IN THE SUPREME COURT OF FLORIDA

RONNIE FERRELL,

Appellant/Cross-Appellee,

v. CASE NO. SC07-92

STATE OF FLORIDA,

Appellee/Cross-Appellant.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE/INITIAL BRIEF OF THE CROSS-APPELLANT

BILL McCOLLUM
ATTORNEY GENERAL

MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399

DEPARTMENT OF LEGAL AFFAIRS
PL-01, THE CAPITOL
Tallahassee, Florida 32399-1050
(850) 414-3300, Ext. 3583
(850) 487-0997 (Fax)

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Appellant, RONNIE FERRELL raises eleven issues in his appeal from the denial of his motion for post-conviction relief. The State raises one issue on cross-appeal.

References to the appellant will be to "Ferrell" or "Appellant". References to the appellee will be to the "State" or "Appellee". On cross-appeal, the State will be referred to as "State" and Ferrell will be referred to as "Ferrell".

The nine volume record on appeal in the instant case will be referenced as "PCR" followed by the appropriate volume number and page number. The exhibits introduced at the evidentiary hearing are contained in the supplemental volumes of this record (1-17). References to exhibits introduced at the evidentiary hearing will be referred to as “PCR Supp Vol” followed by the appropriate volume and page number.

References from Ferrell's direct appeal will be referred to as "TR" followed by the appropriate volume and page number. References to Ferrell's initial brief will be to "IB" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Ronnie Ferrell, born on March 19, 1964, was 27 years old when he, along with Kenneth Hartley and Sylvester Johnson, murdered seventeen year old Gino Mayhew. The relevant facts

surrounding the April 22, 1991 murder are set forth in this court's opinion on direct appeal as follows:

> …On April 20, 1991, the victim ran into the apartment of Lynwood Smith acting very excited and upset. The victim told Smith that he had just been beaten up and robbed by two men, one of whom looked like Kenneth Hartley and one of whom had his face covered. Later that evening, a witness saw Ferrell and Johnson at a pool room and the witness overheard Ferrell state that he had beat and robbed the victim.
>
> Sidney Jones worked for the victim in the victim's crack cocaine business. He testified to the following information. On April 22, the victim was selling crack from his Chevrolet Blazer at an apartment complex. On that date, Jones saw the three codefendants together near the Blazer. He saw Hartley holding a gun to the victim's head and saw him force the victim into the driver's seat. Hartley climbed into the back seat behind the victim. Ferrell climbed into the front passenger seat. Johnson was outside the Blazer talking to Hartley. After Hartley, Ferrell, and the victim entered the Blazer, Jones saw it leave the apartment complex at a high speed and heard Ferrell shout out of the Blazer that the victim would "be back." Johnson followed soon thereafter in a truck.
>
> Another witness confirmed that the victim, Ferrell, and another individual left the apartment complex together in the victim's Blazer at a high rate of speed.
>
> On April 23, police found the victim's Blazer parked in a field behind an elementary school. The victim's body was found slumped over in the driver's side seat of the Blazer. He had been killed by bullet wounds to the head (he had been shot five times: one shot was fired into his forehead, three shots were fired into the back of his head, and one shot was fired into his shoulder).
>
> Several weeks after the victim was found, Jones told police what he had seen on April 22, and Ferrell, Hartley, and Johnson were arrested for the victim's murder. Ferrell provided police with several conflicting stories as to his whereabouts on the night of the murder, which were rebutted at trial.

> While in jail, Ferrell talked to a cellmate about the crime. The cellmate testified as follows. Ferrell told him that Hartley and Johnson had previously robbed the victim and that Ferrell was involved in that robbery; that Johnson and Hartley had been recognized by the victim; and that Ferrell, Hartley, and Johnson conspired to murder the victim to prevent him from retaliating for the robbery. Ferrell told the cellmate that the three of them agreed on a plan to purchase a large amount of crack from the victim to get the victim off by himself. Ferrell was the one who approached the victim about the sale because the victim knew him and had not recognized him in the previous robbery. Ferrell further stated that Hartley entered the Blazer with his gun and told the victim "you know what this is." They took the victim to the isolated field where they robbed him of drugs and money and then Hartley shot the victim in the head four or five times. Johnson met them at the field in the truck and drove them away from the scene. The cellmate's testimony included details about the crime that had not been released to the public. Ferrell presented no evidence or witnesses in his defense and was convicted as charged (armed robbery.

Ferrell v. State, 686 So.2d 1324, 1326 (Fla. 1996).[1]

At Ferrell’s penalty phase proceeding, the State introduced Ferrell's convictions for a 1984 armed robbery and a 1988 riot. A correctional officer testified regarding Ferrell's conduct during the 1988 riot. Ferrell waived presentation of mitigating evidence at the penalty phase of the trial. The jury recommended Ferrell be sentenced to death by a vote of 7-5.

The trial judge sentenced Ferrell to death after finding and giving great weight to five aggravating circumstances (1)

[1] Ferrell's co-defendants, Kenneth Hartley and Sylvester Johnson were also convicted of the first-degree murder, robbery, and kidnapping of Gino Mayhew. They were each tried separately. Hartley was sentenced to death. Johnson was sentenced to life imprisonment.

prior violent felonies (2) the murder was committed in the course of a kidnapping (3) the murder was committed for financial gain; (4) the murder was heinous, atrocious, or cruel (HAC); and (5) the murder was cold, calculated, and premeditated (CCP). He also found, but gave slight weight to, the mitigating circumstance that Ferrell was not the actual shooter. Although not considered in aggravation, the trial judge noted that Ferrell was just as culpable as the shooter because he used his friendship with the victim to lure the victim to his death. Ferrell v. State, 686 So.2d at 1327.

Ferrell raised twelve issues on direct appeal. This Court rejected all but one of Ferrell's claims relating to his conviction and sentence to death. This Court found the evidence insufficient to support the HAC aggravator. This Court found the error to be harmless, however, in light of the four other aggravating factors and minimal mitigation. Ferrell v. State, 686 So.2d 1324 (Fla. 1996).

Ferrell filed a Petition for Writ of Certiorari with the United States Supreme Court. Ferrell's petition was denied on April 14, 1997. Ferrell v. Florida, 520 U.S. 1173 (1997).

Ferrell filed an initial motion for post-conviction relief on April 10, 1998. On August 31, 2004, Ferrell filed an amended motion to vacate his convictions and sentences. He raised eleven (11) claims. The collateral court granted an evidentiary

hearing on all three issues that Ferrell argues to this Court on appeal (Issues I-III).[2] The evidentiary hearing was held on December 5-7, 2005 and April 16, 2006.

After the evidentiary hearing, the collateral court denied Ferrell's claims regarding the guilt phase. The court granted Ferrell a new penalty phase. The court concluded that trial counsel was ineffective for failing to present mental mitigation testimony at the penalty phase of Ferrell's capital trial.

Ferrell raises the same eleven (11) issues on appeal that he raised before the collateral court. The State cross-appeals the collateral court's order granting Ferrell a new penalty phase.

SUMMARY OF THE ARGUMENT

ISSUE I: Ferrell raised some twelve individual claims of error in this claim of ineffective assistance of counsel. The trial court correctly denied each of Ferrell's claims, after an evidentiary hearing, because Ferrell failed in some instances to prove that trial counsel' performance was deficient or in others that counsel's errors resulted in prejudice.

ISSUE II: In this Giglio claim, Ferrell claims the State violated his right to due process when it knowingly presented the false testimony of Robert Williams and Gene Felton. The

[2] Ferrell purports to raise eleven issues on appeal but presents argument on only the first three.

collateral court properly denied this claim because Ferrell failed to show that either Williams' or Felton's testimony was false or the State knew it was false.

Ferrell also alleges the State committed a Giglio violation when the State argued that state witness Robert Williams, was testifying pursuant to a plea agreement that called for a ten year term of imprisonment. The collateral court properly denied this claim because the evidence showed that prosecutor properly recounted Williams' truthful testimony and did not mislead the jury in any way.

ISSUE III: In this Brady claim, Ferrell alleges that trial counsel failed to disclose material exculpatory evidence. The collateral court correctly denied the claim because Ferrell failed to show the allegedly withheld evidence either existed or was withheld.

ISSUE IV- XI: - Appellant has abandoned these claims by presenting no argument.

CROSS-APPEAL ISSUE I: The collateral court erred in granting Ferrell a new penalty phase on the grounds that trial counsel was ineffective for failing to present mental health mitigation. The court erred in two ways. First, Ferrell personally waived his right to present mitigation and Ferrell failed to produce any evidence at the evidentiary hearing that his waiver was involuntary. Absent such proof, Ferrell should not have been

allowed to go behind the waiver to allege ineffective assistance of counsel. Second, the collateral court erred because had trial counsel presented mental mitigation testimony, the jury would have learned that Ferrell has an anti-social personality disorder.

ARGUMENT

ISSUE I

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE OF FERRELL'S CAPITAL TRIAL

Ferrell raises twelve sub-claims of ineffective assistance of counsel in his first issue on appeal. He also raises a cumulative error claim within claim one.

To establish a claim of ineffective assistance of counsel, two elements must be proven. First, the defendant must show that trial counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Kimbrough v. State, 886 So.2d 965, 978 (Fla. 2004).

In order to meet this first element, a convicted defendant must first identify, with specificity, the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts

or omissions were outside the wide range of professionally competent assistance. Pietri v. State, 885 So.2d 245 (Fla. 2004).

In reviewing counsel's performance, the court must indulge a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance. It is the defendant's burden to overcome this presumption. Mungin v. State, 932 So.2d 986 (Fla. 2006).

Trial counsel, Richard Nichols, was deceased at the time of the evidentiary hearing. Accordingly, neither party had the opportunity to examine Mr. Nichols regarding his trial strategy or explore the course of investigation Mr. Nichols conducted in his defense of Mr. Ferrell.

The fact that Mr. Nichols was deceased at the time of the evidentiary hearing does not relieve the defendant of his burden to overcome the presumption Mr. Nichols' conduct fell within the wide range of reasonable professional assistance. The presumption that Mr. Nichols' conduct fell within the wide range of professional assistance includes, within it, the presumption that under the circumstances, the challenged action might be considered sound trial strategy. Asay v. State, 769 So.2d 974, 984 (Fla. 2000) (ruling the defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound

trial strategy). Neither Mr. Nichols' untimely death nor his unavailability to explain his trial strategy to the collateral court should preclude this Court from determining that trial counsel's actions, when viewed as of the time of trial counsel's conduct, constituted objectively reasonable trial strategy.

If the defendant successfully demonstrates trial counsel's performance was deficient, the defendant must then show this deficient performance prejudiced the defense. In order to demonstrate prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Rutherford v. State, 727 So.2d 216, 219 (Fla. 1998).

a. Whether trial counsel was ineffective for failing to meet/consult with Ferrell's friends, family, and other important witnesses.

Ferrell alleges that trial counsel was ineffective for failing to meet/consult with Ferrell's friends, family and other important witnesses. Ferrell does not here, nor did he below, identify any of these people by name. (PCR Vol. I 52-55).

Before this Court, Ferrell complains only that the collateral court failed to rule on the claim. (IB 14). Ferrell contends the court erred when it determined that Ferrell raised the same allegations in more specific sub-claims within his

claim of ineffective assistance of counsel, and as such, no ruling on this "catch-all" claim was necessary. Ferrell requests this Court to remand the claim back to the collateral court for a more specific ruling. (IB 14).

This Court should refuse Ferrell's request to remand this claim for a separate ruling. Instead, this Court should deny this sub-claim because Ferrell presents no substantive argument to this Court in his initial brief.

Ferrell does not demonstrate, or even attempt to demonstrate, where the collateral court went wrong when it determined that Ferrell's general claim of ineffectiveness included allegations that were also included within more specific sub-claims. In neither his motion before the collateral court nor in his initial brief before this Court, did Ferrell ever identify any of his "friends", "family", or "other important witnesses" that he claims trial counsel should have met with, consulted with, or called as witnesses at trial. In failing to do so, Ferrell failed to present a legally sufficient claim of ineffective assistance of counsel. *See* Nelson v. State, 875 So.2d 579, 582 (Fla. 2004) (in order to state a legally sufficient claim of ineffective assistance of counsel for failing to present certain witnesses, the defendant must, *inter alia*, identify the witness by name). Likewise, Ferrell does not offer this Court any assistance in determining which of

Ferrell's friends, family, and other important witnesses were not the subjects of a more specific claim.

Finally, Ferrell claims no specific prejudice stemming from the alleged failure to meet or consult with Ferrell's friends and family. Instead, Ferrell merely states that "Mr. Nichols was ineffective and deficient in his representation and said deficiency undermined confidence in the outcome." (IB 14). In presenting such a conclusory statement of prejudice, Ferrell cannot meet his burden to show prejudice under Strickland. Kearse v. State, 969 So.2d 976 (Fla. 2007) (ruling that a claim of error in a brief that is conclusory meets neither prong of Strickland). This claim should be denied.

b. Whether trial counsel was ineffective for failing to investigate and participate in the discovery process so as to prepare to cross-examine state witnesses.

In this claim, Ferrell alleges that trial counsel was ineffective for failing to partake in discovery rendering him "fully incoherent of the facts". (IB 14). In particular, Ferrell faults trial counsel for failing to attend the majority of depositions taken in this case, failing to conduct any depositions of his own, and failing to read the discovery provided by the State. (IB 15-17).

Ferrell targets three witnesses he asserts trial counsel should have deposed and/or called at trial; Robert Williams, Deatry Sharp, and Jerod Mills. Ferrell alleges that trial

counsel should have deposed Robert Williams so that he could effectively cross-examine him at trial. According to Ferrell, taking Williams' deposition would have revealed a number of impeachment and reliability issues. Ferrell declines, however, to point any these out. Instead, he invites the Court to peruse his motion for post-conviction relief for insight and refers this Court to another portion of his brief. (IB 18).

Ferrell claims that trial counsel should have called Deatry Sharp to testify it was he, and not Ronnie Ferrell who, along with Sylvester Johnson and Kenneth Hartley, robbed the victim the weekend before the murder. Ferrell also alleges that trial counsel should have deposed, and then called, Jerod Mills because Mills would have testified at trial that he saw Sharp and Hartley, not Hartley and Ferrell, committing the robbery. Ferrell claims that Sharp's and Mills' testimony would have rebutted the State's theory as to motive for the murder. (IB 18-21).

