea that Geralds was on probation for felony offenses while they were dating (Vol. XXV, PCR 2741-42). She was not aware that Geralds had been living in a motel at the time he was charged with murder of Pettibone (Vol. XXV, PCR 2744).

Shores' testimony concluded the evidentiary hearing.

On January 18, 2006, the trial court entered an order denying all of Geralds claims (Vol. X, PCR 1737-54). The post-conviction trial court denied Geralds' claims of ineffective assistance during the guilt and resentencing phases of his capital trial (Vol. X, PCR 1741). In rejecting Geralds' claims that his counsel, Joe Adams, was ineffective, the post-conviction trial court noted that, among other matters: 1) Geralds expressed satisfaction with his counsel during the guilt phase, 2) his counsel filed several motions on Geralds behalf during the guilt phase, 3) his counsel emphasized the circumstantial nature of the Government's case throughout the trial, (4) counsel tried to argue that others may have been responsible for the murder of Pettibone, and (5) numerous mitigation witness were deposed by Adams (Vol. X, PCR 1741-47).

The post-conviction trial court rejected Geralds' claims predicated on *Brady v. Maryland, supra* and *Giglio v. United States*, 405 U.S. 150 (1972). The court specifically noted that, as to most of Geralds' allegations, he had been unable to establish that the State failed to comply with *Brady* or *Giglio*; nor, was Geralds able to establish that his defense was in anyway prejudiced by the allegedly withheld evidence (Vol. X, PCR 1747-50).

The post-conviction trial court denied Geralds' claims related to alleged newly discovered evidence. To recall, Geralds opined that the State Attorney's Office had entered into an agreement with the Public Defender's Office, relating to a witness named Dr. William Sybers - who was facing criminal charges in another case. Sybers, a medical examiner, performed the autopsy on Pettibone; but, was not called as a witness during Geralds resentencing hearing. In Sybers' stead, Dr. James Lauridson testified.

Geralds sought to argue that the Public Defender's Office and State Attorney's Office reached an agreement making Sybers unavailable as a witness in any case where he had previously been the medical examiner. The post-conviction trial court determined that Geralds had not established that any newly discovered evidence was in existence; moreover, the trial court noted that if there was any agreement between the State Attorney's Office and the Public Defender - relating to the availability of Sybers as a witness -

the record clearly established that Adams had not been governed by any such "agreement" (Vol. X, PCR 1751). Finally, the post-conviction trial court observed that it is doubtful that Geralds' counsel, Joe Adams, was unaware of the fact that Sybers was facing criminal charges - given the publicity the case received (Vol. X, PCR 1751).

The post-conviction trial court further rejected Geralds' averment that his counsel was ineffective during his resentencing hearing. Geralds argued that his counsel was ineffective because, among other reasons, he failed to investigate potential mitigating evidence (Vol. X, PCR 1752). The court noted that, during the evidentiary hearing, Geralds failed to bring forth any additional evidence which would support his ineffectiveness claim (Vol. X, PCR 1752). The post conviction trial court also recognized that even if additional mitigation evidence was brought forth during the post-conviction proceedings, this would not invariably suggest that counsel's performance during the resentencing hearing was constitutionally ineffective (Vol. X, 1752).

Finally, the post-conviction trial court rejected Geralds' claim that his trial counsel, Joe Adams, was ineffective. Geralds opined that Adams, allegedly, did not provide sufficient information to assist a mental health expert evaluate Geralds (Vol. X. 1753). The post-conviction trial court observed that no

additional medical records had been provided during the course of the post-conviction proceedings, that would contradict previous findings that Geralds had an antisocial personality disorder and was bipolar (Vol. X., PCR 1753).

Geralds now brings this appeal.

SUMMARY OF ARGUMENT

First, Geralds argues that State violated the tenets of *Brady v. Maryland*, 373 U.S. 83 (1963) because potentially exculpatory evidence was not disclosed to Geralds' counsel, Joe Adams. Geralds opined that several items of substantive evidentiary value were not disclosed via discovery. The list of items includes, among other matters: a list describing missing jewelry, various witness statements, lab reports, serology analysis, photographs, handwritten notes, and interview notes.

Geralds arguments are belied by the record. In order to establish a *Brady* violation Geralds must demonstrate that: (1) the State possessed exculpatory evidence, (2) said evidence was not disclosed to Geralds, and (3) Geralds was prejudiced by the nondisclosure. As noted, the post-conviction trial court addressed seriatim the allegedly non-disclosed evidence. The trial court made detailed findings, determining in every instance, either Geralds did not make a showing that the State failed to disclose the evidence or, *assuming arguendo* that the evidence had not been

disclosed, Geralds still could not establish that he had been prejudiced.

The trial court's determination was correct, and was supported by competent substantial evidence and should therefore be affirmed.

Second, Geralds argues that he was denied effective assistance of counsel during the guilt phase of his trial. Specifically, he argues that Geralds' counsel did not present exculpatory evidence to the jury during the guilt phase proceedings; and, that Geralds' counsel failed to make certain arguments during his closing. As the United States Supreme Court recognized in *Strickland v. Washington, supra*, in order to establish that counsel was constitutionally ineffective, Geralds must establish both that: (1) his counsel's performance was deficient, and (2) he was prejudiced. The foregoing standard is both conjunctive, and daunting. *Strickland* recognizes that strategic decisions will rarely form the basis of a cognizable ineffective assistance of counsel claim. Moreover, given the significant amount of evidence linking Geralds to the crime - he faces a difficult hurdle establishing he was prejudiced under the Sixth Amendment.

Third, Geralds argues that he was denied constitutionally effective representation during his resentencing hearing. This argument is without merit. Geralds challenges the actions of his counsel, but in truth he is simply engaging in the same hindsight

analysis that is disfavored by *Strickland*. Moreover, there was no additional evidence presented during the post-conviction evidentiary hearing suggesting that Geralds' counsel performance during the resentencing hearing was deficient.

Fourth, Geralds argues that newly discovered evidence exists which calls into question whether Geralds trial counsel, Joe Adams, was encumbered by a conflict of interest. Geralds relies on an unrelated case for the proposition that the State Attorney's Office and the Public Defender had a tacit understanding that, a Bay County medical examiner, who was facing criminal charges, would not be called as a witness. As the post-conviction trial court determined, there has been no evidence presented suggesting such an agreement was in existence. This claim should be rejected.

