IN THE SUPREME COURT OF FLORIDA

PAUL BEASLEY JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC08-1213
Polk Case No. CF81-0112 A1XX
Alachua Case No. 88-448 CF-A
Death Penalty Case

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The direct appeal record will be cited as "TR" with the appropriate volume and page numbers [TR V#/page#] and the original postconviction record will be cited as "PC-R" with the appropriate volume and page numbers [PC-R V#/page#]. The record from this successive rule 3.851 appeal will be cited as "2SPC-R" with the appropriate volume and page numbers [2SPC-R V#/page#].

STATEMENT ON ORAL ARGUMENT

Appellee submits that oral argument is not necessary for appellate review of the instant cause. The decisional process will not be significantly aided by oral argument as the only issues presented in the instant brief are successive postconviction claims and this case can be decided on the record, briefs, and the case law presented therein.

STATEMENT OF THE CASE AND FACTS

In 1981 a jury convicted Johnson of three counts of first-degree murder, two counts of robbery, kidnapping, arson, and two counts of attempted first-degree murder. The trial court sentenced him to death, and this Court affirmed the convictions and sentences. *Johnson v. State*, 438 So. 2d 774 (Fla. 1983), *cert. denied*, 465 U.S. 1051 (1984). Johnson petitioned this Court for a writ of habeas corpus and was granted a new trial based on a finding that had petitioner's appellate counsel brought the jury separation issue to the court's attention while on direct appeal, a new trial would have been granted. *Johnson v. Wainwright*, 498 So. 2d 938 (Fla. 1986), *cert. denied,* 481 U.S. 1016 (1987). During Johnson's retrial in Polk County in October 1987, the judge granted Johnson's motion for mistrial based on juror misconduct. Johnson filed a motion to disqualify the trial judge and a motion for a change of venue. Both motions were granted. The case then proceeded to trial with a retired judge assigned to hear it in Alachua County in April 1988. *Johnson v. State*, 608 So. 2d 4, 6 (Fla. 1992). The facts presented at the trial were summarized by this Court as follows:

> The evening of January 8, 1981 Johnson and his wife visited their friends Shayne and Ricky Carter. During the evening they all took injections of crystal methedrine and smoked marijuana. Johnson left the

Carters' home later in the evening, and Ricky testified that Johnson said he was going to get more drugs and that he might steal something or rob something. Shayne testified that Johnson said that he was going to get money for more drugs and that "if he had to shoot someone, he would have to shoot someone."

A taxicab company dispatcher testified that driver William Evans went to pick up a fare at 11:15 p.m. on January 8 and called in to confirm the fare fifteen minutes later. Around 11:55 p.m. a stranger's voice came over the radio. Among other things, the stranger said that Evans had been knocked out. He stayed in touch with the dispatcher off and on until about 2:00 a.m. The dispatcher did not hear Evans after 11:30 p.m., and workers in an orange grove found Evans' body on January 14. Evans had been robbed and shot twice in the face. Searchers found his taxicab, which had been set on fire, in an orange grove about a mile from Evans' body.

When she got off work in the early hours of January 9, 1981, Amy Reid and her friend Ray Beasley went to a restaurant for breakfast. Johnson approached them in the parking lot and asked for a ride, claiming that his car had broken down. Beasley agreed to drive Johnson to a friend's house. During the drive, Johnson asked Beasley to stop the car so that he could urinate. While out of the car, Johnson asked Beasley to come to the rear of the car. When Reid looked back, she saw Johnson holding a handgun pointed at Beasley. She then locked the car's doors, moved to the driver's seat, and drove away to look for help.

Reid telephoned the sheriff's department from a convenience store, and deputies Clifford Darrington and Samuel Allison responded to her call around 3:45 a.m. The deputies drove Reid back to where she had left Johnson and Beasley, but found no one there. Back in the patrol car they heard a radio call from another deputy, Theron Burnham, advising that he had seen a possible suspect on the road. When they arrived at Burnham's location, they found his patrol car parked with the motor running, the lights on, and a door open, but could not see Burnham. Johnson, however, walked in front of their car, spoke to them, and then

began firing at them with a handgun. The deputies returned Johnson's shots, and he ran across a field and disappeared among some trees. Allison then found Burnham's body in a roadside drainage ditch. He had been shot three times, and his service revolver was missing.

Later that day, Beasley's body was found seven-tenths of a mile from where Burnham was killed. He had been shot once in the head, and his body was in a weedy area and could not be seen from the road. Although there were some coins in his pockets, his wallet was gone.

The following afternoon Johnson's wife was still at the Carters' home. They saw a police sketch of the suspect in the night's events in a newspaper and discussed whether it looked like Johnson. Johnson telephoned the Carters' home, and, after speaking with him, his wife became very upset. Ricky Carter asked Johnson if he had done the killings reported in the newspaper, and Johnson replied: "If that's what it says." Carter went to pick up Johnson, taking a shirt that Johnson changed into. Johnson threw the shirt he had been wearing, which had been described in the, newspaper, out the car's window. While driving home, Carter heard Johnson's wife ask, "You killed him, too?" to which Johnson replied, "I guess so." At the Carters' home Johnson told them that he hit the deputy with his handgun when told to place his hands on the patrol car and then struggled with him, during and after which he shot the deputy three times.