This claim should fail because Ferrell failed to produce any evidence at the evidentiary hearing to support the claim. Ferrell did not call Robert Williams, Deatry Sharp or Jerod Mills to testify at the evidentiary hearing. Accordingly, Ferrell failed to demonstrate that calling, or more effectively cross-examining, these witnesses probably would have resulted in his acquittal at trial.

Moreover, Ferrell cannot show any prejudice for failing to present evidence at trial that it was Sharp, and not Ferrell, who participated in the robbery two days before the murder because the State's theory as to motive remained the same.[3] The State did not prosecute on a theory that Ferrell's personal participation in robbing Gino Mayhew the Saturday before the murder was the primary impetus for the murder. Instead, the State proceeded on a theory that Ferrell learned that Mayhew had discovered it was Hartley and Johnson who robbed him on April 20, 1991 and that Mayhew intended to "hit" the pair in retaliation.

At trial, Robert Williams' testified that Ferrell told him he learned that Mayhew put out a hit on Sylvester Johnson and Kenneth Hartley because of the April 20, 1991 robbery. According to Ferrell, the three of them (Ferrell, Hartley and Johnson) got together and decided it was in their best interest to take Mayhew out. Mayhew's recognition of Hartley and Ferrell's knowledge about the Mayhew's plans to retaliate were the events that gave rise to the conspiracy between Ferrell,

[3] At trial, the State presented evidence that it was indeed Ferrell who participated, in some capacity, in robbing Gino Mayhew on the Saturday before he was murdered. Moreover, Sharp's description of the Saturday night robbery, as found by the collateral court, was very different than described by other witnesses. By failing to call Sharp to resolve this discrepancies, Ferrell did not demonstrate that Sharp actually took part in that particular Saturday night robbery.

Hartley, and Johnson to murder Gino Mayhew. (TR Vol. XXVIII 670)(TR Vol. XXIX 840, 851, 863). This claim should be denied.

c. Whether trial counsel was ineffective for failing to attend hearings.

In Issue I (c), Ferrell claims that trial counsel was ineffective for failing to appear at several pre-trial hearings. This is essentially the same claim Ferrell made in Issue I (k) where he actually identifies five specific hearings he alleges that trial counsel either failed to attend or failed to ensure Ferrell's presence without a valid waiver.

Ferrell raised this claim below, identifying several hearings which trial counsel missed. Before this Court, however, Ferrell complains about only two.[4]

First, Ferrell complains that his trial counsel failed to attend his initial trial date on November 12, 1991. (IB 26). Ferrell does not contend he was forced to represent himself or go to trial alone. Instead, Ferrell complains that, as a result of Mr. Nichol's absence, Ferrell was forced to waive speedy trial.

Ferrell raised a portion of this claim below.[5] The collateral court found deficient performance on trial counsel's

[4] Ferrell spends several pages under this sub-claim complaining about perceived failures on the part of trial counsel that have nothing to do with the hearings about which Ferrell takes issue. (IB 29-32).

part for failing to attend the scheduled trial date. (PCR Vol. IV 660).[6] The court found no prejudice, however, because even if counsel would have been present, counsel would have moved for a continuance, it would have been granted, and the case would not have proceeded to trial that day. (PCR Vol. IV 661).

While Ferrell complains, before this Court, that Mr. Nichol's absence resulted in a waiver of his speedy trial rights, Ferrell asserts no actual prejudice from the waiver. For instance, Ferrell does not allege that had counsel been present on November 21, 1991 and ready to go, the State would have been unprepared to win his conviction or that he would have been entitled to discharge. Indeed on November 21, 1991, the trial court noted specifically that the State announced it was ready for trial. (TR Vol. XVI 128).

It is not enough for Ferrell to complain that trial counsel's failure to do something caused him harm; he must actually articulate and demonstrate harm sufficient to undermine the confidence in the outcome of his trial. Ferrell failed to do so.

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[5] In his motion for post-conviction relief, Ferrell complained about the missed court date. He did not allege counsel was ineffective because in missing the trial date, counsel waived Ferrell's speedy trial rights. (PCR Vol. I 66).

[6] In this claim, as well as several others, the collateral court assumed deficient performance because trial counsel was dead at the time of the evidentiary hearing and could not provide any explanation. (PCR Vol. IV 660).

Second, Ferrell complains, albeit in a footnote, that counsel was ineffective for failing to attend a hearing held on February 13, 1992. (IB 27, n.5). During that hearing, the State filed a notice that it would seek habitual felony offender (HFO) sentencing should Ferrell be convicted of armed robbery and armed kidnapping. The collateral court found that although counsel's performance was deficient because he failed to attend the hearing, no prejudice had been shown. (PCR Vol. I 661). The Court found no error because Ferrell did not allege or prove that trial counsel failed to explain the notice to him at a later time or was precluded from filing objections to the notice as a result of his absence. (PCR Vol. IV 661).

Before this Court, Ferrell seems to argue that the collateral court's ruling on Strickland's prejudice prong was speculative because there was no evidence that trial counsel ever explained the notice to Ferrell or filed any objections. (IB 27, n 5). Even assuming that neither occurred, Ferrell cannot show any prejudice under Strickland unless he shows that, had counsel would have filed an objection to the HFO notice, it would have been stricken and he would not have been sentenced as an HFO.[7]

[7] On appeal, Ferrell alleged the trial judge erred in sentencing Ferrell as a habitual felony offender to consecutive sentences for the robbery and kidnapping convictions. The State conceded error and this Court directed the trial court to amend the

Ferrell does not even attempt to make such an argument. He certainly put on no evidence, at the evidentiary hearing, to support such a claim. This portion of this sub-claim should be denied.

d. Whether trial counsel was ineffective for failing to impeach state witnesses.

In this sub-claim, Ferrell alleges that trial counsel was ineffective for failing to impeach the credibility of state witnesses with effective cross-examination and inconsistencies in their various statements. Specifically, Ferrell claims trial counsel failed to impeach Robert Williams, Sidney Jones, and Juan Brown. Ferrell did not call Williams, Jones, or Brown to testify at the evidentiary hearing.

(1) Robert Williams

Ferrell's complaints about trial counsel's handling of Robert Williams on the witness stand center on two issues; one that Robert Williams was a convicted felon and jailhouse snitch and two that Robert Williams could have gotten the information about which he testified from the newspapers, instead of from Ferrell. The record reflects that the jury knew Robert Williams was both a convicted felon and a jailhouse snitch who, at the

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sentencing order to provide that these two sentences run concurrently rather than consecutively. Ferrell v. State, 686 So.2d 1324, 1330 (Fla. 1996). However, Ferrell has never contested that he qualified for HFO sentencing upon his conviction for armed kidnapping and armed robbery.

time of trial, was currently awaiting sentencing for dealing in stolen property. (TR Vol. XXVIII 659). The jury was also well aware that Williams was testifying against Ferrell pursuant to a plea agreement on that charge.

During cross-examination, trial counsel brought to the jury's attention that Williams had something to gain by testifying for the State. Trial counsel used Williams' prior sworn statement to impeach him and pointed out to the jury that Ferrell and Williams did not know each other for very long before Ferrell allegedly made incriminating statements to Williams. This latter area of examination was clearly intended to cast doubt on Williams' credibility and imply that it was unlikely Ferrell would "confess" to a stranger. (TR Vol. XXVIII 682-686). During closing argument, trial counsel argued extensively that Robert Williams was a witness unworthy of belief. (TR Vol. XXIX 888-891)

Although Ferrell claimed below that Robert Williams could have learned the details of the crime from a newspaper, instead of from Ferrell himself, Ferrell put on no evidence, at the evidentiary hearing, that Williams ever actually read a newspaper account of the crime. Nonetheless, trial counsel argued to the jury, despite the lack of any evidence to actually support the allegation, that Williams, as well as other state witnesses, could have taken advantage of the media coverage

immediately after the murder to learn details about which they testified. (TR Vol XXIX 888). Trial counsel told the jury that it simply should not buy into the notion that Williams could have gotten his information only from someone present at the murder scene. Mr. Nichols pointed out that it should be obvious that "[e]verybody out there in the street knew what was going on." (TR Vol. XXIX 889). Because Ferrell failed to produce any evidence at the evidentiary hearing to support his claim and because trial counsel ensured the jury knew of Williams' selfish motive to testify and potential exposure to media coverage of the murder, this Court should deny this claim.

(2) Sidney Jones

While Ferrell points this Court to parts of his power point closing argument and raises allegations about inconsistencies in Jones' recollection of events, Ferrell's claim before the collateral court regarding Sidney Jones was much narrower. (IB 39).[8] Below, Ferrell alleged that trial counsel should have impeached Sidney Jones with two perjury convictions, both of which stemmed from his testimony in murder trials. (PCR Vol. I 75). Ferrell claimed this impeachment evidence would have shown

[8] In his brief before this Court, Ferrell points to parts of his closing argument to support his claim. None of this presentation was evidence because Ferrell's power-point closing argument cannot serve to expand the sworn allegations in Ferrell's Rule 3.851 motion.

that Jones' criminal record was more extensive than he reported from the witness stand at trial.

The collateral court rejected this portion of Ferrell's claim. The court found that Ferrell produced no evidence of one of the two convictions Ferrell claimed existed and that Jones' other "conviction" had been overturned by this Court over a decade before trial in Jones v. State, 400 So.2d 12 (Fla. 1981). The collateral court ruled the quashed conviction could not have been used to impeach Mr. Jones. On appeal, Ferrell does not even appeal this finding.[9]

Even if this Court were to consider allegations not presented to the collateral court in Ferrell's sworn motion for post-conviction relief, Ferrell can show no prejudice from trial counsel's alleged failure to point out all of the inconsistencies in Jones' various statements because trial counsel impeached Jones extensively at trial. During cross-examination of Jones before the jury, trial counsel elicited testimony from Jones that he had been convicted five different times of felonies as well as a couple of misdemeanors.

[9] In his brief before this court Ferrell mentions in a footnote that Jones was convicted of perjury for lying under oath about being an eyewitness to a murder. (IB 39, n 6). Ferrell claims his conviction was overturned on "unrelated" grounds. This is simply not the case. Instead, the conviction was overturned because this Court ruled that Jones' apparent recantation was a complete defense and as such Jones' conviction for perjury could not stand. Jones v. State, 400 So.2d 12 (Fla. 1981).

Trial counsel elicited Jones' admission that Jones was a drug dealer and in fact was dealing drugs with Gino Mayhew the night of the murder. Trial counsel also ensured the jury was aware that Jones used cocaine shortly after he saw Ferrell and Hartley in Gino Mayhew's Blazer. Trial counsel used Jones' prior sworn statement to point out inconsistencies between the statement and his trial testimony. (TR Vol. XXVIII 615-629).

Finally, trial counsel argued extensively during closing argument that the jury should not believe Sidney Jones. Trial counsel urged the jury to scrutinize Mr. Jones' claims as to his motive to come forward and conclude that only motive was not to tell the truth but instead to seek the favor of the state. (TR Vol. XXIX 892). Mr. Nichols reminded the jury that Jones' testimony was inconsistent insofar as the time in which important events occurred as well as his own activities near the time of the kidnapping. (TR Vol. XXIX 893-894). Trial counsel argued that it was "inconceivable that anyone would say that's not reason to doubt the testimony of Sidney Jones." (TR Vol. XXIX 893).

At the evidentiary hearing, Ferrell failed to produce compelling impeachment evidence that trial counsel failed to explore. Accordingly, Ferrell failed to demonstrate either specific performance or prejudice. This Court should deny this claim.

(3) Juan Brown

Ferrell claims that trial counsel was ineffective for failing to impeach Juan Brown and to demonstrate that Juan Brown's identification of Ronnie Ferrell in the passenger seat of Gino Mayhew's Blazer was "impossible." (IB 40). In his initial brief, Ferrell points to the testimony of Dr. Richard Boehme, an identification expert called by the defense during the evidentiary hearing. At the evidentiary hearing, Ferrell advised the collateral court that he was not claiming counsel was ineffective for failing to call Dr. Boehme or a like expert. Instead, Ferrell told the court that Dr. Boehme's testimony would be presented to establish that trial counsel was ineffective for failure to investigate potential impeachment evidence concerning Juan Brown. (PCR Vol. VIII 434).[10]

In attempting to support his claim of ineffective assistance of counsel before this Court, Ferrell fails to acknowledge or draw this Court's attention to one key point. The collateral court declined to consider Dr. Boehme's

[10] Dr. Boehme did not interview Juan Brown or have any personal information to allow him to evaluate matters such as Brown's ability to observe and recall or the extent of his familiarity with Ferrell, familiarity which would have most certainly influenced his ability to recognize Ferrell even in less than ideal conditions.

testimony.[11] (PCR Vol. IV 669). Accordingly, it is improper for Ferrell to rely on Dr. Boehme's testimony to support his argument and, like the collateral court, this Court should decline to consider it.

In any event, trial counsel cross-examined Brown on the speed of Mayhew's vehicle and on the fact that Brown's vehicle was going in the opposite direction at about 45 miles per hour. (TR Vol. XXVIII 654). He also inquired into Brown's consumption of alcohol and drugs that evening and the time of night he observed Ferrell in the passenger seat of Mayhew's Blazer. (TE Vol. XXVIII 655-657). The jury was aware that Brown claimed this event occurred at 11:30 p.m.[12]

During closing argument, trial counsel used the information he brought out during cross-examination to vigorously attack Brown's credibility. Mr. Nichols focused his attack on the unlikelihood that Brown actually had the ability to observe Ferrell when the vehicles are passing each other, in opposite directions, at 40-45 miles per hour. (TR Vol. XXIX 895-896). Trial counsel argued that it is unimaginable that anyone would

[11] The collateral court excluded the testimony because he found that the gist of Dr. Boehme's testimony was within the understanding of lay jurors.

[12] As a matter of common sense, it is within general human knowledge that a person does not see as well in the dark as during the daylight and that it is more difficult to observe and recognize people in a moving car than it is when they are sitting still.

not have a reasonable doubt about Brown's ability to recognize Ferrell. (TR Vol. XXIX 896).

Because Ferrell failed to produce any admissible, compelling evidence regarding Juan Brown's testimony that trial counsel failed to exploit and because trial counsel brought out testimony and argument designed to convince the jury that Brown's testimony was not credible, the collateral court's order should be affirmed.

e. Whether trial counsel was ineffective for failing to object to portions of the prosecutor's closing arguments.

During the guilt phase closing arguments, Ferrell complains the prosecutor used the word execute or a variation of it eleven times, called the defendant a liar, and vouched for witnesses' credibility. (IB 47-49).