Fifth, Geralds argues that several procedurally barred claims should have been granted an evidentiary hearing. As will be discussed in greater depth below, his procedurally barred claims were legally insufficient and the post-conviction trial court appropriately denied them.

Finally, Geralds argues that Florida's method of execution - lethal injection - is unconstitutional. The Florida Supreme Court has repeatedly upheld the Department of Corrections protocols, therefore this claim is without merit.

STANDARD OF REVIEW

This matter comes before this Court following the trial court's denial of Geralds' post-conviction claims; accordingly deference is owed to the trial court's findings of fact. *See Walls v. State,* 926 So. 2d 1156, 1165(Fla. 2006). Similarly, it is well-understood that, provided "'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 given the evidence by the trial court.'" *Id.* (quoting *Blanco v. State,* 702 So. 2d 1250, 1252 (Fla. 1997)) (internal quotation marks omitted).

ARGUMENT

I. THE POST-CONVICTION TRIAL COURT CORRECTLY DETERMINED THAT GERALDS HAD NOT BEEN DENIED HIS CONSTITUTIONAL RIGHTS AS UNDERSTOOD BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS GIVEN THAT HE FAILED TO DEMONSTRATE THAT THE STATE WITHHELD EXCULPATORY DISCOVERY EVIDENCE, MOREOVER, HE FAILED TO DEMONSTRATE THAT THE STATE VIOLATED THE CONSTITUTIONAL PRINCIPLES UNDERSTOOD BY *BRADY* AND *GIGLIO*

Geralds asserts that the State withheld crucial exculpatory evidence; and, that the State's alleged actions violated the principles understood by *Brady v. Maryland*, 373 U.S. 83 (1963). Geralds specifically enumerates several pieces of evidence that he believes were improperly withheld.

The State may be found liable for a *Brady* violation under those circumstances where: (1) it was in possession of evidence

that was favorable to Geralds, and the evidence was either exculpatory or impeachable in nature; (2) either intentionally, or through inadvertence, the now-challenged evidence was not disclosed; and (3) prejudice resulted from the State's failure to disclose the evidence in question. *See Davis v. State*, 928 So. 2d 1089, 1113 (Fla. 2005) (citations omitted). This Court has observed that consistent with *Brady*, prejudice exists where the evidence in question was "material," in that there is a strong likelihood that had the suppressed "'evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* (quoting *Strickler v. Greene*, 527 U.S. 263, 280 (1999)); *see also Kyles v. Whitley*, 514 U.S. 419, 435 (1995)(recognizing that a determination as to whether alleged *Brady* evidence is material, requires reviewing courts to assess whether "the favorable evidence could reasonably be taken to put the whole case in such a light as to undermine confidence in the verdict").

This Court's review of *Brady* claims is consistent with the standard applied when reviewing ineffective assistance of counsel claims generally; deference is owed "to the trial court's findings of fact but [this Court will] independently determine whether the facts are sufficient to establish the elements of each claim." *Lamarca v. State,* 931 So. 2d 838, 852 (Fla. 2006); *see also Melton v. State*, 949 So. 2d 994, 1007 (Fla. 2006) ("[g]iving deference to the trial court on questions of fact, this Court reviews *de novo*

the application of the law and independently reviews the cumulative effect of the alleged suppressed evidence”).

First, Geralds mentions a list, Defense Exhibit 1, which is a handwritten listing of jewelry that was missing from the Pettibone’s home. Appellant’s Brief at 26. Geralds argues that the herringbone necklace described in the listing is a inconsistent with the herringbone necklace that was pawned by Geralds.

Exhibit 1, is a two-page handwritten note with “Received 02-15-89” across the top, which was identified by Assistant State Attorney Joe Grammer as being located in a folder labeled “Investigative Material” and “approximately 543 to 600” from Box II of the prosecutor’s file in Geralds’ case, as maintained by the State Attorney’s Office. (Vol. XXV, PCR 2677-78). State’s Exhibit B, “State’s Supplemental Response To Demand For Discovery,” specifically provides that the defense was provided with “approximately 543 pages of investigative material.” R(P.P.), at 2267. Geralds has made no showing that his Exhibit 1 was not included in those materials provided to the defense on or about June 1, 1989.

Second, Geralds references Defense Exhibit 20, a lab report authored by crime laboratory analyst, Shirley Ziegler. Geralds opines that the report was not disclosed; and therefore contends

that the State failed to fully comply with Geralds' discovery requests; moreover, he believes the lab report authored by Ziegler was of some exculpatory value.

Exhibit 20, is an eight-page FDLE report dated April 3, 1989, which was identified by Assistant State Attorney Grammer as being located in a folder labeled "Lab Reports" from Box I of the prosecutor's file in Geralds' case, as maintained by the State Attorney's Office (Vol. XXV, PCR 2682-2684) . State's Exhibit A, "State's Response To Demand For Discovery," filed with the circuit court on April 14, 1989, lists the name of Shirley Zeigler, who had authored the April 3, 1989 report. R.(P.P.), at 2242. Although the lab report is not individually listed as are seven other lab reports from FDLE, Geralds has made no showing that his Exhibit 20 was not included in those materials provided to the defense on or about April 14, 1989. In addition, State's Exhibit A reflects that the lab submittal - related to testing done on Geralds' shoes - was submitted under "Submission 06," see Exhibit 20, at 3; and it disclosed to the defense. R(P.P.), at 2246. And once again, the fact that neither the former State Attorney nor Assistant State Attorney Grammer could not specifically recall disclosing the document fourteen years after having provided the discovery does not establish that the State did not in fact do so.

Third, Geralds argues that the State failed to disclose

Defense Exhibit 25 - a photograph of a photograph depicting a shoe print from the crime scene. Geralds implicitly concedes that he had access to the photograph; but, he maintains that access is not akin to the actual disclosure.