The authorities arrested Johnson for the Beasley and Burnham murders on January 10 and charged him with Evans' murder the following week. Reid, Allison, and Darrington identified him, and his fingerprints were found in Evans' taxicab.

While Johnson was in jail awaiting trial, inmate James Leon Smith was in a cell near him. At trial Smith testified that Johnson told him that he killed a taxicab driver and set the taxicab on fire to destroy his fingerprints, that he shot Beasley while Beasley was on his knees and stole one hundred dollars from Beasley, and that he shot the deputy.

> Johnson's defense was that, at the time of these killings, he was insane because of his drug use.
>
> *Johnson v. State*, 608 So. 2d 4, 7 (Fla. 1992)

The Alachua jury rejected Johnson's insanity defense and found him guilty as charged of three counts of first-degree murder, two counts of armed robbery, kidnapping, arson, and two counts of attempted first-degree murder. (TR 23/3350-3351) After a penalty phase hearing, the jury recommended a sentence of death for each of the murders. (TR 25/3616) The trial court agreed and imposed three death sentences. (TR 25/3648)

Johnson then took an appeal to the Florida Supreme Court raising the following claims: 1) The trial court erred by striking prospective jurors Daniels and Blakely for cause in violation of the Sixth and Fourteenth Amendments, United States Constitution; 2) The trial court erred by denying appellant's request to have individual voir dire of prospective jurors who admitted to having read prejudicial pretrial publicity; 3) Appellant was denied a fair trial by the trial court's repeated interjections and rebukes of defense counsel before the jury; 4) The trial court erred by denying appellant's motion to suppress statements which were obtained by jailhouse informant James Leon Smith in violation of appellant's Sixth Amendment right to counsel; 5) The trial court erred by allowing state witness

James Smith to testify about Johnson's speculation about an insanity defense; 6) The trial court erred by sustaining the state's objection to appellant's examination of Roy Gallemore in regard to his recommendation contained in the pre-sentence investigation of informant and key state witness James Smith; 7) The trial court erred by not permitting testimony from defense witness Dwight Donahue unless appellant waived his attorney-client privilege and provided the state with discovery of privileged communications; 8) The trial court erred by denying appellant's request to instruct the jury on the limited use of collateral crime evidence; 9) The trial court erred by allowing the prosecutor to introduce Johnson's prior criminal record while cross-examining defense witnesses because under the circumstances it had no proper relevance and constituted a nonstatutory aggravating factor; 10) The trial court erred by refusing to admit appellant's proffered allocution into evidence before the penalty jury; 11) The sentencing judge erroneously weighed improper aggravating circumstances and failed to weigh established mitigating circumstances, and; 12) Appellant was denied his right to preparation of the entire record of the conviction and sentence for review by this Court. This appeal was denied. *Johnson v. State*, 608 So. 2d 4, 6 (Fla. 1992). A

subsequent petition for writ of certiorari was also denied. *Johnson v. Florida*, 508 U.S. 919 (1993).

Johnson then filed a motion to vacate on August 1, 1994 in Alachua County. The case was transferred to Polk County where an evidentiary hearing was held on March 3-5, 1997. Relief was subsequently denied on March 19, 1997. (PC-R 6/919-935) Johnson then appealed the denial of his motion to vacate to the Florida Supreme Court asserting the following issues:

> 1. Whether the lower court denied appellant a full and fair evidentiary hearing on his public records requests and whether appellant was denied access to relevant public records.
>
> 2. Whether the lower court erred in denying Mr. Johnson's motion to disqualify judge thereby denying Mr. Johnson his right to a full and fair hearing and his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding Florida law.
>
> 3. Whether the trial court erred in denying Johnson's claims that *Brady* and *Giglio* error occurred and that trial counsel was ineffective during the guilt phase of Johnson's trial thereby denying him his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution and corresponding Florida law.
>
> 4. Whether the lower court abused his discretion in denying Johnson's claims that trial counsel was ineffective at the penalty phase of Johnson's capital trial.
>
> 5. Whether the lower court erred in denying Johnson's claim under *Ake v. Oklahoma*.

> 6. Whether the lower court erred in summarily denying claims which the court found to be either procedurally barred, legally insufficient or conclusively refuted by the files and records in the instant case.
>
> 7. Whether the lower court erred in ruling that venue was appropriate in Polk County for hearing Johnson's post-conviction motion.
>
> 8. Whether the lower court erred in refusing to consider Johnson's claim of cumulative error.

The trial court's denial of the motion was affirmed by this Court on July 13, 2000. *Johnson v. State*, 769 So. 2d 990 (Fla. 2000). Johnson's state habeas petition was subsequently filed on October 10, 2001 and denied on September 26, 2002. *Johnson v. Moore*, 837 So. 2d 343 (Fla. 2002).