At the penalty phase, Ferrell alleges that the prosecutor told jurors they would be breaking the law if they did not vote for death, misstated the law of mitigation, violated the Golden Rule by creating an imaginary script,[13] told the jury that the State did not seek death in every case, used the "same mercy"

[13] This argument was made in the context of arguing for the HAC aggravator. Contrary to Ferrell's allegations that the prosecutor created a "script" from no evidence, this argument stemmed from testimony that Gino Mayhew had been robbed by Hartley shortly before the murder and looked very frightened after Hartley forced him to his Blazer at gunpoint. Moreover, unlike the previous Saturday night when Hartley robbed him without kidnapping him, it is reasonable to conclude that Mayhew knew, or at least feared that Hartley intended this robbery to be different.

argument, injected his personal beliefs and referred to matters not in evidence. (IB 49-54).[14]

Ferrell claims that trial counsel was ineffective for failing to object to these comments, many of which this Court has condemned in Urbin v. State, 714 So.2d 1178 (Fla. 1998) and Brooks v. State, 762 So.2d 879 (Fla. 2000). Although some six years after Ferrell's trial, this Court reversed two cases on direct appeal for these same comments, from the same prosecutor, this case must be examined by a different standard.

While Ferrell looks consistently to Brooks and Urbin to support his claim, ineffective assistance of counsel claims are scrutinized looking back to the time of trial. Accordingly, this Court must examine trial counsel's failure to object based on circumstances existing at the time of trial, not some 6 years later when this Court decided Urbin or some 8 years later when this Court decided Brooks.

Moreover, in accord with the dictates of Strickland and the law from this Court, this Court must "presume" that Mr. Nichols' failure to object might be considered sound trial strategy. It is the defendant's burden to overcome this presumption. Asay v.

[14] Ferrell does not point to any specific misstatement of the law of mitigation. As Ferrell raised these same allegations as claims of fundamental error in his habeas petition, the State argument as to the substantive merit of Ferrell's claims are contained in the State's response to Ferrell's petition for writ of habeas corpus.

State, 769 So.2d 974, 984 (Fla. 2000) (ruling the defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy). Unfortunately, trial counsel was dead at the time of the evidentiary hearing. As such, trial counsel could not speak to the collateral court about his strategy in making, or not making, objections to the prosecutor's comments at Ferrell's capital trial.

This Court need not, however, examine this case devoid of insight into Mr. Nichol's trial philosophy about objecting to the prosecutor's closing arguments. This is so, because the same trial counsel and the same prosecutor tried another capital case that was recently decided by this Court.

In Bell v. State, 965 So.2d 48 (Fla. 2007), this Court examined a claim of ineffective assistance of counsel for failing to object to various comments made by the State in its closing arguments at both the guilt and penalty phases of the trial. These comments included the same ones that Ferrell complains about here. At the evidentiary hearing held in Bell's case, and as noted by this Court in its decision in Bell, Bell asked Mr. Nichols whether he thought these various comments were improper, and Mr. Nichols responded:

> No. And even if it were something that appellate courts said--described as being improper, not every improper argument is something that [a] defense lawyer

> wants to object to because sometimes when a prosecutor makes what would otherwise be considered an improper comment, it essentially opens the door for the defense to attack that strategy in rebuttal. And I have many times let prosecutors, without objection, say things that I thought were objectionable but did it so that I could make a comment on it when I got my next chance to speak.
>
> On cross-examination by the State, Nichols further explained: You have to sort of gauge the pace of the trial and make a decision whether these comments that taken out of context sound like damaging comments and make a decision whether they truly are in the flow of things either significant or damaging.
>
> And you have to guard your own credibility with the jury with regard to just hopping up and down out of your chair and making objections when things are happening that the jury really doesn't see as having very much meaning.
>
> And sometimes improper--sometimes comments that might genuinely be labeled as miss--as improper are once [sic] that open the door for me to make a response that I want to have an opportunity to make and so I'll allow the comment to go forward.

Bell v. State, 965 So.2d 48, 59-60 (Fla. 2007).

A review of Mr. Nichols' closing arguments during both the guilt and penalty phase demonstrates that, like he did in Bell, Mr. Nichols sought to exploit the prosecutor's arguments for the benefit of his client. For instance, during closing arguments during the guilt phase, counsel methodically went through the State's key witnesses and pointed to reasons why the jury should not believe the witnesses. Moreover, counsel told jurors that it was their duty to follow the law and find reasonable doubt despite any passion inspired by the "ranting and raving" of the prosecutor and the death of a 17 year old boy. (TR Vol. XXIX

908). In an earlier portion of his argument, trial counsel argued that, despite the fact that the prosecutor spent an hour and twenty minutes during closing argument, “waving photographs in front of your face and screaming or huffing and puffing around here and talking about murder and executions and kidnappings and all of that sort of thing instead of talking and addressing himself to the meat of the issue...”, the state did not bear its burden of proof. (TR Vol. XXIX 887).

During the penalty phase closing argument, trial counsel once again sought to use the prosecutor’s words, against the State, and for the benefit of his client. Trial counsel told the jury that “it is outrageous to me, it’s nearly beyond my belief that George Bateh would ask you to deal with the defendant in a criminal case the same way some murderer did with his last victim out there on the street.” (TR Vol. XXIX 1013). Mr. Nichols went on to tell the jury that the last thing “Mr. Bateh said to you was he wanted you to show this defendant the same kind of mercy and pitiless be believes that Mr. Ferrell showed to Mr. Mayhew.” (TR Vol. XXIX 1013). Trial counsel told jurors that “[w]hether Ferrell is guilty or not guilty, and he takes the position he is not and so do I, for a prosecutor to say here’s a murder and I want the 12 of you to be a 12 man execution squad who’s going to treat this person in this courtroom the same way some felonious person treated a drug

dealer out there on the street back sometime ago, it's outrageous." (TR Vol. XXIX 1014). Trial counsel continued, "I don't do a lot of hollering and pounding and jumping around here. Not because I don't have some feelings... but I don't believe it's an appropriate thing to do when 12 of us are sitting here to decide whether or not to authorize the state to kill somebody, to do this kind of pounding and jumping around." (TR Vol. XXIX 1014).

In addition to telling the jury that the prosecutor's comments were outrageous and inappropriate, trial counsel sought to correct any notion that the law required them to recommend death if jurors found the aggravating factors outweighed the mitigating factors. Mr. Nichols pointed to the court's instruction, which Ferrell does not contend improperly stated the law, which made clear that the jury was never required to recommend death, even if it determined that the aggravators outweighed the mitigators. (TR Vol. XXIX 1014-1016).

Finally, trial counsel took one last opportunity to use the prosecutor's words against him. Near the conclusion of his closing argument, Mr. Nichols told the jury that "Mr. Bateh wants you to walk out there and be a participant on the same level as people who were out there on Washington Heights or dealing drugs with each other, and robbing drugs and shooting back and forth. He wants you to decide this case on the same

kind of mentality. I don't think you can do that." (TR Vol. XXIX 1019).

Trial counsel's closing arguments provide ample evidence to support a conclusion that counsel's failure to object constituted a reasonable trial strategy. This Court has over and over again ruled that counsel's performance may not be deemed deficient if his actions stem from a reasonable trial strategy. Johnson v. State, 769 So.2d 990, 1001 (Fla. 2000) (citing Remeta v. Dugger, 622 So.2d 452 (Fla. 1993). ("Counsel's strategic decisions will not be second-guessed on collateral attack."). This is true even if other trial counsel would not have taken the same tack as did Mr. Nichols.

In this case as in Bell before it, the record supports a notion that trial counsel's employed his strategy of being judicious with his objections, in the face of arguments he believed were both histrionic and unpersuasive, to order to gain credibility with the jury. Moreover, the record supports a conclusion that Mr. Nichols affirmatively chose not to object so he could exploit the prosecutor's arguments to the state's detriment and to his client's benefit.

It is not an unreasonable strategy to be the cool breeze in a firestorm of fury. Mr. Nichol's closing arguments in both the guilt and penalty phase reflect his strategy over and over again. *See* Zakrzewski v. State, 866 So.2d 688 (Fla. 2003)

(affirming collateral court's conclusion that two experienced lawyers' failure to object to a "golden rule" violation and other arguments made by the prosecutor was a reasonable tactical decision).

Mr. Nichols' closing arguments in both phases of Ferrell's trial reveals they were not only derisive of Mr. Bateh's overreaching arguments but comprehensive in their discussion of the credibility issues facing each witness. (TR Vol. XXIX 885-914) (TR Vol. XXIX 1012-1019)(TR Vol. XXX 1022-1026). As a result, at the penalty phase, Mr. Nichols persuaded 5 members to vote for life. Brown v. State, 846 So.2d 1114, 1122-1123 (Fla. 2003) (affirming the collateral court's finding that trial counsel's failure to object to certain prosecutorial comments and questioning of witnesses in accord with his philosophy of being judicious with his objections in order to avoid antagonizing the jury and losing credibility constituted reasonable trial strategy).[15]

[15] In Brown, this Court, without determining whether the failure to object constituted deficient performance, analyzed counsel's failure to object during closing argument under Strickland's prejudice prong. This Court found no prejudice. The collateral court found neither deficient performance nor prejudice. Brown v. State, 846 So.2d 1114, 1122-1123 (Fla. 2003).

f. Whether trial counsel was ineffective for failing to conduct an adequate voir dire and for permitting potential jurors to be struck from the juror pool when they could have been rehabilitated.

In this claim, Ferrell makes several allegations of ineffective assistance of counsel during *voir dire*. Ferrell alleges that trial counsel was ineffective for (1) conducting such a short *voir dire* that it only encompassed eight pages of the trial transcript; (2) allowing the State to remove 12 unidentified venire persons for cause without individually questioning them or attempting to rehabilitate them, (3) failing to object when the Court made reference to the Bible during *voir dire*; and (4) failing to object to the Court's "hurrying and rushing" *voir dire*.

(1) Short voir dire

Ferrell raised this claim in his motion for post-conviction relief. The collateral court denied the claim. The court ruled that Ferrell's claim was conclusory and insufficiently pled. The court noted that trial counsel told the jury he intended to do a short *voir dire* because most of the questions he would have asked had already been asked by the State and the trial court. (PCR Vol. IV 680).

Below and before this Court, Ferrell fails to identify additional questions that counsel failed to ask, but should have. Moreover, Ferrell fails to identify any prejudice because

counsel did not conduct an extensive *voir dire*. Finally, Ferrell failed to identify any juror that, with more extensive questioning, would have been found either to be unqualified or biased against Ferrell or his theory of defense. Davis v. State, 928 So.2d 1089, 1118 (Fla. 2005)(rejecting Davis' claim of ineffective assistance of counsel for failing to question potential jurors more extensively on aspects of the case, because Davis failed to demonstrate that any unqualified juror served in this case or that any juror was biased or had an animus toward aspects of Davis' theory of the case). The collateral court's order denying this claim should be affirmed.

(2) Allowing excusal of 12 potential jurors

In this claim Ferrell alleges that trial counsel was ineffective for "allowing" the State to remove twelve venire persons for cause without individually questioning them. Ferrell raised this claim below.

The collateral court ruled the claim was conclusory and insufficiently pled. The court noted that Ferrell failed to allege what questions, and to whom, trial counsel should have asked. The court also ruled that Ferrell's allegation the excused venire persons could have been rehabilitated was entirely speculative. (PCR Vol. IV 681).[16]

[16] While Ferrell did not identify the twelve potential jurors about which he takes issue, they were Ms. Elazegui, Mrs. James,

Finally, the collateral court ruled that Ferrell failed to allege any prejudice as a result of trial counsel's purported deficiency. The court noted that Ferrell failed to identify any particular juror who actually served on his case that was biased against him or in favor of the state, any juror who indicated he could not render a verdict solely on the evidence presented and the instructions provided by the trial court, or any juror whose views on the death penalty substantially impaired the performance of his duties as a juror in accord with his oath and the trial judge's instruction. (PCR Vol. IV 681).[17]

This Court should affirm the denial of this portion of Ferrell's first claim. Ferrell's allegation is almost identical to one this Court has rejected before. In Davis v. State, 928 So.2d 1089, 1118 (Fla. 2005), the defendant alleged trial counsel was ineffective during *voir dire* because trial counsel did not have a reasonable basis to stipulate to the removal for

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Ms. Brookins, Mr. Gray, Ms. Desue, Ms. Gagnon, Ms. Wesley, Ms. Ervin, Mr. Miller, Ms. Calhoun, Mr. Watson, and Ms. Cerino. (TR Vol. XXVI 394).

[17] Ferrell failed to set forth facts that would support a finding trial counsel was deficient during *voir dire*. In order to assert a cognizable claim of ineffective assistance of counsel, the defendant must identify with particularity, a deficient overt act or omission of trial counsel. Ferrell has failed to make a prima facie showing of deficient performance under Strickland. Ferrell has failed to allege what questions, or to whom, trial counsel should have asked to rehabilitate potential jurors ultimately stricken for cause because of their views on the death penalty.

cause of eleven potential jurors. Davis asserted that if counsel had "followed up" during *voir dire* with more specific questions and had effectively rehabilitated the jurors, there would not have been a basis for any for-cause challenges.

This Court, as did the collateral court below, found this allegation to be "mere conjecture." Davis v. State, 928 So.2d at 1118.[18] *See also* Reaves v. State, 826 So.2d 932, 939 (Fla. 2002)(rejecting a claim of ineffective assistance of counsel during voir dire when Reeves complained that counsel should have "followed-up" with jurors but failed to allege what questions should have been asked as part of the "follow-up." In accord with this Court's decision in Davis and Reaves, this Court should affirm the collateral court.

(3) The Bible references

In his amended motion for post-conviction relief and before this Court, Ferrell alleged trial counsel was ineffective when he failed to object to Judge Oliff's reference to God's commandment "Thou shall not kill." The comment at issue

[18] This Court also noted in Davis that trial counsel did object to the current state of the law regarding stipulated challenges for cause relating to those individual jurors who were completely against the death penalty, preserving his claim in case of future change in the law. Davis v. State, 928 So.2d at 1118. Mr. Nichols also filed a motion to preclude death qualification of jurors and automatic disqualification of jurors who could fairly decide the issue of guilt but could not vote the death penalty. (TR Vol. I 53-68). Accordingly, like trial counsel did in Davis, Mr. Nichols preserved this issue in case of a future change in the law.

occurred during *voir dire* when a prospective juror indicated she was recalling biblical sources to help her with her personal feelings on the death penalty. The trial judge told the venire that there had been considerable debate among Hebrew and Christian scholars as to the interpretation of God's commandment that "thou shall not kill." The Judge noted that some scholars believe the commandment is more appropriately translated "thou shall not murder." Judge Oliff went on to tell potential jurors that when attorneys inquire about the ability to sit in judgment, they are asking whether potential jurors can make a determination of guilt or innocence. Ferrell v. State, 686 So.2d 1324, 1328 (Fla. 1996).