Regarding Exhibit 25, Geralds failed to establish that it was not included in those materials provided to, or made available, to the defense. Assistant State Attorney Grammer testified that the crime scene photographs would have been made available for defense counsel's review (Vol. XX, PCR 2286, 2312). Defendant made no showing that that did not happen or that the photograph constituting Exhibit 25 was not included in those photographs made available to Adams. Moreover, Geralds failed to meet his burden that the photograph was material. Obviously a second shoe print does not exculpate Geralds, but, at most, merely reflects that Geralds did not act alone.

Fourth, Geralds references Defense Exhibit 7 (**Exhibits** Vol. I, PCR 65), which is a note from an interview that was conducted by Investigator Bob Jimmerson with a pawn broker named Tony Swoboda. According to Exhibit 7, Swoboda stated that he had previously sold a necklace to Geralds; consequently, Geralds reasons that this note was exculpatory because he believes that it demonstrates that the necklace he attempted to pawn to Billy Danford, may have been the necklace that Geralds purchased from Swoboda.

Geralds' reasoning is specious. First, as the post-conviction trial court noted there is no suggestion that Exhibit 7, was not disclosed . Additionally, as was noted by the post-conviction trial court, Defense Exhibit 5 (evidencing the same information found in Exhibit 7), was indeed disclosed to Geralds.

As noted, Exhibit 5, a handwritten note with "1/23" written across the top and the photo copy of a "Gordon Jewelers" business card on the left-hand side, was located in one of the boxes that was represented by the defense as being trial counsel's complete file, and the original was admitted as State's Exhibit F. Because this note was not evidence withheld by the State, defendant has failed to make out a *Brady* violation. And to the extent that defendant claims that the State failed to disclose the handwritten note, it very important to note that Adams was clearly aware of Swoboda given that he was in the defense's "List Of Witnesses" filed on January 18, 1990. R.(P.P.), at 73.

Geralds continues by arguing that Defense Exhibit 8 (**Exhibits** Vol. I, PCR 66-69) was withheld; Exhibit 8 enumerates Billy Dandford's criminal history. He also argues that Defense Exhibit 10 (**Exhibits** Vol. I, PCR 90-108), which is a letter from the State Attorney's Office stating that it would not be prosecute Billy Danford for an unrelated crime, was withheld. To recall, Danford was the pawn broker to whom Geralds sold Pettibone's herringbone

necklace. Geralds argues that both Exhibits 8 and 10 were of material value to his defense and he was prejudiced by not having access to them. He maintains that if understood in conjunction, Exhibits 8 and 10 evidence that the State Attorney's Office had an "understanding" with Danford, wherein charges would not be brought against Danford if he provided favorable testimony at Geralds' trial. This claim is meritless.

As to Exhibit 8, a "Defendant Case History" which solely references Billy Danford, Geralds has failed to carry his burden that there existed a deal between the State and Billy Danford, such that his two misdemeanor charges were dropped in order to secure his testimony. While Geralds presented no testimony or other evidence on the issue, Mr. Grammer testified that there were no deals made with Mr. Danford. (Vol XX, PCR 2248). Even if the Court were to assume that there was a deal, which the State does not concede, Geralds cannot establish that he was prejudiced by the nondisclosure. That is, Billy Danford's testimony consisted solely of identifying Geralds as the individual who had pawned a necklace at his store on February 1, 1989, along with the pawn slip that defendant had signed. G.P.Tr., at pp.1631, 1633, 1634, 1643.[2]

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[2]The State has cited to the page numbers of the trial transcript as originally numbered by the court reporter, prior to numbering of the record for appeal. In the event that the

The pawn slip was recovered from Geralds, and Geralds does not deny that he pawned a herringbone necklace; he only argues that he did not steal it from the Pettibone house but instead had bought it from Tony Swaboda. Geralds is unable to establish that had the case history (Exhibit 8) been disclosed that there exists a reasonable probability that the undisclosed evidence would have produced a different verdict. *See Rose v. State*, 774 So. 2d 629, 634 (Fla. 2000), *overruled on other grounds, Guzman*, 868 So. 2d at 506. Regarding Exhibit 10, also relating to Billy Danford's charge of Dealing in Stolen Property, once again Geralds failed to establish any kind of deal between Danford and the State for his testimony.

Moreover, proving the existence of some type of "arrangement" would have been impossible in any event, as the alleged crime referenced in Exhibit 10 did not occur until March 2, 1990, and Geralds was found guilty as charged on February 7, 1990. And even assuming a deal, which the State does not concede, based on the limited purpose of Danford's testimony, defendant has not demonstrated prejudice.

Geralds also references Defense Exhibit 13 (**Exhibits** Vol. I, PCR 149), which is a brief note from an interview between

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Court's copy of the transcript was numbered to include that for the record on appeal, Det. Winterman's testimony appears at pages 1753, 1755, 1756, 1765.

Investigator Jimmerson and Gregg Toriac. Geralds' suggests that the note describing the conversation between Jimmerson and Toriac, was potentially exculpatory, and was not disclosed to the defense. Again, Geralds is unable to satisfy the requirements under *Brady.*

As noted, Exhibit 13, is a handwritten note with "Gregg Toriac" across the top. Even if this Court were to assume that the document was not disclosed to the defense, which the State does not concede, review of the document does not establish anyting substantive. The note does not inculpate William Pelton (the individual Geralds seeks to inculpate for the crime). Further, the note does not establish that William Pelton was not present at Club LaVela, his place of employment, on February 1, 1989. To the contrary, it establishes that Mr. Pelton did come to work that day.

Moreover, Geralds ignores the fact that defense counsel was familiar with Mr. Toriac, as he was included in the "Supplemental List Of Witnesses" filed on February 2, 1990 and the defense's "Praecipe For Subpoena" filed that same day. To the extent that defendant intimates that Exhibit 13 should have been disclosed because of the reference to Dave Meadows, again he fails to establish its materiality. At the evidentiary hearing, Meadows did not testify that he knew that Mr. Pelton was not at Club LaVela at any time during the day on February 1, 1989 (Vol. XX, PCR 2326).[3]

[3] Geralds references several Defense Exhibits, including 31,

34, and 36 as evidentiary items that were not disclosed. Exhibit 31 is a handwritten note, and Exhibits 34 and 36 are FDLE reports. Geralds raises allegations that are without merit under *Brady*. Geralds failed to present testimony or any other evidence that the State failed to disclose that evidence to the defense. The fact that the former State Attorney could not specifically recall disclosing each individual document fourteen years after having provided the discovery does not establish that the State in fact did not do so. Moreover , the State established at the post-conviction evidentiary hearing that it did provide Mr. Adams with aforementioned defense exhibits, notwithstanding Geralds' unsupported allegations. See Vol. XXV, PCR 2653-2687 Moreover, Geralds makes no attempt to meet his burden under *Brady*. Contrary to the defense's apparent position, he cannot establish a *Brady* violation simply by pointing to documents that he claims (but presents no evidence to prove) were not disclosed.