The next year, on February 6, 2003, Johnson filed his first *successive* motion to vacate raising a claim of error under *Ring v. Arizona*, 536 U.S. 584 (2002). The lower court denied relief on March 11, 2005. (SPC-R 2/289-293) The trial court's denial of relief on this claim was affirmed by this Court on March 17, 2006. *Johnson v. State*, 933 So. 2d 1153 (Fla. 2006).

Over a year later, on April 27, 2007, Johnson filed his second successive motion to vacate, raising a newly discovered evidence/*Brady* claim and challenges to Florida's lethal injection procedures. The lower court ordered an evidentiary hearing as to the newly discovered evidence/*Brady* claim which was held on December 4, 2007. (2SPC-R 12/1860). The lower court

summarized the testimony presented at the evidentiary hearing as follows:

> EVIDENTIARY HEARING TESTIMONY
>
> An evidentiary hearing was held in this matter on December 4, 2007. At the evidentiary hearing, defense counsel, Terri L. [Backhus], Esq., asked the Court to take judicial notice of all the files and records in this case. The State had no objection to this, and the Court took judicial notice of the files and records in this case. A summary of the testimony presented at the evidentiary hearing follows:
>
> **Testimony of Hardy Pickard, Esq., pages 9—71, from Transcript of Evidentiary Hearing Volume I, held on December 4, 2007.**
>
> The defense called Hardy Pickard, Esq., as a witness. Mr. Pickard is an Assistant State Attorney in the Tenth Judicial Circuit. He testified that he prosecuted capital cases in the mid l970s through the latter part of the 1980s. Mr. Johnson's case was one of the cases he prosecuted. Mr. Pickard testified that prior to the hearing he reviewed a copy of the Motion filed by the defense, the Response from the Attorney General's Office, and the original direct appeal opinion from the Florida Supreme Court. He said that he had not reviewed anything in the State Attorney files. He said that he reviewed the notes that were attached to the Defendant's Motion. Mr. Pickard agreed that the Florida Supreme Court originally affirmed the conviction and sentence of death. He said he also recalled that the Florida Supreme Court subsequently ordered a new trial. He agreed that the State Attorney's Office for the Tenth Judicial Circuit did not handle the new trial. He said that one of Mr. Johnson's attorneys was Jerry Hill, who had become the State Attorney. He said that his recollection was that the Hillsborough County State Attorney's Office handled the second trial, and the second trial ended in a mistrial. He said that he thought a third trial was conducted in Gainesville, Florida on a change of venue. That trial ended in the conviction that is currently pending against Mr. Johnson.

Mr. Hill became the State Attorney in January 1985, and it was subsequent to that that the new trial was granted by the Florida Supreme Court. The second trial was conducted in Bartow. Mr. Pickard said that he did not recall the process of providing the Hillsborough County State Attorney's Office with his files, records, or notes, but he knows that they did. He said that he specifically tried to avoid contact with Mr. Atkinson who prosecuted the second trial. He agreed that he was not a witness in the mistrial that occurred in the second trial, and he was not a witness or involved in any fashion in the third trial that took place in Alachua County. He recalled that he was a witness in a 3.850 evidentiary hearing. He did not have an independent recollection of the date of the evidentiary hearing that took place March 3 — 5, 1997. He said that the Attorney General's office called him as a witness to testify concerning James Smith. He said that he recalled that Mr. Smith was a jail house informer who was called in the trial that he prosecuted. Mr. Smith testified regarding statements made to him by Mr. Johnson. He said that he was the prosecutor assigned to Mr. Johnson's case from the outset.

He agreed that he used State Attorney subpoenas in the course of the investigation. He said a State Attorney Subpoena is an investigative subpoena to a witness to appear at the State Attorney's Office to be talked to by an assistant state attorney concerning an investigation. He said that sometimes the questioning would be under oath. A court reporter would not be present at the questioning, but sometimes a police investigator or an investigator from the State Attorney's Office would be present. Generally, the subpoenas would be used early in the prosecution process usually after someone had been arrested. In a capital case, they could be used both before and after an indictment. In most of the cases the accused defendant already was represented by counsel, but defense counsel was not invited to be present at these interviews. Counsel for the witness might be present at the interviews. He said that generally the State Attorney subpoenas were issued under the caption State of Florida versus John Doe. He said that they

generally had a specific defendant in mind. However, they used these subpoenas because they preferred that the whole world didn't know who they were talking to and what was going on in the investigation. He agreed that the whole world included the defendant's attorney. He did not have a court reporter present, but he did take some notes at these information gathering interviews. He was asked about the purpose of the notes. He said; "To assist me in determining certain aspects of what the witness knew about the case that would help me in later preparing questions for the witness if the witness was going to be a trial witness." See page 23 from transcript of evidentiary hearing Volume I, held on December 4, 2007. The notes that he took were not verbatim, and he said that the notes he took were his impression of what the witness was saying. He said that he did not view the notes as discoverable. Generally, he did not give out copies of the notes in discovery to the defense. He was asked if he considered the interview results to be confidential or privileged. He said;

> I consider it to be - - I considered it then and I still consider it today to be work product. The notes I took are not verbatim, they were never adopted by the witness, they were never shown to the witness, they don't even, in many cases, accurately reflect word for word what the witness says. A lot of it is just my mental impressions of what I think the witness is saying. So to answer your question directly, I considered it work product. I considered it not to be, a quote, unquote, statement as referred to in the discovery rules, and did not consider those notes to be discoverable during the discovery process.