On appeal, Ferrell alleged that the trial judge's comments amounted to fundamental error. This Court, while discouraging trial courts from injecting biblical philosophy into any criminal trial, ruled the "judge's brief discussion was harmless when viewed in light of the entire record." Ferrell v. State, 686 So.2d at 1328.

Ferrell raised this same claim in his motion for post-conviction relief in the guise of an ineffective assistance of counsel claim. The collateral court ruled the claim was procedurally barred because Ferrell raised the claim on direct appeal. Alternatively, the court found that Ferrell had not shown any prejudice from trial counsel's failure to object

because this Court found the error to be harmless. (PCR Vol. IV 681).

On appeal, Ferrell does not point to, or even allege, any prejudice suffered as a result of trial counsel's failure to object to the judge's brief comment. (IB 56). Ferrell only claims it was improper for the judge to inject religious philosophy into his capital proceedings.

In collateral proceedings, Ferrell must demonstrate that trial counsel's failure to object undermined confidence in the outcome of his trial. Rutherford v. State, 727 So.2d 216, 219 (Fla. 1998). He does not even attempt to do so. Moreover, even had he made some effort to demonstrate prejudice, this Court's finding, on direct appeal, that the error was harmless dooms his claim to be denied. Cox v. State, 966 So.2d 337 (Fla. 2007)(noting that the Florida Supreme Court's finding the prosecutor's misstatements constituted harmless error was fatal to Cox's claim that counsel was ineffective for failing to object to them.) The collateral court's order denying this portion of Ferrell's claim should be affirmed.

(4) Rushing voir dire

Before the collateral court, Ferrell alleged that trial counsel was ineffective for failing to object when the trial court "rushed" *voir dire*. The collateral court denied the claim finding that, rather than being rushed, *voir dire* was quite

lengthy. The court noted that nothing in the trial record gave rise to a conclusion that either the prosecution or trial counsel felt rushed during questioning or were unable to adequately exercise their allotted challenges in the time available. Finally, the court noted that Ferrell had failed to allege any particular prejudice as a result of the trial courts "rushing" of *voir dire*. (PCR Vol. IV 681).

Before this Court, Ferrell demonstrates neither deficient performance nor prejudice. Ferrell cannot demonstrate deficient performance because he failed to demonstrate the trial court actually rushed *voir dire*.

The record reflects that *voir dire* began on Monday, March 9, 1992 at 10:37 a.m. and ended sometimes in the latter part of the afternoon. At its conclusion, and before the parties began exercising challenges, the trial judge noted that *voir dire* had lasted a long time. The judge likened the process to a Chinese water torture, pointing out, that in his view, the prosecutor had unnecessarily made the process longer than it should have been. (TR Vol. XXVI 396). Neither counsel complained he felt rushed or that the judge had unfairly curtailed his right to fully examine each potential juror.

Ferrell points to nothing in the record that indicates the judge actually rushed *voir dire*. It is axiomatic that trial counsel cannot be ineffective for failing to object to something

that did not happen. Mungin v. State, 932 So.2d 986, 997 (Fla. 2006) (counsel is not ineffective for failing to raise a meritless objection).

Even if Ferrell had made some showing the trial court "hurried" *voir dire*, Ferrell cannot prevail because Ferrell failed, both below, and before this Court to demonstrate any prejudice. Indeed, he does not even allege any particular prejudice.

In order to meet his burden under Strickland, Ferrell must show that some particular deficiency of trial counsel undermines this Court's confidence in the outcome of his trial. Kimbrough v. State, 886 So.2d 965, 978 (Fla. 2004); Rutherford v. State, 727 So.2d 216, 219 (Fla. 1998). Ferrell does not even attempt to make such a showing. He simply invites this Court to say it is so because he says it is so. This Court should demur.

g. Whether counsel was ineffective for recommending to Ferrell not to present any evidence at the guilt or penalty phase in order to have two closing arguments during the guilt phase.[19]

In this claim, Ferrell alleges that trial counsel was ineffective for persuading Ferrell not to present any evidence of his innocence at the guilt phase in order to preserve first

[19] Notwithstanding the heading to this claim in which Ferrell purports to raise allegations about counsel's performance in both phases of Ferrell's capital trial, Ferrell only presents argument as to the guilt phase. Accordingly, the state will address the claims regarding the penalty phase in its argument on cross-appeal (Issue I).

and last argument. Ferrell raised this claim in his amended motion for post-conviction relief.

After an evidentiary hearing, the collateral court denied this claim. The court denied the claim on two grounds. First, the collateral court ruled that Ferrell failed to present any "exculpatory" evidence that counsel should have presented, but did not. (PCR Vol. IV 682). Second, the court noted that, at trial, Ferrell had personally waived his right to call any witnesses and had failed to prove, at the evidentiary hearing, the waiver was not voluntary. (PCR Vol. IV 682).

This Court should deny this claim for two reasons. First, Ferrell did not testify at the evidentiary hearing that counsel "persuaded" him not to testify or present evidence on his behalf. Ferrell presented no evidence that trial counsel prevented him from testifying even though he really wanted to. Finally, Ferrell did not testify, at the evidentiary hearing, that he did not understand what he was doing by waiving his right to present any evidence during the guilt phase. Accordingly, Ferrell failed to prove the factual allegations underlying his claim.

Second, this Court may deny this claim because even assuming that trial counsel "persuaded" Ferrell not to testify or present evidence on his behalf, Ferrell can show no prejudice. While Ferrell complains that counsel was ineffective

for failing to present "evidence in support of Defendant's innocence," Ferrell presented no evidence of innocence at the evidentiary hearing. Counsel is not constitutionally ineffective for failing to present non-existent evidence of innocence. Pooler v. State, 33 Fla. L. Weekly S 81 (Fla. Jan. 31, 2008) (counsel not ineffective for failing to present a defense where there is no evidence to support a defense); Bell v. State, 965 So.2d 48, 64 (Fla. 2007)(counsel not ineffective for failing to present a credible defense when there is no evidence to support a credible defense).

h. Whether trial counsel was ineffective because he failed to put on a defense after promising the jury during opening statement that a defense would be presented.

In this claim, Ferrell alleges trial counsel was ineffective for failing to present any "defense" during the guilt phase after he promised the jury he would call a witness who could testify as to Ferrell's whereabouts on the night of the murder. The collateral court judge denied this claim finding that Ferrell failed to show any prejudice because Ferrell failed to show he had actually had an alibi for the night of the murder. (PCR Vol. VIV 685).

Telling the jury that the defendant will call an alibi witness and then not calling him, is a situation best avoided.[20]

[20] During closing arguments, trial counsel explained that the witness that he alluded to during opening became unnecessary

However, even if counsel should have played his cards, during opening statements, a bit closer to the vest, there is still one singular hurdle that Ferrell cannot leap. In order to prevail under the prejudice prong of Strickland for failing to put on a defense, Ferrell must show there was a defense available to present. At the evidentiary hearing, Ferrell presented no such defense.

Ferrell presented no evidence that Ferrell had an alibi for the night of the murder or that some other person was actually the person riding shotgun in Gino Mayhew's Blazer on the night of Gino's last day of life. Indeed the only "alibi" witness that Ferrell produced at the evidentiary hearing was a former correctional officer who gave Ferrell an alibi for the wrong night. (PCR Vol. VI 67-70).

While Ferrell makes a series of allegations against his trial counsel concerning his failure to investigate, Ferrell does not point to a single bit of evidence that trial counsel should have, but did not, present that would exculpate Ferrell. Pooler v. State, 33 Fla. L. Weekly S 81 (Fla. Jan. 31, 2008) (counsel not ineffective for failing to present a defense where there is no evidence to support a defense); Bell v. State, 965

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when the state could not pinpoint the time of death. Moreover, Detective Jefferson testified, as Mr. Nichols described, that Ferrell told him that he was at his mother-in-law's house at the time of the murder. (TR Vol. XXIX 904-906).

So.2d 48, 64 (Fla. 2007)(counsel not ineffective for failing to present a credible defense when there is no evidence to support a credible defense). This Court should deny this claim.[21]

i. Whether trial counsel was ineffective for failing to object to certain jury instructions.

Ferrell presents no argument on this issue. Instead, he improperly attempts to re-allege and reincorporate the argument he presented below. Ferrell has waived this claim by attempting to incorporate, by reference, his claims and arguments made to the collateral court below. "Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." Simmons v. State, 934 So.2d 1100 (Fla. 2007), quoting Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."). *See also* Shere v. State, 742 So.2d 215, 218 n.6 (Fla. 1999)(a claim is not properly presented for appellate review if appellant fails

[21] Trial counsel explained to the jury, during his closing arguments that even though he had discussed, during opening, calling a witness who could account for Ferrell's whereabouts at the time of the murder, the witness became irrelevant when the State could not pinpoint the time of death. (TR Vol. XXIX 904).

to present any argument or allege on what grounds the trial court erred in denying his claim).

j. Whether trial counsel was ineffective for failing to argue the sufficiency of the evidence in a motion for a judgment of acquittal or a motion for a new trial.

In this claim, Ferrell's argument turns on his allegation that the collateral court was wrong to deny this claim because "it is clear from the record that Mr. Nichols' was ineffective and deficient in his representation at trial and that said deficiency undermined confidence in the outcome." (IB 62). This Court may deny this claim for two reasons.

First, the issue is procedurally barred because sufficiency of the evidence was raised and considered on direct appeal. In raising this claim again in the guise of an ineffective assistance of counsel claim, Ferrell seeks, improperly to use post-conviction proceedings as a second appeal of the same issue. Medina v. State, 573 So.2d 293, 295 (Fla. 1990)(holding that allegations of ineffective assistance cannot be used to circumvent rule that post-conviction proceedings cannot serve as second appeal).

This claim may also be denied because this Court ruled, on direct appeal, that there was sufficient evidence to support Ferrell's convictions for armed robbery and first degree murder. Ferrell v. State, 686 So.2d 1324, 1329-1330 (Fla. 1996). Accordingly, no matter how vigorously counsel may have pursued a

motion for a new trial or a motion for a judgment of acquittal, the motions would have been properly denied.

k. Whether trial counsel was ineffective for failing to ensure Ferrell was present at all pre-trial hearings absent a valid waiver.

In the heading of this claim, Ferrell purports to raise a claim that trial counsel was ineffective for failing to ensure that Ferrell was present at all pre-trial hearings, absent a valid waiver. Ferrell points to several hearings about which he takes issue. (IB 63-64). Ferrell does not, however, actually make any argument on the claim he purports to present.

Instead, Ferrell actually complains that trial counsel was not present for two hearings, held on July 18 and October 11, 1991 and voir dire held on November 12, 1991. Ferrell avers that counsel's actions at, or before, these hearings, as well as counsel's actions at a hearing held on June 26, 1991, constituted ineffective assistance of counsel.[22]

[22] In his amended motion, Ferrell did raise a claim that counsel was ineffective to for failing to ensure Ferrell's presence at all pre-trial hearings. (PCR Vol. I 104). Ferrell did not point to any of the particular hearings about which he complains before this Court. Instead, Ferrell simply complained that trial counsel waived his presence at all pre-trial hearings. (PCR Vol. I 104). Moreover, Ferrell did not allege, in his post-conviction motion, any specific harm that Ferrell suffered as a result of his absence from any particular hearing. Instead, Ferrell averred that it is enough that he did not personally waive his presence. (PCR Vol. IV 104). The collateral court denied this claim. (PCR Vol. IV 690).

(1) June 26, 1991 hearing

At this hearing, trial counsel was present and Ferrell was not. However, Ferrell does not make any allegation he was prejudiced by his absence. Instead, Ferrell alleges that trial counsel was ineffective because, only 19 days after he was appointed and before the bulk of discovery had been provided, trial counsel had already decided that he would not file a motion to suppress. (IB 63), (TR Vol. VI 18).

Even assuming that counsel intended to bind himself forever to that position, Ferrell can still show no prejudice. In order to show prejudice for failing to file a motion to suppress, Ferrell has to demonstrate that had such a motion been made, it would have been successful. Zakrzewski v. State, 866 So.2d 688, 694 (Fla. 2003) ("[W]here defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious.").

In his motion for post-conviction relief, Ferrell made no allegation that trial counsel was ineffective for failing to file a motion to suppress any evidence. Likewise, at the evidentiary hearing, Ferrell put on no evidence that any legal grounds existed for trial counsel to file a motion to suppress.

Trial counsel cannot be ineffective for failing to file a motion to suppress when no grounds exist for the suppression of

any evidence. Id. Ferrell's claim as to this particular hearing should be denied.

(2) July 18, 1991

At this hearing, neither trial counsel nor Ferrell were present. At the hearing, counsel for Mr. Hartley and Mr. Johnson complained that the prosecutor had not been diligent in providing them with requested discovery. After the prosecutor agreed to furnish some additional materials, the parties agreed they would sit down with each other and work it out. (TR Vol. VI 21).

In order to prevail on a claim of ineffective assistance of counsel for failing to require Ferrell's presence at pretrial conferences, Ferrell must show he was prejudiced by his absence at each particular pretrial conference. Kormondy v. State, 32 Fla. L. Weekly S 627 (Fla. Oct. 11, 2007). At the evidentiary hearing, Ferrell presented no evidence that he was deprived of any discovery material as a result of his or counsel's absence at the hearing. Because Ferrell can show no adverse impact on his case by counsel's failure to attend this hearing, this Court should deny his claim.

(3) October 11, 1991

At this hearing, the trial court considered motions filed by counsel for Mr. Hartley. Of particular import was Hartley's

motion to exclude Williams rule evidence that Hartley had committed two particular taxi cab robberies with a shotgun.

Mr. Nichols was not present. Neither was counsel for co-defendant, Sylvester Johnson.

Ferrell complains that his counsel did not file a motion *in limine* on behalf of Mr. Ferrell or even attend the hearing where Hartley's Williams rule motion was being heard. (IB 64). According to Ferrell, this was "blatantly ineffective and prejudicial." (IB 64).