Finally, Geralds has failed to establish that he was prejudiced due to cumulative errors. *See, e.g., Tompkins v. State*, 872 So. 2d 230, 241-42 (Fla. 2003) (denying *Brady* claim, noting "[e]ither the undsclosed documents are not material because that are neither favorable to Tompkins, nor suppressed, or Tompkins has not demonstrated that he was prejudiced by the lack of disclosure.").

Accordingly, the record demonstrates that the State did not violate the principles articulated in *Brady*.[4]

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[4] Geralds also argues that the State violated the tenets of *Giglio v. United States*, 405 U.S. 150 (1972). See Appellant's

Brief 37-41. In order to establish a *Giglio* violation, the defendant must show "that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." *Guzman*, 868 So. 2d 498, 505 (Fla. 2003). He contends that the testimony of Analyst Rousseau at trial related to blood evidence found on Geralds' shoe was actually misleading; and, that later testing performed by Analyst Ziegler indicated that no bloodstaining could be found on the sneaker. Contrary to Geralds' assertion regarding Exhibit 20, Agent Rousseau testified that the left shoe, using both "Luminol and Phenophaline, came up positive for presumptive testing for blood . . . . ," G.P.Tr., at 1601, not that there existed the presence of blood. And while Shirley Zeigler reported that the presence of bloodstaining could not be demonstrated, Exhibit 20, at 8, that does not establish that there was not originally blood on Geralds' left shoe as presumptively demonstrated by the Luminol and Phenophaline tests. Additionally, Geralds presented no evidence regarding the Phenophaline test, nor that the results obtained by Shirley Zeigler were not caused by the Luminol test consuming the blood that was present - but not visible to the naked eye. (Vol. XXII, PCR 2488-89). Thus in addition to failing oftlineto demonstrate that he in fact was not provided with the April 3, 1989 FDLE report, Geralds has not met his burden establishing that the report was, in any event, material.

II. GERALDS WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF HIS TRIAL, AND THEREFORE WAS NOT DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS; MOREOVER, GERALDS HAS FAILED TO PRODUCE EVIDENCE WHICH CALLS INTO THE QUESTION THE PROPRIETY OF HIS CONVICTION

Geralds argues that the case brought against him was "entirely circumstantial." Appellant's Brief at 43. Geralds maintains that his cousel should have more vigorously argued that another individual was responsible for the murder of Pettibone. He believes that the crime scene clearly evidences that someone, other than Geralds, was responsible for the crime. Specifically, he references forensic evidence which he believes suggests that he is entirely innocent.

He further opines that his trial counsel, Joe Adams, was constitutionally ineffective because counsel failed to challenge perceived flaws in the State's case related to, among other matters, blood, hair and fingerprint evidence from the crime scene. Specifically, Geralds contends that: there was blood from the crime scene belonging to someone else; fingerprints found in the Pettibone home did not belong to Geralds; there were shoeprints in the Pettibone home which did not belong to Geralds; and Geralds' blood was not located in Pettibone's car.[5]

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[5] Of course, Geralds failed to establish any of claims related to insufficiency of the evidence at the post-conviction evidentiary hearing.

Geralds also finds that his counsel, Joe Adams, failed to challenge prosecution witnesses recollections, did not properly cross-examine and impeach various witnesses, and failed to raise objections and motions at the appropriate time. Accordingly, Geralds believes that Adams performance during the guilt phase was constitutionally infirm, and contravened the principles of *Strickland v. Washington, supra*.

Strickland's constitutional commands are well-understood:

> Under *Strickland*, in order to demonstrate that counsel was ineffective, a petitioner must show (1) deficient performance by counsel and (2) a reasonable probability that counsel's deficient performance affected the outcome of the trial. *466 U.S. at 687, 104 S. Ct. 2052*. If a defendant fails to make a showing as to either performance or prejudice, she is not entitled to relief. *Id. at 697, 104 S. Ct. 2052*. Thus, [**24] we need not address the prejudice prong if we find that the performance prong is not satisfied. *Turner v. Crosby, 339 F.3d 1247, 1279 (11th Cir. 2003)*, cert. denied, *541 U.S. 1034, 124 S. Ct. 2104, 158 L. Ed. 2d 718 (2004)*; *Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000)* ("Because both parts of the test must be satisfied in order to show a violation of the *Sixth Amendment*, the court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa." (citation omitted)).
>
> The standard for counsel's performance under Strickland is "reasonableness under prevailing professional norms." *466 U.S. at 688-89, 104 S. Ct. 2052*. The reasonableness of counsel's performance is evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential. See *Mills v. Singletary, 63 F.3d 999, 1020 (11th Cir. 1995)* (citing *Kimmelman v. Morrison, 477 U.S. 365, 381, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986))*. "Even if many reasonable lawyers would not have done [**25] as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable [*1320]