See page 24 from transcript of evidentiary hearing Volume I, held on December 4, 2007.

He did not think the notes came within the purview of Brady v. Maryland. He said that if something came out in the interview that he felt was Brady material he had an obligation to disclose it, but not the notes themselves. He did not recall during

a trial having an occasion where a witness was testifying and it became necessary to advise defense counsel that the witness had said something different when interviewed earlier pursuant to a State Attorney subpoena. He said that his notes were cryptic, and it would be hard to go back and look at them and say the witness told him something different.

Defense Exhibit Number 1 was marked for identification. Mr. Pickard was shown page number one of the six page document. Page number one said Amy Reid at the top of it. Mr. Pickard said the document was in his handwriting. He agreed that this was the type of notes he would make. He said the notes were not taken in any particular format. The name at the top of the page indicated the name of the person he was interviewing. He said that he normally put the date on the interview notes. He said that his initials were on the last page of the document. Defense counsel quoted the following language from the last page; "Photo I.D. prior to line-up tentative I.D." See page 31 from transcript of evidentiary hearing Volume I, held on December 4, 2007. Mr. Pickard agreed that the word tentative was his mental impression of what she was telling him, not necessarily a word used by Ms. Reid. He said he could not tell now what she had actually said. He did not think it was Brady material. He said that even if she testified at the trial that her identification was 100 percent, he did not believe she could be impeached by his notes. He said the notes would not have been disclosed to the defense prior to the time the Hillsborough County State Attorney's Office took over the case. He does not know if they were disclosed to the defense after the Hillsborough County State Attorney's Office took over the case. He did not recall any contact with anybody from the Hillsborough State Attorney's office regarding the notes. Defense Exhibit 1 was admitted into evidence without any objection by the State.

Mr. Pickard was handed Defense Exhibit 2, a five page document that was previously marked for identification. The name James Smith was at the top of the first page. Page 1 was in Mr. Pickard's handwriting. Mr. Pickard did not know if he was talking to Mr. Smith pursuant to a State Attorney

Subpoena, or if Mr. Smith had just been brought over from the county jail by the sheriff's office. In his notes, he would usually note if a detective or a defense attorney was present. This note mentioned nobody else, and he agreed it would suggest that nobody but he and Mr. Smith were present. He said that he had no specific recollection of the interview. A date on the notes indicated that the interview took place on February 19, 1981. Although defense counsel said that some of the notes on page 2 of the notes appeared to be in another person's handwriting, Mr. Pickard said that the notes were made by him. Mr. Pickard was asked about a line that said; "Wilcox talked to me and Glen about agent theory". See page 39 from transcript of evidentiary hearing Volume I, held on December 4, 2007. He said that the note was in his handwriting, and he might have written it quicker or something. The page contained the name (James Smith), a dash, the word (taped), a dash, the date (February 6), a dash, and the time (11:00 a.m.). He agreed that this seemed to indicate that somebody made a taped statement of James Smith on February 6 at 11:00 a.m. He did not have a specific memory that this is what it meant. He was asked about the next line that said; "First report he wrote February 8th". See page 40 from transcript of evidentiary hearing Volume I, held on December 4, 2007. He said that he had no idea what that meant. He was asked if he recalled who Ben Wilkerson was, and he said that he was an investigator with the sheriff's office. He agreed that Mr. Wilkerson was somebody who had contact with Mr. Smith. He said that he recalled that there was a motion to suppress Mr. Smith's testimony. He did not have an independent recollection that both Mr. Smith and Mr. Wilkerson testified regarding the contact that they had with each other. Mr. Pickard was shown a volume of the direct appeal, which started on page 1896. The front page indicated that it was a hearing on August 28th 1981. Mr. Pickard agreed that Mr. Wilkerson clearly testified. Mr. Pickard was asked if he remembered the basis of the motion. He said;

> I think the motion was that the State and/or law enforcement had made Mr. Smith an agent of the State and had sent him into Mr. Johnson's cell for the purpose of trying to

> get incriminating statements out of Mr. Johnson in violation of Mr. Johnson's right to counsel, and that any statements that Mr. Johnson gave Mr. Smith under those circumstances should be disallowed in evidence. My recollection is that that's what the—

See page 43 from transcript of evidentiary hearing Volume I, held on December 4, 2007.

Mr. Pickard said that the State prevailed on the motion, and Mr. Smith's testimony was not suppressed. Mr. Pickard agreed that the Florida Supreme Court in the direct appeal seemed to be saying that it was a close case as to whether or not Mr. Smith was an agent. The Florida Supreme Court found that it did not have a basis for disagreeing with the trial court. The trial court had also said it was a close case, but the trial court had decided in favor of the State. Mr. Pickard said that sometimes he would talk with the police officers involved in the case, but he would not subpoena them into his office. He agreed that he sometimes took notes.