In making this accusation against trial counsel, an accusation that trial counsel had no opportunity to answer, Ferrell apparently overlooked the obvious. Trial counsel was not present because the hearing, about which Ferrell complains, had nothing to do with the Mayhew murder, or Ronnie Ferrell at all. (TR Vol. XIII 70-109).

Instead, this hearing was held on another case, in which Kenneth Hartley was charged with robbing a taxi driver with a sawed off shotgun. (TR Vol. XV 119). At the hearing, Hartley's counsel attempted to exclude evidence that Hartley had, previously, committed two other taxi cab robberies in a similar manner.

Hartley was ultimately unsuccessful at excluding the evidence and Hartley was convicted of the robbery. He was also convicted, separately, of one of the other two robberies. These

robberies were used at Hartley's trial, but not Ferrell's, to prove the prior violent felony aggravator. Hartley v. State, 686 So.2d 1316, 1319 (Fla. 1996).

Ferrell can show no prejudice from trial counsel's absence from a hearing that had nothing at all to do with his case. Kormondy v. State, 32 Fla. L. Weekly S 627 (Fla. Oct. 11, 2007)(ruling that in order to prevail on a claim of ineffective assistance of counsel for failing to require the defendant's presence at trial, the defendant must show he was prejudiced by his absence). This Court should deny his claim.

(4) November 12, 1991

Ferrell complains that his trial counsel failed to attend *voir dire* on November 12, 1991, the date his trial was originally set. (IB 65). In making this argument, Ferrell implies that *voir dire* was conducted without counsel.

Trial did not begin on that date. Indeed, it did not begin until several months later in March 1992. While the record does not reveal any explanation for trial counsel's absence on November 12, except that he had earlier informed the court he was not ready for trial and would (or had) seek a continuance, the record does show that Ferrell did not go to trial that day without counsel. (TR Vol. XVI 128-129). Ferrell failed to demonstrate that trial counsel's absence prejudiced him in any manner that affected the outcome of the trial.

l. Whether trial counsel was ineffective for failing to file a motion for change of venue.

In this sub-claim, Ferrell alleges trial counsel was ineffective for failing to file a motion for change of venue. Ferrell presented this same claim below. The collateral court denied the claim ruling that Ferrell had failed to show trial counsel was ineffective.

The collateral court ruled that the record refuted Ferrell's claim the jury was unlawfully tainted by pre-trial publicity because counsel had no trouble picking a jury. (PCR Vol. IV 692). The court also found that had trial counsel made a motion for a change of venue, there is no reasonable probability that the trial court would have granted the motion. Finally, the collateral court found that Ferrell failed to allege, much less establish, there was a lack of impartiality in any one of the jurors that actually served on his jury. (PCR Vol. IV 692).

This claim may be denied for two reasons. First, Ferrell does not present any argument on this sub-claim. Instead he improperly attempts to re-allege and re-incorporate arguments made in the collateral court. Ferrell has waived this claim by attempting to incorporate, by reference, his claims and arguments made to the collateral court below. "Merely making reference to arguments below without further elucidation does

not suffice to preserve issues, and these claims are deemed to have been waived." Simmons v. State, 934 So.2d 1100 (Fla. 2007), quoting Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

This claim may also be denied because Ferrell failed to show that a motion for a change of venue probably would have been granted if counsel would have filed the motion. Griffin v. State, 866 So.2d 1 (Fla. 2003) (ruling that when applying the prejudice prong of Strickland to a claim that defense counsel was ineffective for failing to move for a change of venue, the defendant must, at a minimum, bring forth evidence demonstrating that there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue if defense counsel had presented such a motion to the court).

Pretrial publicity is normal and expected in certain high profile cases. The fact there is pre-trial publicity, even extensive pre-trial publicity, standing alone will not require a change of venue. Rolling v. State, 695 So.2d 278, 285 (Fla. 1997).

The test for determining whether to grant a motion for change of venue is whether the inhabitants of a community are so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom. Griffin v. State, 866 So.2d 1 (Fla. 2003). If a trial lawyer makes a motion for a change of venue, the trial court must examine both the extent and nature of any pretrial publicity and the difficulty encountered in actually selecting a jury. If it proves impossible to select jurors who will decide the case on the basis of the evidence, rather than the jurors' extrinsic knowledge, then the trial court should grant a motion for change of venue. Id.

In this case, the record refutes Ferrell's claim the venire was unlawfully tainted by pre-trial publicity. Contrary to Ferrell's claim, there is no evidence any prospective juror was even aware of the media coverage of this murder.

During the opening moments of voir dire, the trial judge inquired of the venire whether anyone had any knowledge about the facts of the case. There was a collective negative response. (TR Vol. XXV 192-193).

At the beginning of the prosecutor's group voir dire, the prosecutor noted that potential jurors may have heard or read

about the case from the newspaper, television or radio. The prosecutor inquired specifically whether anyone knew or remembered anything about the case from other than the media. There was a collective negative response. (TR Vol. XXV 313)

Only one prospective juror reported any prior knowledge of the case. The prospective juror recounted that he was a school teacher at the school where Mayhew's body had been found. He taught at that school for one year. When asked, he agreed he could lay aside anything he read from the papers and decide the case solely on the evidence he heard from the witness stand. (TR Vol. XXVI 314). All other potential jurors answered affirmatively when asked whether they could set aside anything they might recall about the case from outside sources and decide the case based solely on the evidence. (TR Vol. XXVI 313).

Counsel had no difficulty picking a jury. Based on this record, even if counsel had moved for a change of venue, there is no reasonable probability the trial court would have, or should have, granted the motion.

m. Whether the cumulative effect of counsel's numerous errors deprived Ferrell of a fair trial.

Ferrell's claim of cumulative error must fail because Ferrell has failed to show that trial counsel was ineffective during the guilt phase of Ferrell's capital trial. If, after analyzing the individual issues above, the alleged errors are

either meritless, procedurally barred, or do not meet the Strickland standard for ineffective assistance of counsel, there can be no cumulative error. Because Ferrell's alleged individual errors are without merit, his contention of cumulative error is similarly without merit. Griffin v. State, 866 So.2d 1, 22 (Fla. 2003) ("Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit, and [the defendant] is not entitled to relief on this claim.").

ISSUE II

WHETHER THE COLLATERAL COURT ERRED IN DENYING FERRELL'S CLAIM THE STATE VIOLATED THE DICTATES OF THE UNITED STATES SUPREME COURT'S DECISION IN GIGLIO V. UNITED STATES

In Ferrell's second issue, Ferrell alleges the State violated the dictates of Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). (IB 66-78). In order to demonstrate a Giglio violation, the defendant must prove two elements: (1) the prosecutor presented or failed to correct false testimony; and (2) the prosecutor knew the testimony was false.

If the defendant bears his burden as to the first two elements, the state has the burden to show the false evidence was not material. False evidence is deemed material if there is a reasonable possibility that it could have affected the jury's verdict. The state can bear its burden by demonstrating the

introduction of the false testimony was harmless beyond a reasonable doubt. Green v. State, 32 Fla. L. Weekly S 619 (Fla. Oct. 11, 2007); Guzman v. State, 868 So.2d 498, 505 (Fla. 2003).

Giglio claims present mixed questions of law and fact. As such, this Court defers to those factual findings supported by competent, substantial evidence, but reviews *de novo* the application of the law to the facts. Green v. State, 32 Fla. L. Weekly S 619 (Fla. Oct. 11, 2007).

Before the collateral court, Ferrell claimed the state violated Giglio when it knowingly introduced the false testimony of two witnesses, Robert Williams and Gene Felton. Ferrell also claims the state committed a Giglio violation when, during closing argument, the state attempted to bolster Robert Williams' credibility by telling the jury that Robert Williams should be believed because he had entered into a plea agreement with the state that would limit his exposure to prison to ten (10) years. (PCR Vol. I 110-118). An evidentiary hearing was held on this claim. (PCR Vol. II 234).

a. Robert Williams

In this portion of his Giglio claim, Ferrell avers that Robert Williams' trial testimony was false and the prosecutor knew the testimony was false. Ferrell's argument centers on the notion that Williams testified falsely when he told the jury that Ferrell told him about the murder of Gino Mayhew.

At trial, Robert Williams told the jury that while he and Ferrell were housed together in the Duval County Jail, Ferrell made several statements admitting his involvement in the murder of Gino Mayhew. Williams testified that Ferrell told him that Kenneth Hartley and Sylvester Johnson had robbed the victim, the Saturday night before the murder. (TR Vol. XXVIII 665). Ferrell told Williams he was also involved but Mayhew did not recognize him because he was masked. (TR Vol. XXVIII 668-669).

Williams testified that Mayhew recognized Hartley and Johnson and that Ferrell, Hartley, and Johnson conspired to murder the victim to prevent him from retaliating for the robbery. (TR Vol. XXVIII 670-671). Williams told the jury that Ferrell explained that he, Hartley and Johnson agreed on a plan to purchase a large amount of crack from the victim to get the victim off by himself and then kill him. (TR Vol. XXVIII 672). Ferrell was the one who approached Mayhew about the sale because the victim knew Ferrell and had not recognized him in the previous robbery. (TR Vol. XXVIII 673).

Ferrell told Williams that Hartley entered the Blazer with his gun and sat in the back seat. They drove to Sherwood Park. Hartley told the victim “you know what this is.” Hartley and Ferrell robbed Mayhew of drugs and money. Ferrell took a gold rope from around Mayhew’s neck. (TR Vol. XXVIII 676).

Ferrell told Williams that, after the robbery, he got of the Blazer. Hartley then shot the victim in the head four or five times. Ferrell told Williams that Hartley shot Mayhew from the back seat of the Blazer. (TR Vol. XXVIII 676).

Ferrell did not tell Williams what kind of gun Hartley had. Ferrell did say the gun Hartley used to shoot Mayhew had a clip. (TR Vol. XXVIII 677). Williams assumed it was an automatic because an automatic holds its ammunition in a clip. (TR Vol. XXVIII 677-678).

Williams testified that Ferrell told him that Sylvester Johnson met them at the field in the truck and drove them away from the scene. (TR Vol. XXVIII 677-678). The trio left drug paraphernalia in the front seat. Williams inferred that leaving the paraphernalia was designed to mislead the police even though Ferrell did not directly say so. (TR Vol. XXVIII 678).

In presenting his Giglio claim to the collateral court, Ferrell alleged that Williams' trial testimony was false. Ferrell claimed that Williams' testimony was false because he could have learned all the details about which he testified from the media rather than from Ronnie Ferrell. (PCR Vol. I 112).

The collateral court rejected this claim. (PCR Vol. IV 693-694). The court found that Ferrell did not meet Giglio's first prong because Ferrell did not demonstrate that Williams' testimony was false in any way. (PCR Vol. IV 693). Moreover,

the court found that Ferrell failed to demonstrate that all of the details about which Williams testified were ever reported in the media.

The collateral determined that, while Ferrell introduced evidence of the media coverage that was available, Ferrell failed to prove that Williams personally had access to any media reports about the murder, read any of the media reports, or gleaned all, or even some, of the details about which he testified from the media. The court noted that Ferrell did not call Robert Williams at the evidentiary hearing to determine what, if any, media exposure he had before giving his testimony. (PCR Vol. IV 693-694).

The collateral court's findings are supported by substantial competent evidence in the record on appeal. Ferrell failed not only to prove that Robert Williams got all of his information from the media, Ferrell failed to prove that Williams actually obtained any of his information from the media. Instead, as he did below, Ferrell invites this Court to comb through all of the newspaper articles introduced into evidence at the evidentiary hearing and make a comparison between the articles and Williams' testimony to determine which

details of Williams' testimony were actually reported in the media. This Court should decline the invitation.[23]

At the evidentiary hearing, not only did Ferrell fail to demonstrate that all of the details about which Williams testified were actually reported in the media, he also failed to demonstrate that Williams read or heard any media reports at any time prior to his testimony. While Ferrell did introduce evidence at the evidentiary hearing that jail inmates had access to newspapers and television and that state law enforcement officials were aware there was media coverage of the murder, Ferrell produced no evidence that Williams personally had access to any of the media coverage or if he did, ever read or heard about the murder from the media. Likewise, Ferrell produced no evidence that the prosecutor knew, or even suspected, that Williams got his information from any source other than Ronnie Ferrell.

Ferrell did not call Robert Williams to testify at the evidentiary hearing. Nor did he produce any witness who testified that Robert Williams obtained any or all of his testimony from the media. Ferrell did not even testify at the

[23] Even if the court made such a comparison and found common facts between Williams' testimony and media reports, there is still no evidence that Williams got the information about which he testified from the media reports.

evidentiary hearing to deny, under oath, that he had discussed the murder with Williams.

Though he was granted an evidentiary hearing on this claim, Ferrell failed to produce any evidence that Robert Williams' testimony was false or that the prosecution knew, or even suspected that Williams testimony was false. Ferrell's self-serving speculation that Williams' testimony was false does not make it so. Maharaj v. Secretary for Dept. of Corrections, 432 F.3d 1291, 1313 (11th Cir. 2005)(In the Giglio context, the suggestion that a statement may have been false is simply insufficient; the defendant must conclusively show that the statement was actually false). The collateral court's findings of fact and conclusions of law should be affirmed.

b. The prosecutor's closing argument

In his next sub-claim, Ferrell alleges the prosecutor committed a Giglio violation when, during closing argument, he told the jury that Robert Williams would be in prison for ten years pursuant to a plea agreement that included a "truthful testimony" provision. (IB 73). Ferrell avers this argument constituted a Giglio violation because in reality Williams had a plea agreement in which he faced a "possibility" of up to ten

years in prison. Ferrell also points out that Williams was ultimately sentenced to only 18 months in prison. (IB 73-74). [24]

Ferrell presented this claim to the collateral court below. The court rejected his claim on three separate and independent grounds. (PCR Vol. IV 694-695).

First, the collateral court found the claim to be procedurally barred. (PCR Vol. IV 694). The court found that, rather than a Giglio claim, Ferrell was actually presenting a substantive claim of improper closing argument. The collateral court found that, as such, Ferrell could have, and should have raised the claim on direct appeal. (PCR Vol. IV 694).

Second, the collateral court found that Ferrell had not demonstrated the prosecutor knowingly presented false argument. The court went on to note the fact Mr. Williams subsequently was sentenced to 18 months did not create a Giglio violation. (PCR Vol. IV 695).