> lawyer, in the circumstances, would have done so." *Rogers v. Zant, 13 F.3d 384, 386 (11th Cir. 1994)*. Counsel's performance is deficient only if it is "objectively unreasonable and falls below the wide range of competence demanded of attorneys in criminal cases." *Cross v. United States, 893 F.2d 1287, 1290 (11th Cir. 1990)* (citations omitted).
>
> Moreover, "counsel will not be deemed unconstitutionally deficient because of tactical decisions." *McNeal v. Wainwright, 722 F.2d 674, 676 (11th Cir. 1984)* (citations omitted); *Crawford, 311 F.3d at 1312* ("Deliberate choices of trial strategy and tactics are within the province of trial counsel after consultation with his client. In this regard, this court will not substitute its judgment for that of trial counsel." (quotation marks, internal alteration, and citation omitted)). There is a strong presumption that counsel's performance was reasonable and adequate, with great deference being shown to choices dictated by reasonable strategy. *Rogers, 13 F.3d at 386*; [**26] see also *Conklin v. Schofield, 366 F.3d 1191, 1204 (11th Cir. 2004)*, cert. denied, *544 U.S. 952, 161 L. Ed. 2d 531, 125 S. Ct. 1703 (2005)*. "The presumption of reasonableness is even stronger when we are reviewing the performance of an experienced trial counsel." *Callahan v. Campbell, 427 F.3d 897, 933 (11th Cir. 2005)*.
>
> To overcome this presumption, the petitioner "must establish that no competent counsel would have taken the action that his counsel did take." *Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000)* (en banc) (footnote and citation omitted). Under this standard, there are no "absolute rules" dictating what reasonable performance is or what line of defense must be asserted. *Id. at 1317*. Indeed, as we have recognized, "absolute rules would interfere with counsel's independence -- which is also constitutionally protected -- and would restrict the wide latitude counsel have in making tactical decisions." *Putman v. Head, 268 F.3d 1223, 1244 (11th Cir. 2001)*.

Michael v. Crosby, 430 F.3d 1310, 1319-20 (11th Cir. 2005).

Geralds is unable to assert that his rights under the Sixth

Amendment were violated. First, it should be noted that unconverted evidence was presented during both the guilt and penalty phases, tying a direct nexus between Geralds and the murder of Tressa Pettibone.

To recall, Billy Danford testified during the resentencing hearing that Geralds pawned a gold herringbone necklace on February 1, 1989 (PP. 580-583). Law enforcement recovered Geralds' wallet during the course of its investigation and the pawn ticket was located within the wallet (PP. 398). Blythe Pettibone, Tressa Pettibone's daughter testified that the necklace Geralds' pawned belonged to her mother (PP. 610). Bloodstains found on the necklace were consistent with Tressa Pettibone and inconsistent with Geralds (PP. 464-482). Additionally, Vicky Ward testified that Geralds had given her a pair of Red Bucci sunglasses in late January or early February of 1989 (PP. 396, 424-25, 576-79). Blythe Pettibone testified the sunglasses that Ward had received from Geralds had belonged to Tessa Pettibone.[6]

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[6] Contrary to defendant's representation of the facts, both Kevin Pettibone and Blythe Pettibone identified the sunglasses as being identical to those belonging to the victim. See Defense Exhibit 6 (Continuation of Investigation Report by Det. Jimerson, 39 pages), at 12 (while Blythe Pettibone originally stated "that possibly a red pair of Bucci sunglasses . . . were missing," upon being shown the sunglasses recovered from Vicky Ward, Blythe Pettibone was able to identify them as "just like her mother's,

Further, Detective Kenneth Hoag testified that bloody shoeprints found on Pettibone's vinyl floor were of a similar size and tread as sneakers which belonged to Geralds (PP 486-491); and, a bag of plastic electrical ties that were found in the trunk of Geralds' automobile, were made by exact company whose electrical ties were found at the crime scene (PP. 403-04).

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which were missing." Similarly, "Bart Pettibone also observed the sunglasses and agreed that the sunglasses belonged to his mother."); Defense Exhibit 50 (Deposition of Kevin Pettibone), at 15 ("They [the police] had some red Bucci sunglasses they brought over there, and I know that she had a pair of red Bucci sunglasses just identical to the ones that they brought over.").

Geralds lists various physical items that he contends counsel was ineffective for failing to undermine the State's case. This evidence does not, however, exonerate Geralds.[7] And even if the Court were to conclude that counsel should have used the physical items, defendant fails to establish any prejudice, particularly in

[7] For example, contrary to Geralds' assertion regarding Exhibit 20, (i.e., the alleged lack of blood evidence) Agent Rousseau testified that the left shoe, using both "Luminol and Phenophaline, came up positive for presumptive testing for blood . . . . ," G.P.Tr., at 1601. He did not say that there was an absence of the presence of blood. And while Shirley Zeigler reported that the presence of bloodstaining could not be demonstrated, Exhibit 20, at 8, that does not establish that there was not originally blood on defendant's left shoe as presumptively demonstrated by the Luminol and Phenophaline tests.

light of the foregoing evidence.[8]

Geralds also argues that there were a number of things trial counsel should have done, such as develop certain evidence, impeach certain witnesses, advance specific arguments, and make certain objections.[9]

This Court has also observed that simply reviewing a cold trial record to determine what questions might have been asked is an inappropriate basis for a ineffective assistance of counsel claim; for while it is certainly true that Geralds' trial counsel, Adams, could have propounded alternative questions on cross-examination, "or more strenuously examined [witnesses] on certain

[8] Nor has defendant established that the absence of blood in the victim's car exonerated him or otherwise was deficient, and that he was prejudiced as a result. Obviously the absence of blood in the car could have resulted from any number of reasons, such as Geralds wiping the blood off or walking about to remove the blood.

[9] Geralds asserts that his grandfather would have provided certain information had he been interviewed, deposed, or asked at trial. That counsel for the defendant asserts as much does not establish the claim. Geralds put on no such evidence to entitle him to relief.

issues, [this] is essentially hindsight analysis. 'The standard is not how present counsel would have proceeded, in hindsight, but rather whether there was deficient performance and a reasonable probability of a different result.'" *Brown v. State,* 846 So. 2d 1114, 1121 (Fla. 2003) (quoting *Cherry v. State,* 659 So. 2d 1069, 1073 (Fla. 1995)). That current counsel would have represented Geralds differently does not establish that Adams performed deficiently, nor that Geralds was prejudiced as a result. .

Additionally, Geralds cannot make a showing that Adams' performance was deficient - which, necessarily, is a difficult burden to achieve. *See Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir.) (cases granting relief will be few and far between because "[e]ven if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. This burden, which is [the defendant's] to bear, is and is supposed to be a heavy one."), *cert. denied*, 513 U.S. 899 (1994).