Mr. Pickard testified that he was sure the name Ben at the top of page 2 of the notes referred to Ben Wilkerson. He disagreed that what was written on the page necessarily indicated what Mr. Wilkerson had told him. He said that what was written may have been from police reports or gathered from some other source. He said that he did not know whether the note on the page that said; "Wilcox talked to me and Glen about agent theory", was written at the same point in time as the rest of the note or days later. See pages 47-48 from transcript of evidentiary hearing Volume I, held on December 4, 2007. He said that Wilcox referred to Dan Wilcox, who was an assistant state attorney working in intake. He said that Glen referred to Glenn Brock, Mr. Smith's attorney. He was asked why he would have written down that he had a conversation about agent theory. He said;

> Sure. We were concerned that Mr. Smith not be considered an agent of the State. I was aware that the law was we could not send Mr.

> Smith in there to take statements from Mr. Johnson because it would have violated his attorney - - he had an attorney. And I wanted to make sure that everybody was on the same page that Mr. Smith was not planted, so to speak, in Mr. Johnson's cell for the purpose of obtaining statements.

See pages 48 and 49 from transcript of evidentiary hearing Volume I, held on December 4, 2007. Mr. Pickard was asked if he recalled that there was an issue regarding whether or not Mr. Smith was told to take notes. He said; "I'm sure he was told to listen, to take notes if he had an opportunity to take notes as to anything that Mr. Johnson said. He may have been even told to turn over the notes." See page 49 from transcript of evidentiary hearing Volume I, held on December 4, 2007.

Mr. Pickard's attention was drawn to the line on the notes next to the name Ben that said; "Told Smith to make notes" and a line that said; "Told Smith to keep his ears open." See page 49 from transcript of evidentiary hearing Volume I, held on December 4, 2007. He said that this was his understanding of what Mr. Smith had been told, but he said that this did not make him an agent. Mr. Pickard was shown page 3 of Defense Exhibit 2, and he said that it was not in his handwriting. Mr. Pickard was asked about the name Meeks on the page, and he said that Arthur Meeks was an investigator. He said that the notes were in Mr. Meek's handwriting. Mr. Pickard was asked about a line that said: "Hardy, told James Smith", and he said he had no idea what was being discussed. See pages 50-51 from transcript of evidentiary hearing Volume I, held on December 4, 2007. Page 4 of Defense Exhibit 2 had the name James Smith at the top of it, and Mr. Pickard said the notes were in his handwriting. Mr. Pickard agreed that the notes indicated a date of February 16, 1981. He agreed that the notes on that page and the next page were his efforts to memorialize the gist of what Mr. Smith was telling him. He said that the notes on the five pages would not have been provided to the defense. He said that he did not specifically know if he had advised the defense that Mr. Smith had been told to take notes and keep his ears open, but that it

probably came out at the suppression hearing. Mr. Pickard testified that his notes were not of such quality that he could look at them and conclude that they contradicted testimony from Mr. Smith or Mr. Wilkerson. He did not believe anything in his notes could be used to impeach a witness. Defense Exhibit 2 was admitted into evidence without any objection by the State.

Mr. Pickard was shown Defense Exhibit 3, which had been previously marked for identification. He said that the page had his handwriting on it, but the notes over on the side of the page were not in his handwriting. He said that the notes on the side of the page were made by Arthur Meeks, and the numbers listed were probably phone numbers and not case numbers as suggested by defense counsel. The name Arthur was at the top of the page, and Mr. Pickard said that this did not indicate that it was an interview that he had with Mr. Meeks. He said that it was an investigative request asking Mr. Meeks to do certain things on the case. Mr. Pickard agreed that somebody else looking at the document might be confused by what it shows, and they might think the numbers refer to an 86 case number or an 88 case number. He said that he or Mr. Meeks would be in the best position to really know what the documents represented. He also agreed that somebody else could look at Defense Exhibits 1 and 2 and be confused.

Mr. Pickard was shown the transcript of the 1997 evidentiary hearing beginning at page 355. Mr. Pickard said that it did not refresh his memory as to whether he was provided any of the documents prior to testifying. He said that his best recollection is that he did not review any of these documents when he testified in 1997, but he could not say that with 100 percent accuracy. He said that he did not recall the notes from Defense Exhibit 2 being provided to him before he testified at the hearing in 1997. On cross-examination Mr. Pickard said he had not seen the notes for 20 or 25 years. Mr. Pickard was asked if it would be fair to say that he could not say with any certainty what anything in them might or might not mean. He said;

> Some of the things I probably would have a fairly good understanding of what they probably mean. But I cannot- - I don't have any independent recollection of interviewing any of these witnesses. All I can rely on is the notes which are not verbatim. And to be able to tell anyone exactly what a witness says, I could not do that.

See page 62 from transcript of evidentiary hearing Volume I, held on December 4, 2007.