Finally, the Court found that even if Ferrell had met his burden as to the first two prongs of Giglio, there was no reasonable likelihood that it could have affected the judgment of the jury. The court found that the jury was aware that William was facing up to ten years in prison as a result of his

[24] Ferrell put on no evidence that, at the time of trial, there was any *sub rosa* agreement in place between the prosecution and Williams that he would actually be facing much less than ten years in prison based upon his guilty plea to dealing in stolen property

plea agreement. The collateral court found the prosecutor related this same information to the jury during closing argument. (PCR Vol. IV 695).

Assuming that a prosecutor's closing argument could ever constitute a *bona fide* Giglio claim, the collateral court correctly ruled no violation occurred in this case.[25] In order to prove a Giglio violation, Ferrell would have to show either that Williams' plea agreement did not actually call for a sentence up to ten years in prison or that the prosecutor misled the jury by stating that Williams would actually be sentenced to ten years in prison if he testified truthfully against Ferrell.

Ferrell does not claim that Williams testified untruthfully about his plea agreement. Nor does he claim the plea agreement did not contain a provision that allowed Williams to be sentenced to prison for "up to ten years."

Indeed, in his initial brief, Ferrell acknowledges that Williams' plea agreement called for a possibility of up to ten years in prison. (IB 73). Ferrell claims the Giglio violation occurred when the prosecutor misled the jury into believing that Williams would actually get ten years in prison.

[25] The State does not believe that any argument can ever constitute a Giglio violation because the jury hears all of the testimony and is told that arguments of counsel are not evidence.

At trial, Williams testified that he was pending sentencing on a charge of dealing in stolen property. Williams told the jury that he entered into a plea agreement with the state on the charge. (TR Vol. XXVIII 660). The agreement required him to plead guilty and to testify truthfully about his knowledge of the Gino Mayhew murder. Judge Tygart would sentence him, to up to ten years in prison, after Ferrell's trial. (TR Vol. XXVIII 660-661). Williams told the jury that in return for his truthful testimony, he "wouldn't receive no more than [a] ten year sentence in the Florida State Prison." (TR Vol. XXVIII 660).

During closing argument, the prosecutor discussed Williams' plea agreement with the jury. The prosecutor argued, consistently with Williams' testimony, that "he would get no more than ten years in prison if he would be truthful, to say what he knew about the murder." (TR Vol. XXIX 866). A bit later, the prosecutor returned to the testimony of Robert Williams and once again discussed the terms of Williams' plea agreement. The prosecutor pointed to Williams' testimony that he "won't get more than ten years in State Prison." (TR Vol. XXIX 873).

Contrary to Ferrell's claim, the record clearly refutes any notion the State told the jury that Williams would actually be sentenced to ten years in prison. Instead, the record clearly

shows the prosecutor accurately recounted Williams' testimony that he would be sentenced to no more than ten years. (TR Vol. XXIV 866, 873).

Ferrell cannot show the prosecutor committed a Giglio violation because it is crystal clear the prosecutor scrupulously adhered to the truth in relating the details of Williams' plea agreement. The prosecutor told the jury that Williams' plea agreement called for him to be sentenced to no more than ten years in prison. Plainly, a sentence possibility of "no more than ten years in prison" means the defendant may lawfully be sentenced to any term of imprisonment ranging from one to ten years in prison, or even no prison at all. As Ferrell points out, Williams was sentenced to 18 months in prison, a sentence squarely within the parameters of "no more than ten years in prison." This Court should affirm the trial court.

c. Robert Williams and Gene Felton

In this claim, Ferrell claims the prosecutor knowingly presented the false testimony of Robert Williams and Gene Felton regarding the robbery of Gino Mayhew on the Saturday night before his murder. Ferrell does not take issue with the fact that Mayhew was robbed by three men, two seen and apparently one unseen. Ferrell claims only that Felton and Williams lied when they testified that Ferrell was involved in that robbery.

Ferrell claims the identity of the third robber was critical because the state used the April 20, 1991 robbery as a motive for Mayhew's murder.

This court should deny this claim. Ferrell presented no evidence at the evidentiary hearing that Williams' or Felton's testimony was false or that the prosecutor knew their testimony was false.

In the collateral court, Ferrell alleged a Giglio violation arose because the State knew that Deatry Sharp and not Ronnie Ferrell was the third man who, along with Kenneth Hartley and Sylvester Johnson, robbed Gino Mayhew on the Saturday evening before he died. Ferrell alleged the State knew that Deatry Sharp, not Ferrell, was the third robber because Deatry Sharp testified in two depositions that Kenneth Hartley and Sylvester Johnson (standing somewhere out of sight) robbed Mayhew while Sharp acted as lookout.

The collateral court denied his claim. (PCR Vol. IV 696-697). The court ruled that:

> ... At the evidentiary hearing, the Defendant introduced two depositions of Sharp: one taken on February 13, 1992, prior to the Defendant's trial and one taken in October 1992, taken some six months after Defendant's trial. Both depositions are fairly consistent with each other and in both Mr. Sharp states, he, Sylvester Johnson and Kenneth Hartley robbed the victim on April 20, 1991. According to Mr. Sharp, he was the look-out man and participated against his will upon threat of death. Mr. Sharp stated that Hartley approached the victim alone and in the October 1992 deposition, Mr. Sharp testified that the victim was never

struck or injured by Mr. Hartley. Mr. Sharp stated he did not know where Johnson was at the time, just that he was close by. Mr. Sharp never mentioned that anyone wore a mask.

Lynwood Smith testified at trial that two days before the murder, the victim ran into Mr. Smith's apartment and claimed he had just been robbed by two men who took his money and drugs (TT-556-557). Mr. Smith testified that the victim looked as if he had been beaten up, was still bleeding from a gash in his forehead and testified that he saw where a bullet had grazed the victim's knee. (TT 558). The victim told Mr. Smith that he had been robbed by two men, one he stated he thought was Kip Hartley but the other had a hat down over his face and he could not recognize him. Further, while the Defendant contends in his motion that Mr. Smith "confessed that [the victim] told him he knew Duck and Kip were involved but he could not determine the third person, Mr. Smith actually testified that the victim thought one of the robbers was Kip, but was not certain, and could not identify anything about the other person as he had a mask covering his face. (Defendant's Amended Motion at 72). (TT 556,561).

Gene Felton testified that on the night of April 20, 1991, he was sitting drinking beer when he overheard the defendant and co-defendant Johnson discussing how they beat up the victim and had taken his money and drugs. (TT 565-67). Robert Williams testified that the Defendant told him he, and co-defendants Hartley and Johnson had robbed the victim on the Saturday night before the murder and the victim recognized both Hartley and Johnson, but did not recognize him because he was masked. (TT 665-69). Mr. Williams also testified that the Defendant told him that the victim put out a hit on Hartley and Johnson because of the robbery. Id.

This Court has reviewed and considered the depositions of Mr. Sharp and the trial testimony of Mr. Smith, Mr. Felton, and Mr. Williams and finds that the depositions do not establish that Mr. Smith's Mr. Felton's or Mr. Williams' testimony was false nor do they establish the prosecutor in his case knowingly presented false testimony to the jury. While the prosecutor did have Mr. Sharp's February 13, 1992 and possessed Sharp's sworn statement admitting to the robbery, Mr. Sharp's description of the robbery differed significantly from Mr. Smith's observation of the physical

> appearance after the robbery as well as the victim's statements. Specifically, Mr. Sharp testified that the victim was never struck and that he would have seen if the victim had been struck as he observed the entire encounter. Mr. Smith testified that the victim came into his apartment after the robbery took place and looked as if he had been beaten up and was still bleeding from a gash on his forehead. Mr. Sharp stated no one was masked while Mr. Smith testified he could not identify one of the robbers as he was masked. Further, Mr. Sharp stated that Hartley alone robbed the victim while Mr. Sharp was the look-out and Johnson was in the area while Mr. Smith testified that the victim stated two men robbed him. Mr. Felton and Mr. Williams testified to what the Defendant stated regarding the robbery, and the version the Defendant gave was consistent with what Mr. Smith was told by the victim and Mr. Smith's own observations. Accordingly, the Defendant has failed to establish a Giglio violation in the instant subclaim.
>
> (PCR Vol. IV 695-697).

In ruling on this claim, the collateral court made four essential factual findings: (1) Robert Williams and Gene Felton's testimony was consistent with both with the victim's version of events and with Lynwood Smith's observations about Gino's physical appearance immediately after the April 20, 1991 robbery; (2) Deatry Sharp's deposition testimony about how that robbery went down was inconsistent with the victim's version of events and Lynwood Smith's observations about the victim's physical appearance immediately after the April 20, 1997 robbery; (3) Sharp's deposition testimony did not demonstrate that Williams' and Felton's testimony was false and (4) the inconsistencies did not give rise to a finding that the

prosecutor knew that Williams' and Felton's testimony was false and Deatry Sharp's testimony was true.

The gist of Ferrell's argument seems to be that if the State has one witness who's out of court testimony conflicts with three other witnesses' testimony, a Giglio violation arises if the State puts only the latter three witnesses on the witness stand.[26] This Court has never said that a Giglio violation occurs if the State puts on witnesses whose testimony conflicts with another person's version of events. Such a rule of law would be patently absurd. This is especially true in this case, when Felton's, Smith's, and Williams' testimony are more consistent with the victim's own physical appearance and report of the robbery than was Sharp's.

Additionally, Ferrell put on no evidence at the evidentiary hearing to establish that Sharps' testimony was truthful and Williams', Felton's and Smith's was false. Ferrell did not call Williams, Felton, Smith or even Deatry Sharp at the evidentiary hearing. Nor did Ferrell take the stand at the evidentiary hearing to disclaim any participation in the April 20, 1991 robbery.

Ferrell must do more than suggest that a witness' testimony is false. He must actually show it was. Maharaj v. Secretary

[26] Ferrell has never claimed that he could not have called Deatry Sharp at trial.

for Dept. of Corrections, 432 F.3d 1291, 1313 (11th Cir. 2005)(In the Giglio context, the suggestion that a statement may have been false is simply insufficient; the defendant must conclusively show that the statement was actually false). Competent, substantial evidence supports the collateral court's finding that Ferrell wholly failed to show that Williams and Felton's testimony was false or that the prosecutor "knowingly" presented false evidence by putting Felton and Williams on the witness stand. This Court should affirm.

ISSUE III

WHETHER THE COLLATERAL COURT ERRED IN DENYING FERRELL'S CLAIM THE STATE WITHHELD MATERIAL EVIDENCE IN VIOLATION OF THE UNITED STATES SUPREME COURT DECISION IN BRADY V. MARYLAND

In this claim, Ferrell alleges the State withheld material exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). Ferrell raised this same claim before the collateral court in Claim III of his amended motion for post-conviction relief. (PCR Vol. I 74-74). The collateral court ordered an evidentiary hearing on Ferrell's Brady claim. (PCR Vol. II 234).

Before this Court, Ferrell identifies three items of Brady material he avers the State withheld:

(1) Police interviews and notes, if any with Joyce Worth and Natasha Brown, (IB 81-82),

(2) Police interviews, statements or depositions of Bobby Brown, (IB 81-82) and

(3) Evidence that Sydney Jones was a CI for the Jacksonville Sheriff's Office (IB 81-82).

To establish a Brady violation, a defendant must show: (1) evidence favorable to the accused, because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) prejudice ensued. Wright v. State, 857 So.2d 861, 870 (Fla. 2003); Jennings v. State, 782 So.2d 853, 856 (Fla. 2001); Brady v. Maryland, 373 U.S. 83, 87 (1963). The burden is on the defendant to demonstrate the evidence he claims as Brady material satisfies each of these elements. Wright v. State, 857 So.2d 861, 870 (Fla. 2003).

The prejudice prong is not satisfied unless the defendant shows the withheld evidence is material. Under Brady, the undisclosed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985). The mere possibility that undisclosed items of information may have been helpful to the defense in its

own investigation does not establish the materiality of the information. Wright v. State, 857 So.2d 861, 870 (Fla. 2003).

Before this Court, Ferrell has failed to establish any error in the collateral court's denial of his Brady claims. This Court should affirm the collateral court's ruling.

a. Police interviews and notes with Joyce Worth and Natasha Brown.

In Ferrell's first sub-claim, Ferrell alleges the State withheld interviews and notes from police interviews with Joyce Worth and Natasha Brown. (IB 81-82). After an evidentiary hearing, the collateral court denied the claim.

The court ruled that Ferrell failed to establish a Brady violation because Ferrell failed to prove that any law enforcement officer or agent of the State made or possessed notes of an interview with Brown or Worth. (PCR Vol. IV 699). The collateral court's ruling is supported by competent substantial evidence.

Logic dictates that in order to show the State withheld a particular thing, the defendant must prove the thing existed. At the evidentiary hearing, Ferrell never put on any evidence these purported interview notes even existed. Ferrell did not call a single witness or produce a single shred of evidence to support his claim that police interview notes existed and then were withheld.

Likewise, Ferrell put on no evidence that these notes contained any Brady material. In his brief, Ferrell alleges, without elucidation, that the notes are important because Worth and Brown "had learned that a person other than the Defendant committed the murder of Gino" and that with these notes, defense counsel could have established a "concrete alibi". (IB 83).

However, Ferrell put on no evidence in support of his assertion that "a person other than the Defendant committed the murder of Gino." Nor did Ferrell produce Joyce Worth or Natasha Brown to testify how, and under what circumstances, they supposedly "learned" that another person committed the murder.[27]

Moreover, while Ferrell claims, that "defense counsel could have established a concrete alibi using this exculpatory evidence", Ferrell produced no such alibi at the evidentiary hearing. (IB 83). Instead, the only purported alibi evidence that Ferrell produced at the evidentiary hearing was the testimony of Rene Jones, a former correctional officer, who gave Ferrell an "alibi" for the wrong night.

Mr. Jones testified before the collateral court that he was watching a western on television when Ferrell arrived at Ferrell's mother's and sister's home somewhere around 11:30 on

[27] Ferrell makes no contention that either Worth or Brown had any firsthand knowledge of who killed Gino Mayhew.

Sunday night, April 21, 1991. (PCR Vol. VI 67-68).[28] Mr. Jones was certain it was on a Sunday because he had gone to church that morning and spent time with his family. He had also gone to a club, Club 53, that he usually goes to on Sunday. (PCR Vol. VI 70).

Mr. Jones testimony, even if believed, would not have established an alibi because Gino Mayhew was not kidnapped and murdered on Sunday night, April 21, 1991. Instead, Gino Mayhew was kidnapped late on Monday, night, April 22, 1991 and murdered that same night or in the early morning hours of April 23, 1991. Accordingly, Jones' testimony does not establish an alibi.