As the post-conviction trial court noted in its Final Order denying Geralds' relief, Adams put forth a substantive defense of his client. Adams argued, among other things, that: others may have been responsible for the crime; there was a lack of blood in the victim's automobile; the plastic electrical ties found at the crime scene and in the trunk of Geralds truck were not uncommon;

the tread on Geralds sneakers - which was similar to that found at the crime scene - were not uncommon; and witnesses testified that Geralds was not observed with any scratches on his person following the murder.

Adams' representation of Geralds was clearly not deficient. *See White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992) ("The test for [assessing deficient performance] has nothing to do with what the best lawyers would have done. Nor is the test what even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.").

Therefore, Geralds' claim that his counsel was ineffective during the guilt phase should be rejected.

III. GERALDS WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF HIS CAPITAL TRIAL; MOREOVER, HE WAS NOT DENIED HIS CONSTITUTIONAL RIGHTS AS UNDERSTOOD BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Geralds opines that he was denied effective assistance of counsel during his resentencing hearing. He maintains that the post-conviction trial court erroneously denied his assertion that his Adams conduct during the resentencing hearing fell below constitutional standards. Geralds believes that Adams committed a litany of errors in the presenting mitigation evidence, claiming that the presentation was "inconsistent and illogical." Appellant's Brief at 62.

He argues that Adams failed to bring forth substantive mitigation. Geralds avers, for example, the Dr. Beller's evaluation of Geralds for the purposes of the resentencing hearing was largely incomplete because Beller failed to interview several of Geralds' family members. Appellant's Brief at 65. Moreover, Geralds believes that additional mental health tests should have been administered to Geralds in order to establish that he was encumbered by extreme emotional disturbance contemporaneous to the crime. He opines that, had Beller met with Geralds' family members in preparation for the resentencing hearing, Beller would have learned that Geralds' family had a history of mental health issues.

Geralds ineffective assistance of counsel claim is, of course, governed by *Strickland v. Washington, supra*. *Strickland* commands that ineffective assistance of counsel claims must be evaluated through a prism according deference to trial counsel's performance, providing that "[j]udicial scrutiny of counsel's performance must be highly deferential . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689. Moreover, review of trial counsel's performance "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the

presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Geralds' claim that he was denied ineffective assistance of counsel during his resentencing hearing is belied by the record. Geralds did not present any records at the post-conviction evidentiary hearing, nor did he show that there were supplementary records that were in existence, yet nevertheless were not provided to Dr. Beller. Compare Defense Exhibits 1-21, 23-30 (admitted at Vol. XX, PCR Tr.2393), Defense Exhibits 31-50 (admitted id. at Vol. XXII, PCR 2554); Defense Exhibit 53 A-B (admitted id. at 2561). The fact that eleven years later Dr. Beller could only add to his testimony that as a child Geralds probably would have been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), (Vol. XXII, PCR 2569), that by a relative's report one of Geralds' family members had been diagnosed with a mental illness, id. at 2582-83, and that one of Geralds' teachers at some unknown time had suggested that he see a psychiatrist, id. at 2592, does not establish that counsel performed deficiently, particularly where Dr. Beller's diagnoses did not change from those made previously. Id. at 2583. Geralds also ignores that trial counsel did seek authority to hire an investigator, both prior to the original

trial, R.(G.P.), 2265-2266, and then sought and obtained authority to hire an investigator upon remand from the Florida Supreme Court for a new penalty phase. R.(P.P.), 264-265, 278, respectively. Geralds made no showing that counsel failed to hire such investigators, and/or, through their investigation, information was discovered that should have been provided to Geralds' mental health expert. Defendant fails to acknowledge that he had previously been evaluated by another expert, in preparation for the original trial. See R.(G.P.), 2471-2473; see also id. at 2264. Dr. McClaren met with defendant on three different occasions (July 15, 1989; July 31, 1989; January 17, 1990), for a total period of thirteen hours. Id. at 2473. According to Dr. McClaren's "Statement," he provided the following service:

> Forensic psychological evaluation of Mark Geralds. The evaluation included three separate interviews with Mr. Geralds including psychometric testing in the form of the Minnesota Multiphasic Personality Inventory and the Wechsler Adult Intelligence Scale - Revised. Investigation reports in regard to the allegations against the defendant were inspected. Jail staff familiar with his jail adjustment were briefly interviewed in regard to his jail adjustment. A written report was provided to the defendant's public defender.

Id. Geralds has not put into evidence what findings were made by Dr. McClaren and did not contend that counsel was ineffective in respect to the earlier mental health evaluation. Geralds fails to establish that counsel performed deficiently under *Strickland*.

Nor does the fact that eleven years later Dr. Beller received additional information leading him to conclude that as a child defendant probably would have been diagnosed with ADHD, (Vol. XXII, PCR 2569, that by a relative's report one of Geralds' family members had been diagnosed with a mental illness, id. at 2583-84, and that one of defendant's teachers at some unknown time had suggested that he see a psychiatrist, id. at 2584, establish prejudice where Dr. Beller's diagnoses of antisocial personality disorder and bipolar disorder did not change from that previously made in preparation for resentencing. Id. at 2583. As compared to the above scant additional information he received for the purpose of re-evaluating Geralds for the postconviction proceeding, as well as having conducted a test that was not available in 1992, id. at 2583, Dr. Beller performed the following tests upon Geralds prior to the resentencing: "the Minnesota Multi-phasic Personality Inventory, otherwise known as the MMPI, the Rorschack Ink Blot test, the Thematic Appreciation Test, the Trait Anxiety Inventory, the Rust Test of Schizotypical Cognition and a clinical interview." P.P.Tr, Vol. VI, at 394. Moreover, Dr. Beller had at the time of his initial evaluation information from Geralds' that he was "significantly depressed probably starting about the age of 9 or 10 . . . [a]nd had developed already emotional problems by that age," id. at 401-402, and "[h]e describe[d] his mother as having

emotional problems." Id. at 402. That information is practically no different from the lay testimony of family members and friends presented at the 3.851 evidentiary hearing, except as to the statement that one of Geralds' teachers at some unknown time had suggested that he see a psychiatrist and that Geralds did not do well in school and dropped out. Compare (Vol. XXI, PCR 2433-37) (Lisa Johnson, older sister); id. at PCR 2442-44 (Vicki McCann (formerly Vicki Ward)); (Vol. XXII, PCR 2528-30)(Kenneth Scott Hobbs, a friend).