Mr. Pickard said that the notes were never shown to the witnesses or adopted by them. He said that this was not the purpose of the notes. He said that nothing in the notes changed his memory about whether or not anybody was inserted in Mr. Johnson's cell to gather information. Mr. Pickard was shown a transcript from a hearing that took place on August 28, 1991. The transcript contained testimony from a person Mr. Pickard identified as being George Elliott, a detective from the Sheriff's office. Mr. Pickard agreed that Mr. Elliott's testimony indicated that Amy Reid was tentative about her [identification]. Mr. Pickard was shown Ms. Reid's testimony from pages 16-20 of a transcript of the 1981 trial. Mr. Pickard agreed that Ms. Reid's testimony indicated that she was not sure about the identification.

On redirect examination, Mr. Pickard agreed that it would be fair to say that the notes he wrote down were an effort to tell himself what his understanding was of what was being said to him. Mr. Pickard was asked if he would have been able to say anything more about the notes if he had been asked about them in 1997. He said probably not, but it was hard to say. He said nothing had changed his belief that the notes were not discoverable.

Testimony of Robert Norgard, Esq., pages 71 — 98, from Transcript of Evidentiary Hearing Volume I, held on December 4, 2007.

The defense called Robert Norgard, Esq., as a witness. He testified that he had been practicing law since 1981, and he was Mr. Johnson's attorney for his

second trial in 1988. He said that his co-counsel was Larry Shearer. Mr. Norgard was asked about doing a motion to suppress, and he recalled doing one with respect to statements made by a jailhouse informant named Mr. Smith. He said that the basis of the motion was that Mr. Smith was an agent of law enforcement, and the motion was denied. He said that the defense they used was an insanity defense based on drug induced psychosis. Mr. Norgard was asked if Mr. Smith's testimony had an effect on the theory of defense. He answered affirmatively, and he said that some of Mr. Smith's statements regarding what Mr. Johnson relayed to him had to do with Mr. Johnson's mental state. Mr. Smith said that Mr. Johnson had supposedly said to him that he would be out in a short period of time if he faked that he was crazy. Mr. Norgard agreed that this testimony was particularly important to the State to rebut the defense being presented. Mr. Norgard testified that he did not recall getting any notes from the State in discovery. He said that he did not get any notes from the State Attorney's office that were particular to James Smith or Amy Reid. He said that they did get some notes written by Mr. Smith. Mr. Norgard was asked about Defense Exhibit 1, and he said that they already had portions of the information from the notes through reviewing police reports and transcripts of depositions. However, he said that he was not aware of a reference in the notes regarding Mr. Johnson looking for meth, and a reference that Ms. Reid's identification was initially tentative. He was asked what he would have done with this information. He said;

> With respect to the information about Mr. Johnson looking for meth and then also in the context there was a note where there's a reference about having smoked a joint with Mr. Beasley who was one of the homicide victims, that information would have assisted in terms of the defense related to insanity based on drug-induced psychosis because Mr. Johnson was doing meth at the time of the offense. And that would have certainly corroborated that he was looking for meth. Also, the fact that he had smoked

> marijuana shortly before this homicide. With respect to the tentative nature of the identification, that would have been helpful in that the witness's Amy Reid's opportunity to observe Mr. Johnson, would have been important in terms of her testimony at trial as to Mr. Johnson's behavior since we were raising an insanity defense. Obviously, his behavior, how he was acting and how he appeared was relevant, and the fact that she did not observe him well enough to make a definite I.D. at first would have been important in terms of impeaching her opportunity to observe him.

See pages 78-79 from transcript of evidentiary hearing Volume I, held on December 4, 2007.

Mr. Norgard was shown a portion of Amy Reid's trial testimony from 1988 regarding the photograph line-up. Mr. Norgard said his recollection even before he looked at the portion of the trial testimony was that Ms. Reid specifically identified Mr. Johnson in the photo pack. He said that Mr. Pickard's handwritten notes indicating the tentative nature of her identification could have been used to impeach the more certain identification she gave at the trial. Mr. Norgard testified that he could not recall whether the law enforcement officer who did the photo pack testified, but his recollection was that the officers pretty much indicated that Ms. Reid just picked out the Defendant without equivocation. He said that the notes could have been used to impeach law enforcement as well. Mr. Norgard was shown Defense Exhibit 2, (handwritten notes regarding James Smith), and he was asked if he saw anything favorable to the defense. He answered;

> Essentially, what these notes are appear to be interviews of Mr. Smith prior to his actually having been discovered as a witness in the - by the prosecution in this case. And it would appear, and I would need to cross reference this with the different dates that Mr. Smith attributed information of Mr. Johnson, but it would appear that

> relatively early on, at least as early on as February of 1981 that Mr. Smith was being essentially asked to be an agent of law enforcement and try to obtain statements from Mr. Johnson.

See page 81 from transcript of evidentiary hearing Volume I, held on December 4, 2007.