At the evidentiary hearing, Ferrell put on no evidence that any interview notes existed. Ferrell also put on no "concrete alibi" or any evidence that any person other than Ronnie Ferrell, Kenneth Hartley and Sylvester Johnson killed Gino Mayhew. Ferrell's claim is without merit and this Court should deny his claim.

b. Interview notes, statements or depositions of Bobby Brown.

Ferrell next alleges the State withheld police notes of an interview of Bobby Brown. At issue, is Brown's statement that Ferrell gave Clyde Porter a ride to Jax Liquor Store at 11:00 p.m. Before the collateral court, Ferrell asserted this testimony would have established it was impossible for Ferrell

[28] Jones was visiting Ferrell's sister, Towana.

to have been in Washington Heights at 11:00 p.m to participate in the abduction and murder of Gino Mayhew.

The collateral court found that the evidence introduced at the evidentiary hearing "clearly showed the state did not withhold this information. (PCR Vol. IV 700). The collateral court's ruling is supported by the evidence adduced at the evidentiary hearing.

The evidence adduced at the evidentiary hearing established that Detective William Bolena gave a pre-trial deposition in which he discussed his interview with Bobby Brown. The deposition was attended by Ferrell's trial defense counsel, Richard Nichols. (PCR Supp. Vol. IX 1468).

In his deposition, Detective Bolena testified he had spoken to Bobby Brown. Mr. Brown told Detective Bolena that Ferrell gave Clyde Porter a ride to Jax Liquors at 11:00 p.m. on the night of the murder. (PCR Supp. Vol. IX, 1482). Bolena related that Mr. Brown was certain of the time because he had gotten off at 11:00 p.m. and his wife had come to pick him up. (PCR Supp. Vol. IX, 1482-1483).

Bolena testified he also talked with Clyde Porter.[29] Porter initially told the detective that Ferrell gave him a ride to Jax

[29] Mr. Porter was listed on the State's witness list provided to the defense during discovery and the State provided Mr. Porter's sworn statement to the defense. (Defense Exhibit 5). Likewise, Mr. Porter's statement to the police was included in the

Liquors somewhere between 10:30 p.m. and 11:00 p.m. but later changed it to midnight. (PCR Supp. Vol. IX, 1482-1483).

The evidence introduced during the evidentiary hearing establishes that Bobby Brown's statement was not withheld. Instead, as found by the collateral court, the evidence "clearly established" this allegedly exculpatory evidence was disclosed to the defense. Peede v. State, 955 So.2d 480 (Fla. 2007)(no Brady violation when record evidence supports a finding the alleged withheld material was disclosed to the defense).

Even if Ferrell had established Mr. Brown's statement was withheld, Ferrell's Brady claim would fail because Ferrell put on no evidence that giving Clyde Porter a ride to the liquor store would have made it impossible, improbable, difficult, or even mildly challenging for Ferrell be in Washington Heights in time to kidnap and then murder Gino Mayhew. Jennings v. State, 782 So.2d 853 (Fla. 2001)(Brady materiality prong not satisfied unless there is a "reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different).[30] Ferrell's claim as to Bobby Brown is without merit.

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homicide report and Ferrell makes no claim this report was withheld. (Defense Exhibit 6).

[30] Ferrell gave Mr. Porter a ride to the liquor store and then back to Washington Heights.

c. Evidence that Sidney Jones was a paid CI for the Jacksonville Sheriff's Department.

In his final Brady sub-claim, Ferrell alleges the state withheld information that Sidney Jones had been in the past, and was at the time of the murder, a paid police informant. Information that a state witness is, or has been, a confidential informant for the investigating police agency is information that should be disclosed to the defense. Hendrix v. State, 908 So.2d 412 (Fla. 2005).

The collateral court denied Ferrell's Brady claim. The court found that the evidence introduced at the evidentiary hearing established that trial counsel was aware, prior to trial, that Sidney Jones was a confidential informant. (PCR Vol. IV 703). The collateral court's ruling is supported by competent substantial evidence in the record of this case.

At the evidentiary hearing, Ferrell introduced the deposition of Sidney Jones. (PCR Supp. Vol. VIII 1339- 1435). The deposition was taken in co-defendant Sylvester Johnson's case, before Ferrell went to trial. Trial counsel for both Kenneth Hartley and Sylvester Johnson were in attendance. Mr. Nichols was not present for the deposition. In his deposition, Jones testified he was a confidential informant for the Jacksonville Sheriff's Department. He testified he had worked as a paid CI for both the robbery and narcotics division.

Jones told the assembled attorneys that, at the time of the murder, he was a CI for the narcotics division. (PCR Supp. Vol. VIII 1421-1422).

Though Mr. Nichols was not personally in attendance at the deposition, the State introduced evidence that Mr. Nichols had a copy of Jones' deposition prior to Ferrell's trial. Former trial prosecutor, George Bateh, testified at the evidentiary hearing that he had personal knowledge that Mr. Nichols had a copy of Jones' deposition. (PCR Supp Vol. I 43,48).

Mr. Bateh told the collateral court that he and Nichols had discussed the deposition prior to Ferrell's trial.[31] Mr. Bateh testified he actually saw the deposition in Mr. Nichols' possession. (PCR Supp Vol. I, 43). The collateral court found Mr. Bateh's testimony to be credible. (PCR Vol. IV 703).

The evidence at the evidentiary hearing established that Mr. Nichols was in possession of the information Ferrell alleged had been withheld. Accordingly, Ferrell's Brady claim must fail. Peede v. State, 955 So.2d 480 (Fla. 2007)(no Brady violation when record evidence supports a finding the alleged withheld material was disclosed to the defense).

[31] The State put on Mr. Bateh's testimony for the limited purpose of establishing that trial counsel had a copy of Jones' deposition prior to trial. Because Mr. Nichols was deceased, Mr. Bateh was the only known available witness to establish that the alleged Brady material had not been withheld.

ISSUE IV

WHETHER NEWLY DISCOVERED EVIDENCE ENTITLES FERRELL TO A NEW TRIAL

In his initial brief, Ferrell presents no argument on his newly discovered evidence claim. (IB 86-87). Indeed, Ferrell does not even identify what "newly discovered evidence" he is referring to. Instead, he invites this Court to comb through the appellate record, consider his argument below, guess as to the basis for his claim of error before this Court, and then grant relief. This court should decline Ferrell's invitation.

Ferrell has waived this claim by attempting to incorporate, by reference, his claims and arguments made to the collateral court below. "Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." Simmons v. State, 934 So.2d 1100 (Fla. 2007), quoting Duest v. Dugger, 555 So.2d, 849, 852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."). *See also* Shere v. State, 742 So.2d 215, 218 n.6 (Fla. 1999)(a claim is not properly presented for appellate review if appellant fails to present any argument or allege on what grounds the trial court

erred in denying his claim); State v. Mitchell, 719 So.2d 1245, 1247 (Fla. 1st DCA 1998), *review denied*, 729 So.2d 393 (Fla. 1999)(finding that issues raised in appellate brief which contain no argument are deemed abandoned).

ISSUES V

WHETHER CUMULATIVE ERROR DEPRIVED FERRELL OF A FAIR TRIAL

In his initial brief, Ferrell presents no argument on his cumulative error claim. (IB 87). Ferrell has waived this claim by attempting to incorporate, by reference, his claims and arguments made to the collateral court below. "Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." Simmons v. State, 934 So.2d 1100 (Fla. 2007), quoting Duest v. Dugger, 555 So.2d, 849, 852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

Even if this Court were to consider the merits of this claim, Ferrell would not be entitled to relief because he has shown no error. Griffin v. State, 866 So.2d 1, 22 (Fla. 2003) ("Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit, and [the defendant] is not entitled to relief on this claim.").

ISSUE VI

WHETHER THE COLLATERAL COURT ERRED IN DENYING FERREL'S CLAIM HE IS INNOCENT OF FIRST DEGREE MURDER

In his initial brief, Ferrell presents no argument on his claim that he is innocent of first murder. (IB 87). Ferrell does not even identify the grounds upon which he bases this claim. Instead, he invites this Court to comb through the appellate record, consider his argument below, deduce the basis for his claim of error, and then grant relief.

Ferrell has waived this claim by attempting to incorporate, by reference, his claims and arguments made to the collateral court below. "Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." Simmons v. State, 934 So.2d 1100 (Fla. 2007), quoting Duest v. Dugger, 555 So.2d, 849, 852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

Even if this Court were to consider this claim on the merits, Ferrell is entitled to no relief. On direct appeal, this Court found the evidence admitted at trial sufficient to

sustain his conviction. At the evidentiary hearing, Ferrell put on no evidence of innocence.

ISSUE VII

WHETHER THE COLLATERAL COURT ERRED IN DENYING FERRELL'S CLAIM HE WAS DEPRIVED OF A PROPER DIRECT APPEAL DUE TO OMISSIONS IN THE RECORD AND WHETHER THESE OMISSIONS HAVE RENDERED POST-CONVICTION COUNSEL INEFFECTIVE

In his initial brief, Ferrell presents no argument on his claim that he was deprived of a proper direct appeal because of unidentified omissions in the record. (IB 87-88). Ferrell does not identify either the legal grounds upon which he bases this claim or the portions of the record that he alleges were improperly omitted.

Instead, he invites this Court to comb through the appellate record and determine on its own what was improperly omitted. This Court should decline Ferrell's invitation and rule that Ferrell has abandoned this claim.

Ferrell has waived this claim by attempting to incorporate, by reference, his claims and arguments made to the collateral court below. "Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." Simmons v. State, 934 So. 2d 1100 (Fla. 2007), quoting Duest v. Dugger, 555 So.2d, 849, 852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal.

Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

Even if this Court were to consider this issue, a claim alleging omissions of the record on direct appeal is procedurally barred in collateral proceedings. Thompson v. State, 759 So.2d 650 (Fla. 2000).

ISSUE VIII

WHETHER THE COLLATERAL COURT ERRED IN DENYING FERRELL'S CLAIM THAT THE FLORIDA SUPREME COURT ERRED IN FAILING TO REMAND FOR A NEW PENALTY PHASE WHEN IT STRUCK THE HEINOUS, ATROCIOUS, OR CRUEL (HAC) AGGRAVATOR

Ferrell presents no argument on his allegation that the collateral court should have found that this Court erred in failing to remand for a new penalty phase when it struck the HAC aggravator. (IB 87). Nor does he explain how the collateral court could “overrule” this Court.

Ferrell has waived this claim by attempting to incorporate, by reference, his claims and arguments made to the collateral court below. "Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." Simmons v. State, 934 So.2d 1100 (Fla. 2007), quoting Duest v. Dugger, 555 So.2d, 849, 852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal.

Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

Even if this Court were to consider this issue on the merits, Ferrell is not entitled to relief. In Wright v. State, 857 So.2d 861, 874 (Fla. 2003), this Court ruled that the same type of claim Ferrell raises here does not relate to the judgment or sentence, but rather, relates to the Florida Supreme Court's opinion on direct appeal. Accordingly, such a claim is inappropriate for 3.851 proceedings. Wright at 874.

ISSUE IX

WHETHER THE COLLATERAL COURT ERRIED IN DENYING FERRELL'S CLAIM THAT FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL

Ferrell presents no argument on his claim that Florida's capital sentencing scheme is unconstitutional. (IB 88). Instead, he invites this Court to comb through the appellate record to deduce the legal bases upon which he challenges the constitutionality of Florida's capital sentencing statute.

Ferrell has waived this claim by attempting to incorporate, by reference, his claims and arguments made to the collateral court below. "Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." Simmons v. State, 934 So.2d 1100 (Fla. 2007), quoting Duest v. Dugger, 555

So.2d, 849, 852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

Even if this Court were to consider the claim on the merits, Ferrell's claim should be denied. This Court has consistently upheld the constitutionality of Florida's capital sentencing scheme. Belcher v. State, 851 So.2d 678, 685 (Fla. 2003); Walton v. State, 847 So.2d 438, 444 (Fla. 2003); Lugo v. State, 845 So.2d 74, 119 (Fla. 2003); Sweet v. Moore, 822 So.2d 1269 (Fla. 2003); Sims v. State, 754 So.2d 657 (Fla. 2000).

ISSUE X

WHETHER THE TRIAL COURT ERRED IN DENYING FERRELL'S CLAIM THAT EXECUTION BY LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

Ferrell presents no argument on his claim. (IB 88-89). Ferrell has waived this claim by attempting to incorporate, by reference, his claims and arguments made to the collateral court below. "Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." Simmons v. State, 934 So.2d 1100 (Fla. 2007), quoting Duest v. Dugger, 555 So.2d, 849, 852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely

making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

Even if this Court were to consider this claim on the merits, the claim should be denied. This Court has already determined that execution by lethal injection under Florida's current protocols do not constitute cruel and unusual punishment. Schwab v. State, 973 So.2d 427 (Fla. 2007); Lightbourne v. McCollum, 969 So.2d 326 (2007).

ISSUE XI

WHETHER THE COLLATERAL COURT ERRED IN RULING THAT ALLEGED PROSECUTORIAL MISCONDUCT DID NOT DEPRIVE FERRELL OF A FAIR TRIAL

Ferrell presents no argument on his claim. (IB 89). Ferrell has waived this claim by attempting to incorporate, by reference, his claims and arguments made to the collateral court below. "Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." Simmons v. State, 934 So.2d 1100 (Fla. 2007), quoting Duest v. Dugger, 555 So.2d, 849, 852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

Even if Ferrell had not waived this claim by failing to present any argument, Ferrell is not entitled to relief because a substantive claim of prosecutorial misconduct is procedurally barred in post-conviction proceedings. Lamarca v. State, 931 So.2d 838, 851 n. 8 (Fla. 2006).

CROSS-APPEAL ISSUE I

WHETHER THE TRIAL JUDGE ERRED IN GRANTING FERRELL A NEW PENALTY PHASE PROCEEDING

In this issue, the State cross-appeals the collateral court's order granting Ferrell a new penalty phase on the grounds that counsel was ineffective for failing to present mental mitigation during the penalty phase of Ferrell's capital trial. The Court erred in two ways.

First, the collateral court erred in concluding that Ferrell's waiver was not knowing and intelligent. Second, the collateral court erred in determining that Ferrell's jury probably would have recommended a life sentence if Ferrell had presented the mental mitigation testimony at trial that Ferrell presented at the evidentiary hearing.