Defendant has failed to establish *Strickland* prejudice.

IV. THE POST-CONVICTION TRIAL COURT DID NOT ERR BY DENYING GERALDS CLAIM REGARDING NEWLY DISCOVERED EVIDENCE; THEREFORE, HE WAS NOT DENIED HIS CONSTITUTIONAL RIGHTS UNDER FIFTH, SIXTH, EIGHTH , AND FOURTEENTH AMENDMENTS

Geralds relies upon the proceedings in an unrelated case for the proposition that the testimony Dr. Lauridson was impeachable. To recall, Dr. Lauridson testified at the resentencing hearing in the place of Dr. Sybers. Sybers, who performed the autopsy on Tressa Pettibone, was not called to testify at the resentencing hearing; Lauridson did. Sybers was facing criminal charges related to the death of his wife.

Geralds cites the testimony of Michael Stone, a former Assistant Public Defender, who testified at an evidentiary hearing in an unrelated case, State v. Orme, Bay County Case No. 92-442.

See Appellant's Brief 70-71. Stone testified that because of the criminal charges that Sybers, and agreement was reached between the Public Defender's Office and State Attorney's Office that Sybers would not be called as a witness in those cases where he had been the medical examiner. Geralds relies on Stone's testimony for the proposition that had he been aware of an "agreement" between Public Defender's Office, Sybers, and the State Attorney's Office, he (Geralds) could have impeached the testimony of Lauridson.

The Florida Supreme Court has set forth the following standard governing the consideration of claims of newly discovered evidence:

> In order to qualify as newly discovered evidence, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991) *(quoting Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979)). If this test is met, the court must next consider whether the newly discovered evidence is of such a nature as to probably produce an acquittal on retrial. *Id.* at 915. Additionally, we have said that newly discovered evidence, by its very nature, is evidence that existed but was unknown at the time of the prior proceedings. *See Porter v. State*, 653 So. 2d 374, 380 (Fla. 1995).

Wright v. State, 857 So. 2d 861, 870-871 (Fla. 2003), cert. denied, 541 U.S. 961 (2004).

First, the State would note that any reliance by Geralds upon testimony from Michael Stone, a former Assistant Public Defender in an unrelated case, is entirely inappropriate.

As to the merits of Geralds claim alleging newly discovered evidence, he fails to address the fact that while the Orme hearing,

was held in December, 1991, Geralds' new penalty phase was not held until March, 1993. Geralds offers no basis to establish that he could not have known of the facts testified to by Mr. Stone in Orme's postconviction case.

In addition, Geralds ignores that when Stone appeared on his behalf at the evidentiary hearing, (Vol XXI, PCR 2403-30), he was unable to testify that there was an agreement between the Public Defenders' Office and the State Attorney's Office to preclude criminal defendant's from inquiring into such an alleged agreement that would create an inability to impeach Dr. Sybers' prior results or testimony.(Vol XXI, PCR 2424). And even if the testimony from the Orme case is properly before this Court, which the State does not concede, Geralds neglects to acknowledge that his trial counsel, Adams, did object to Dr. Lauridson testifying, whereas in the Orme case, Mr. Stone had resigned prior to trial. Orme, Case No. 92-442, December 12, 2001 Hearing Transcript, at 81. Nor does there appear to be any indication in the Orme case that Dr. Lauridson was subject to deposition, whereas Geralds' trial counsel did depose Dr. Lauridson, on January 18, 1993. And finally, Geralds does not address the fact that, as found by the Florida Supreme Court:

> there was no potential taint from Dr. Lauridson basing

> his opinion on the materials Dr. Sybers prepared and compiled because Dr. Lauridson based his independent conclusions largely on the objective evidence. Dr. Lauridson arrived at his conclusions by reviewing: (1) two to three hundred Kodachrome slides taken at the murder scene and during the autopsy; (2) written records prepared by Dr. Sybers; and (3) Dr. Sybers' previous testimony he offered in this case. Given the wealth of objective evidence (i.e., the slides) upon which Dr. Lauridson based his opinions, the trial court did not abuse its discretion in permitting Dr. Lauridson to testify.

Geralds, 674 So. 2d at 100.

Accordingly, Geralds makes no showing that the alleged, unsupported collusion between the State Attorney's Office and the Public Defenders' Office "is of such a nature as to probably produce an acquittal on retrial."

V. THE POST-CONVICTION TRIAL COURT DID NOT ERR WHEN IT DENIED GRANTING AN EVIDENTIARY HEARING AS TO SEVERAL OF GERALDS CLAIMS; ACCORDINGLY, GERALDS WAS NOT DENIED DUE PROCESS NOR WERE HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS IMPINGED[10]

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[10]The claims referenced in Section V of Geralds brief were summarily denied by the post-conviction trial court and therefore were not considered in the trial court's final order denying Geralds' claims for post-conviction relief.

Respectfully, Section V - related to those claims that were not made a part of the evidentiary hearing - are procedurally barred from this Court's consideration. *See Ziegler v. State*, 2007 Fla. LEXIS 1142, *8 n. 1 (Fla. June 28, 2007) ("[C]laims that the trial court excluded from consideration at the evidentiary hearing are procedurally barred"). Nevertheless, the State will briefly address his claims.

A. THE POST-CONVICTION EVIDENTIARY COURT RULED APPROPRIATELY WHEN IT DENIED GERALDS' SUPPLEMENTAL 3.851 MOTIONS

Geralds opines that the post-conviction trial court erroneously denied two separate supplemental 3.851 motions. The supplemental motions were intended further amend his Motion for Relief. Appellant's Brief at 74. As Geralds notes in his briefing, his first supplemental 3.851 motion dovetailed with his earlier clams that his counsel was ineffective under *Strickland, supra*; and, additionally, that the State violated the principles of *Brady, supra* by withholding exculpatory evidence that was germane towards putting forth a viable defense.

The first supplemental 3.851 motion raised the following claims: 1) the State had not provided Geralds' with the entirety of his public records requests; 2) the State failed to disclose discovery in law enforcement's possession related to other potential suspects in the murder of Pettibone; 3) information related to an unnamed individual's confession to the crime was not disclosed; 5) Geralds' counsel was ineffective because he failed to adequately investigate potential mitigation; and 6) allegedly impermissible hearsay evidence was presented during the penalty phase hearing in contravention of *Crawford v. Washington*, 541 U.S. 36 (2004). (Vol. VIII, PCR 1449-77). The post-conviction trial court summarily denied Geralds first supplemental 3.851 motion.