He said that this would have been valuable in both the guilt phase and penalty phase. He said that if he was aware of the notes he would have presented them to the judge in a motion to suppress. He said that if they had definitive evidence that Mr. Smith was an agent of the police, and Mr. Smith denied it, they would certainly have used it to attack his credibility. Mr. Norgard's attention was brought to the part of the notes that indicated Ben Wilkerson had told Mr. Smith to take notes. Mr. Norgard agreed that they could have used it to impeach law enforcements' claim that Mr. Smith was not their agent as well as for a motion to suppress. He agreed that this was the kind of material that they were looking for when they filed their Brady request and discovery request in 1987. Mr. Norgard was shown the Florida Supreme Court's opinion from 1983, Johnson v. State, 438 So. 2d 774 (Fla. 1983), and he was asked what the Court held in that case. He testified that the Florida Supreme Court agreed with the trial court that the issue regarding whether Mr. Smith had become an agent of the State presented a close question.

Mr. Norgard was shown a transcript of testimony by Mr. Smith from a hearing on the initial motion to suppress on August 28, 1981. He said that Mr. Smith testified that he was never asked to record or make any notes about conversations with Mr. Johnson. Mr. Norgard said that this was contrary to the notes from Defense Exhibit 2. Mr. Norgard was also shown Mr. Wilkerson's testimony. He said that Mr. Wilkerson denied giving Mr. Smith any instructions at all. He said again that this was contrary to what the notes in Defense Exhibit 2 indicated. He was shown Mr. Pickard's closing argument. Mr. Pickard said in the closing argument that all the testimony from the police officers and Mr. Smith indicated that Mr. Smith

was acting on his own initiative. He agreed that this was what was in the records when they made their motion to suppress in 1988.

On cross-examination, Mr. Norgard acknowledged that co-counsel, Mr. Shearer, was involved in the suppression hearings that were conducted in 1981. Mr. Norgard agreed that if the record reflected that Ms. Reid made statements that she was tentative about the I.D. in the record in 1981, he would have had the benefit of that in 1988. Mr. Norgard was asked why he thought nonverbatim unadopted notes of the sort taken by Mr. Pickard were discoverable. He said:

> Certainly a prosecutor can talk to witnesses, talk to people they intend to potentially call as witnesses in trials. What is discoverable would be if during the course of those meetings and witness preparation conferences that there was some Brady material disclosed, that would certainly be discoverable. Any evidence favorable to the defendants should be disclosed in discovery. To that extent, that's what I'm referring to as being material. It's discoverable.

See page 93 from transcript of evidentiary hearing Volume I, held on December 4, 2007.

Mr. Norgard was asked by Mr. Cervone if it was legally permissible for a witness to be told to take notes about whatever the Defendant has to say to you. Mr. Norgard said it would depend on the context. Mr. Norgard was asked if he believed it was impermissible to tell the witness to keep his ears open for whatever the Defendant has to say. Mr. Norgard said that it was impermissible in the context of law enforcement officers talking to an informant who has provided them with information. Mr. Norgard was asked if it wouldn't be highly speculative to draw a conclusion from a note when the the [sic] author has no specific recollection of it. Mr. Norgard said that he thought the note speaks for itself. On redirect examination, Mr. Norgard was asked about his familiarity with Kyles v. Whitley from the United States Supreme Court and Young

v. State, from the Florida Supreme Court. He said that both under Florida and federal law, if a prosecutor's notes contain Brady material they are required to be disclosed. He agreed that the note in and of itself would be Brady information that would have caused him to investigate further. Mr. Norgard said that when Amy Reid and Mr. Smith testified at the trial, the State did not stand up to correct their testimony.

Testimony of Heidi Brewer, Esq., pages 98—129, from Transcript of Evidentiary Hearing Volume I, held on December 4, 2007.

The defense called Heidi Brewer as a witness. In 1997, she was an attorney employed by the C.C.R.C. Northern Region. She said that she became involved in Mr. Johnson's case in June of 1994, soon after starting her employment with C.C.R.C. She said she made public record requests for the State Attorney files in Polk County and Hillsborough County. She said that just prior to the first evidentiary hearing after the initial 3.850 was filed and an amendment thereto, they discovered that state attorney files were actually lodged within Attorney General files. Ms. Brewer was asked if there was some confusion within the State Attorney's office regarding the location of the State Attorney's file. She said;

> Yeah, there definitely was. And, I mean, I can't specifically remember every detail of it, but I know that I was continually trying to get state attorney files that seemed to — should have, in my mind, existed, but I was not getting them. And then at some point Karen Cox of the Hillsborough County State Attorney's Office was in charge of — I guess she was in charge of the record — generally the records keeping of it and had stated, you know, you have everything. It was — it was represented to me, "You have everything."

See page 101 from transcript of evidentiary hearing Volume I, held on December 4, 2007.

Ms. Brewer said there was a Court ruling by Judge Bentley or Judge Doyle that they had everything prior to the filing of the first amended 3.850 in 1995. She was asked how she found the files;

> I sent — had an investigator go down to look at the Attorney General's files, which had been previously represented that there basically — usually just copies of pleadings and things that would already have been provided and found somewhere else. The investigator went down there, looked for the files—looked through the files and that's where we found these state attorney files — or state attorney notes and other files.