(a) The Waiver

The record of trial reflects that after the state rested its case in aggravation, Mr. Nichols advised the court that Ferrell would not testify nor put on any witnesses. Mr. Nichols assured the court he had conferred with his client and advised

him of his right to testify and put on witnesses at the penalty phase. (TR Vol. XXIX 984). Mr. Nichols told the trial court that Mr. Ferrell instructed him that he did not want to testify himself, has taken the position that he is not guilty and that there is nothing to offer by way of mitigation. (TR Vol. XXIX 984). The court inquired of Mr. Ferrell personally, and Mr. Ferrell told the court that it was his decision not to testify and not to put on any witnesses. (TR Vol. XXIX 984).[32]

Before the collateral court, Ferrell, for the first time, alleged his waiver was not knowing and voluntary. (PCR Vol. I 96). The collateral court agreed, noting that Mr. Nichols was not available to testify about what investigation he did or did not do, and the reasons behind his decisions. The court concluded that "without knowing what attempts counsel made to investigate mental health mitigators and what counsel relayed to the Defendant regarding any potential mental health mitigators available to him, this Court cannot find that the Defendant made a knowing and voluntary waiver." (PCR Vol. IV 694).

It is well-established that defendants have the right to waive presentation of mitigating evidence. Grim v. State, 971 So.2d 85 (Fla. 2007). A defendant has the right to choose what

[32] This case was tried before this Court set forth, in Koon v. Dugger, 619 So.2d 246 (Fla. 1993), the inquiry necessary when a defendant wishes to waive mitigating evidence against the advice of counsel.

evidence, if any, the defense will present during the penalty phase. Grim v. State, 841 So.2d 455, 461 (Fla. 2003). After doing so, a defendant should not be allowed, as a general rule, to complain that counsel was ineffective for allowing him to exercise that right.

This Court has recognized, however, that a defendant's waiver of his right to put on mitigation evidence will not always defeat a claim of ineffective assistance of counsel.[33] This Court has held that a defendant may still show deficient performance if counsel fails to conduct an adequate investigation and advise the defendant so that he reasonably understands what is being waived and its ramifications. State v. Lewis, 838 So.2d 1102, 1113 (Fla. 2002).

The collateral court erred in ruling that Ferrell's waiver did not defeat a claim of ineffective assistance of counsel because in doing so, the collateral court improperly shifted the burden to the State to prove that Ferrell was not entitled to relief. As Ferrell raised this claim as a claim of ineffective assistance of counsel and the court granted him an evidentiary hearing on the claim, Ferrell, and not the State, bore the burden to show Ferrell's waiver was involuntary. Asay v. State, 769 So.2d 974, 984 (Fla. 2000) (ruling the defendant bears the

[33] The United States Supreme Court has never imposed an informed or knowing requirement upon a defendant's decision not to introduce evidence. Schiro v. Landrigan, 127 S.Ct. 1933 (2007).

burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy); Jacobs v. State, 880 So.2d 548, 555 (Fla. 2004) (when the trial court orders an evidentiary hearing, the burden is on the defendant to demonstrate counsel was ineffective under the two-pronged analysis contained in Strickland v. Washington).

To bear his burden, Ferrell was obligated to put on evidence that trial counsel failed to investigate potential mental mitigation and to advise him so that he reasonably understood what is being waived and its ramifications. Ferrell did not testify that Mr. Nichols failed to relay information regarding any potential mental health mitigators available to him. Nor did he testify that the reason why he instructed trial counsel not to put on any evidence in mitigation was that trial counsel failed in his responsibility to investigate potential mitigating evidence. Indeed, he did not testify at all.

Accordingly, Ferrell put on no evidence that trial counsel failed to explore, with him, potential avenues of mental mitigation evidence or that trial counsel interfered with his right to present evidence in mitigation. Likewise, Ferrell put on no evidence that counsel misadvised him about the availability of mitigating evidence about which he may not have known or that his on-the-record waiver did not reflect his full

informed personal decision to waive the presentation of mitigation evidence. Finally, Ferrell presented no evidence he was not competent at the time of trial, did not understand what counsel was placing on the record about his decision to waive mitigation, or that he was incapable of consulting with counsel and making a knowing, intelligent, and voluntary waiver of his rights to present testimony or to take the witness stand himself.

In short, Ferrell put on no evidence at all to support his claim his on-the-record waiver was not knowing and voluntary. Indeed, the only evidence in the record is Ferrell's personal affirmation, at trial, that the decision not to testify and not to put on any witnesses was his own. (TR Vol. XXIX 984).

In finding trial counsel's performance was deficient because the collateral court could not determine whether Mr. Nichols investigated potential mitigation evidence and discussed presenting mental mitigation evidence at trial with Ferrell, the collateral court improperly placed the burden on the State to show his waiver was voluntary. In turn, Ferrell failed to satisfy his burden to show his on-the record personal waiver of his right to present mitigation was anything other than knowingly, intelligently, and voluntarily made. This Court should reverse the collateral court's order granting Ferrell new penalty proceedings.

(b) Prejudice

If this Court allows Ferrell to go behind his waiver, Ferrell is still not entitled to relief unless he proved, at the evidentiary hearing, that he was prejudiced by trial counsel's failure to put mental mitigation evidence before the jury. In order to do so, Ferrell had to present evidence that he would have allowed counsel to put on mitigation evidence if only counsel would have fully investigated and fully advised him of the availability of potential mitigating evidence.

This he did not do. Ferrell did not testify at the evidentiary hearing that he would have made a different decision at trial if counsel had been more diligent. As such, Ferrell failed to show any actual prejudice because of trial counsel's alleged failure to investigate. Schriro v. Landrigan, 127 S.Ct. 1933, 1941 (2007) (if defendant instructed his counsel not to present mitigation, failure to conduct further investigation is not prejudicial).

Even if this Court were to determine that such a showing is not required, Ferrell must still show that his jury probably would have recommended a life sentence if counsel would have presented mental mitigation during the penalty phase of Ferrell's capital trial. The collateral court determined that, in light of the three mental health experts called by Ferrell at

the evidentiary hearing, it could not find that Ferrell had failed to show prejudice. (PCR Vol. IV 684).

The collateral court found there is a reasonable probability, in light of the 7-5 vote for death, that one juror might have been swayed had mental health mitigation been presented. (PCR Vol. IV 685). The State respectfully disagrees and asks this Court to disagree as well.

At the evidentiary hearing, Ferrell presented the testimony of three mental health experts. One of these was Dr. Stephen Golding. Dr. Golding testified that he was hired to do an evaluation of the evidence in this case. Ferrell also introduced a copy of Dr. Golding's report. (PCR Supp. Vol. XII 2165-2168).

Dr. Golding testified that, in his view, there were a number of areas of potential mitigation that were not investigated. (PCR Vol. VII 386).[34] These potential mitigators, outlined in Dr. Golding's report, "primarily center on trying to understand how Ferrell came to become so involved in the criminal justice system at an early age and would focus upon family disruptions [separation from father occurring temporally

[34] Dr. Golding apparently did not speak with trial counsel and did not speak to Ferrell. As such, there was no basis for Dr. Golding's conclusion that potential mitigation was not investigated. Moreover, almost all of Dr. Golding's testimony centered around his criticisms of Dr. Miller's competency exam, none of which is relevant at all to Ferrell's presentation of mitigation evidence.

in sequence with deterioration in school performance and involvement with positive peer culture; loss of supervision from his older sister, evidence suggestive of early learning disabilities, his work record, and his ability to maintain age-appropriate marital and parental relationships." PCR Supp. Vol. XII 2166).

Dr. Golding did not, however, testify that any of these potential mitigators actually existed. For instance, Dr. Golding did not testify that Ferrell had learning disabilities, had a good or bad work record, or did or did not have the ability to maintain age-appropriate marital and parental relationships. Likewise, Dr. Golding offered no opinion about whether Ferrell has an anti-social personality disorder, is retarded or has any major mental illness or brain damage. While Dr. Golding did note that previous psychometric testing revealed that Ferrell has IQ of 78, Dr. Golding did not testify that Ferrell's low IQ had any nexus to the murder of Gino Mayhew. (TR Vol. VIII 420-421). Dr. Golding could not testify that any mitigator actually existed at all because Dr Golding never evaluated or even interviewed Ferrell. (PCR Vol. VIII 420).[35]

[35] Dr. Golding was not a witness that Ferrell claims trial counsel should have been called at trial. Instead, Dr. Golding was called at the evidentiary hearing to criticize Dr. Miller's competency exam and mitigation evaluation. However, because competency has never been a genuine issue and Dr. Miller testified he was not asked to evaluate Ferrell for mitigation,

On the other hand, Dr. Krop did evaluate Ferrell in preparation for the evidentiary hearing. (PCR Vol. VII 322). Dr. Krop testified that Ferrell has an IQ of 78 and had suffered a number of head injuries in his lifetime. Dr. Krop opined that, based on testing that he and a Dr. Gelbort conducted in 2002, Ferrell showed signs of significant deficits in frontal lobe functioning. Dr. Krop testified that frontal lobe deficits can impact a person's impulse control, flexibility, and ability to control behavior. (PCR Vol. VII 322-323, 326).

Dr. Krop testified that Ferrell is not mentally retarded and does not suffer from any mental illness. Ferrell does, however, have an anti-social personality disorder. (PCR Vol. VII 338). According to Dr. Krop, a person with anti-social personality disorder has problems with impulse control and delaying gratification. A person with an anti-social personality disorder gets involved in illegal activity or at least commits acts against society, and does not think about, or learn from, the consequences of his actions.

Dr. Krop noted that in looking at Ferrell's background, he found that Ferrell had been suspended from school, had been involved in the juvenile and adult justice system, and had sold drugs. (PCR Vol. VII 340). Dr. Krop testified that the

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Dr. Golding's testimony was entirely irrelevant to Ferrell's claim of ineffective assistance of counsel.

prognosis for a person with an anti-social personality disorder was not very good. (PCR Vol. IV 340). According to Dr. Krop, a person with an anti-social personality disorder has difficulty conforming his behavior to the requirements of the law. (PCR Vol. VII 341).

Dr. Krop also noted that, during his evaluation, Ferrell denied any physical or emotional abuse as a child, denied any sexual abuse or neglect, and denied any childhood trauma. Ferrell also reported he was married and had two children. Dr. Krop noted that Ferrell reported a high degree of infidelity which Dr. Krop attributed to Ferrell's anti-social personality disorder. Dr. Krop described Ferrell's lifestyle, both in and out of his marriage, as "promiscuous". (PCR Vol. IV 351).

Dr. Krop offered no opinion that at the time of the murder, Ferrell was, as a result of his low IQ or frontal lobe damage under an extreme emotional or mental disturbance. Likewise, Dr. Krop offered no opinion that at the time of the murder, Ferrell's low IQ or frontal lobe damage impaired Ferrell's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

Finally, Dr. Miller testified that he was appointed to do a competency examination. He did not recall conducting an evaluation for potential mitigation. (PCR Vol. VI 133). Dr. Miller recalled that his evaluation was limited to whether

Ferrell was competent to stand trial, was insane at the time of the murder, and met the criteria for hospitalization. (PCR Vol. VI 146). He concluded that Ferrell was of average native intelligence. He estimated Ferrell's IQ between 80-110. (PCR Vol. VI 147).

To rebut Dr. Krop's opinion that there was substantial evidence that Ferrell had frontal lobe damage, the State called Dr. Tannahill Glen to testify at the evidentiary hearing. Dr. Glen is a neuropsychologist employed at the University of Florida, Shands and is board certified in clinical neuropsychology. (PCR Vol. IX 695).

Like Dr. Golding, she did not interview Ferrell. Instead, Dr. Glenn reviewed the neuropsychological testing done by Dr. Krop in 2005 and Dr. Gelbort in 2002. She also reviewed Ferrell's school records and criminal history. Dr. Glen disagreed with Dr. Krop's assessment of frontal lobe damage. She testified that in the testing materials she reviewed, she did not see any specific evidence to suggest that Ferrell has a frontal lobe deficit or dysfunction. (PCR Vol. IX 704).

Certainly the conflict between the testimony of Dr. Glen and Dr. Krop on the issue of brain damage would be an issue for the jury to sort out. However, even assuming the jury would have resolved the conflict in favor of Dr. Krop's opinion, Ferrell still failed to show the jury likely would have

recommended a life sentence if trial counsel would have presented Dr. Krop to testify.

Ferrell has an anti-social personality disorder. Had Dr. Krop, or a like expert been called, the jury would have heard that a person with anti-social personality disorder has impulse control problems and problems delaying gratification. A person with an anti-social personality disorder gets involved in illegal activity or at least commits acts against society, and does not think about, or learn from, the consequences of his actions. (PCR Vol. VII 338-340).

The jury would have also heard that Ferrell had been suspended from school, had been involved in the juvenile and adult justice system, had sold drugs, and for the rest of his life would have difficulty conforming his behavior to the requirements of the law. (PCR Vol. VII 340-341). Had Dr. Krop testified at trial, the jury would have learned that although Ferrell was married and had two children, he was chronically unfaithful and lived what Dr. Krop described as a promiscuous lifestyle, both in and out of his marriage. (PCR Vol. IV 351).

Finally, although Dr. Krop would have opined that Ferrell has frontal lobe damage and a low IQ, Dr. Krop’s testimony would not have established a link between the murder and Ferrell’s brain damage and low IQ. Likewise, Dr. Krop’s testimony would

have supported a finding that either statutory mental mitigator existed.

This Court has consistently recognized that anti-social personality disorder is "a trait most jurors tend to look disfavorably upon." Freeman v. State, 852 So.2d 216, 224 (Fla. 2003). *See also* Willacy v. State, 967 So.2d 131, 144 (Fla. 2007); Reed v. State, 875 So.2d 415, 437 (Fla. 2004). Given that Ferrell failed to provide any link between the murder and his brain damage or low IQ coupled with evidence that he has anti-social personality disorder and a history of failing to conform his conduct to the law, Ferrell failed to demonstrate the probability of a different outcome at trial. This Court should reverse the collateral court and deny Ferrell a new penalty proceeding.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the collateral court's order denying Ferrell's guilt phase claims and reverse the collateral court's order granting Ferrell a new penalty phase.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

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MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399
Department of Legal Affairs
PL—01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3583 Phone
(850) 487-0997 Fax
Attorney for the Appellee
and Cross-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Rick Sichta and Frank Tassone, 1833 Atlantic Boulevard, Jacksonville, Florida 32207 this 17th day of March, 2008.

_____
MEREDITH CHARBULA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

_____

MEREDITH CHARBULA
Assistant Attorney General