This Court has previously articulated the standard for summarily denying a post-conviction motion, explaining "that 'a defendant is entitled to a postconviction evidentiary hearing unless (1) the motion, files, and records in the case conclusively show that the prisoner is not entitled to any relief, or (2) the motion or a particular claim *is legally insufficient*.'" *Garcia v. State*, 948 So. 2d 980, 989 (Fla. 2006) (quoting *Freeman v. State,* 761 So. 2d 1055, 1061 (Fla. 2000)) (emphasis added).

As noted, following a *Huff*[11] hearing, the post-conviction trial court denied Geralds' motion for a evidentiary hearing. The trial court observed that most of the summarily denied claims lacked some measure of substantive facts. For example, the court rejected Geralds' assertion that there was evidence available to Geralds' counsel, and/or law enforcement, that someone other than Geralds was responsible for the murder of Pettibone.

The trial court noted that, based on the allegations contained in Geralds 3.851 motion, he had failed to demonstrate a cognizable error under either *Brady* or *Strickland*. The trial court noted that the onus is on Geralds to establish the requisite elements of a *Brady* claim; but that, he did not propound anything more than

[11] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

very generalized claims. See (Vol. IX, PCR 1530-31); *see also Arbalaez v. State*, 775 So. 2d 909, 915 (Fla. 2000) ("Where a motion lacks sufficient factual allegations . . . the motion may be summarily denied).

In Geralds second supplemental motion (Vol. IX, PCR 1610-24), he again argued that law enforcement had ignored other leads regarding who was responsible for the murder of Tressa Pettibone. Geralds observed that, two days after the murder of Pettibone, law enforcement was presented with evidence that an individual named Warren Cash may have been responsible for the crime. Geralds argues that had the defense been afforded information related to Cash's potential involvement in the murder, this would have proven beneficial to his defense.

The claim, relating to Warren Cash's involvement in the murder, was without merit, and the post-conviction trial court was warranted in its summary denial. This Court has well-understood that "[t]he State [is] not required to provide defense counsel every piece of evidence regarding other suspects." *Guzman v. State*, 679 So. 2d 736, 739 (Fla. 1996). If law enforcement stopped pursuing other leads once Geralds became a suspect, this was appropriate; he was responsible for the crime.

Despite his efforts to denigrate, ignore, or minimize *all* of the evidence presented against him, recall: 1) he pawned a necklace

belonging to Pettibone which contained the presence of blood evidence consistent with Pettibone; 2) electric plastic ties found at the crime scene were also located in the trunk of Geralds car; 3) Geralds gave a pair of distinct Red Bucci sunglasses - which had belonged to Pettibone - to Vicky Ward; 4) a shoeprint that was found at the crime scene was consistent in size and tread to sneakers belonging to Geralds. Thus, there was significant inculpatory evidence tying Geralds to the very brutal murder of Tressa Pettibone, and his assertions to the contrary are simply without merit.

B. Geralds Remaining Claims[12] are Without Merit and The Summary Denial of These Claims was Appropriate

First, Geralds opines that it was inappropriate to allow the testimony of Billy Danford and Vicky Ward's from the guilt phase, to be read to the jury during the resentencing hearing. As Geralds concedes, Danford and Ward were unavailable to testify at the resentencing hearing. As is well-recognized, under Florida law,

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[12] For example, Geralds raises an argument that Adams was ineffective during the resentencing hearing because he allowed Investigator Jimmerson to testify "inaccurately." Apppellant's Brief at 87-88. He concedes however, that no objection was raised to Jimmerson's testimony. The Florida Supreme Court has routinely recognized that absent fundamental error, a claim which has not been objected to, is not preserved, and therefore, may not be raised on appeal. *See, e.g., Rodgers v. State*, 934 So. 2d 1207, 1217 (Fla. 2006); *Archer v. State*, 934 So. 1187, 1205-06 (Fla. 2006) *Spann v. State*, 857 So. 2d 845, 852 (Fla. 2003); *Conahan v. State*, 844 So. 2d 629, 641 (Fla. 2003).

the previous testimony of an unavailable witness may be read into the record in the same or different proceeding, provided the testimony being read was subjected to some means of cross-examination. *See* Fla. Stat. § 90.804(2)(a). Because Ward and Danford's testimony was subjected to cross-examination during the guilt phase, it was permissible for their testimony to be read during the resentencing hearing.

Additionally, Geralds argues that the State raised a number of constitutionally impermissible arguments during its closing at both the guilt phase and during the resentencing hearing. See Appellant's Brief 92-95. Notwithstanding the fact that Geralds claims are without merit, he faces an equally daunting hurdle - his claims should have been raised on direct appeal. *See, e.g., Knight v. State*, 923 So. 2d 387, 393 n. 6 (Fla. 2005) (finding that Knight's claim that the State raised improper arguments during its closing argument, was a procedurally barred claim that should have been raised on direct appeal).

Accordingly, the post-conviction trial court appropriately found that Geralds foregoing claims were procedurally barred, therefore these claims should be rejected.

VI. FLORIDA'S METHOD OF EXECUTION IS CONSTITUTIONAL

Geralds briefly argues that Florida's method of execution - lethal injection - is constitutionally infirm. However, this Court

recently held that Florida's lethal injection protocols comported with the Eighth Amendment's dictates. *See Lightbourne v. McCollum*, 2007 Fla. LEXIS 2255, *76 (Fla. Nov. 1, 2007) ("Lightboure has failed to overcome the presumption of deference we give to the executive branch in fulfilling its obligations, and he has failed to show that there is any cruelty inherent in the method of execution provided for under the current procedures.").

Accordingly, this claim must fail.

CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm the post-conviction trial court's denial of Mark Allen Geralds' 3.851 motion.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Linda McDermott, McClain & McDermott, P.A., 141 N.E. 30th St., Wilton Manors, Florida 33334 this 21th day of December, 2007.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New font 12 point.

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