See page 102 from transcript of evidentiary hearing Volume I, held on December 4, 2007.

She agreed that these were the files that the State had previously stated that they could not find. She said she was shocked that the files were found at the Attorney General's office because it was not a normal place that they would have been. She said that the files were disclosed to her on January 3rd, six days before the Huff hearing on January 9th. She said that there were two boxes of files. She said there were possibly thousands of pages. She notified the Court and asked for 60 days of additional time to review the records and file an amended 3.850 after that. The Judge gave her 20 days. She said that she thought an evidentiary hearing was already scheduled for early March. She asked the Court for permission to take depositions of the State Attorney's office to try and find out the meaning of the records, but her request was denied. She asked for additional discovery as a result of the boxes, but her request was denied. She was asked if she had time to review in detail what she had been given by the State Attorney's office, and she said: "Absolutely not." See page 105 from transcript of evidentiary hearing Volume I, held on December 4, 2007. She agreed that she filed the amendment after 20 days without having done a complete investigation of the files that had been turned over to her. She was shown what had been marked as Defense Exhibits 1 and 2, and she said that she first saw them

when the Attorney General files came to her on January 3. She said she did not know what they were, or who had written them. She said that nobody from the Attorney General's office or the State Attorney's office told her what they were. She said that she would not have known who wrote the notes or when they were written without some assistance from the State Attorney's office. She was asked about the significance of Mr. Smith's testimony at the evidentiary hearing. She said;

> Well he had – he testified at trial that Mr. Johnson had voluntarily given him all these statements and that Mr. Smith was just listening to him and, basically, taking a log of these statements. He also attributed a statement to Mr. Johnson that Mr. Johnson said. "I would act crazy and beat the charges." So at the evidentiary hearing, however, he had admitted that what he – that that whole process was not the way it happened. He had stated that the state attorneys, in essence, told him – gave him instructions, told him to go back in, take notes, that sort of thing. So he was – It was an agency type of thing. And that, of course, Mr. Johnson was not warned of the fact that Mr. Smith was working on behalf of the State to get those. And I think also at the evidentiary hearing he had testified that Mr. Johnson did not make that statement, "I would act crazy to beat the charges."

See pages 108-109 from transcript of evidentiary hearing Volume I, held on December 4, 2007.

She said that Judge Bentley's order found Mr. Smith to be not credible, and Mr. Pickard to be credible. She said that she did not have any corroboration of Mr. Smith's recanted testimony, and the ultimate result was that the Florida Supreme Court affirmed the denial of the 3.850. She agreed that had she known the meaning of the notes she would have asked about them at the evidentiary hearing. She agreed that there was no indication in the file that

the notes had been made pursuant to state attorney subpoenas. She said she did not know that the State sometimes used state attorney subpoenas with a caption of State versus John Doe. She said that Mr. Pickard was called as a witness by the State at the evidentiary hearing. She said that he never indicated in the evidentiary hearing or in other conversations that he had issued state attorney subpoenas and taken statements from witnesses.

Ms. Brewer was asked to review Defense Exhibits 4 and 5, which had been previously marked for identification. She was asked what they were. She said;

> Well, they appear to be — Exhibit 4, Defense Exhibit 4 is an office — is a letter on Office of State Attorney letterhead 10th Judicial Circuit signed by Hardy Pickard to Larry Broncobank (Phonetic.) And, basically, he's saying that Paul Johnson's execution was called off at the last minute, his first death warrant. And then he makes reference to the parole commission and there's nothing more that he could do or write them that is not already covered in previous letters to them, apparently meaning the parole commission."

See page 112 from transcript of evidentiary hearing Volume I, held on December 4, 2007.

She said that this was one of the documents in the State Attorney's file given to her. It was discernible. It showed what it was and who it was written by. She said that was also true of Defense Exhibit 5. She said that she did not have a basis at the time of the evidentiary hearing to ask Mr. Pickard what the notes were. She was not going to approach him at the evidentiary hearing and say what is this, when she did not know where she was going with it. She said that she never knew with any certainty that Mr. Pickard wrote the notes or understand the context of the notes at the time they had the evidentiary hearing.

On cross-examination, Ms. Brewer said it was not a surprise that a State Attorney would take notes of interviews, but she was not aware of the state subpoena John Doe thing. Ms. Brewer agreed that it was possible that the initial order by the Court regarding the public records process was the judge saying that he believed you had everything that everybody could locate at that time. She agreed that she had possession of the notes roughly two months before the hearing in March, and she had actually looked at them. She was asked if the notes from Mr. Pickard were dated. She agreed that they were, but she said that the problem was trying to determine if these are notes from a deposition or from an interview or something else. Ms. Brewer agreed that she knew the dates of the homicide and various proceedings. She said that she did not clearly know the context of the date February 19, 1981. She would have had to go back through the entire record and look to see what occurred on January 21, 1981. She disagreed that she knew full well the context and dates and what they meant. She agreed that she knew that Mr. Smith was a witness, and he was very important to her assertions. She saw his name on the notes. She agreed that this was also true about Ms. Reid. She agreed that other notes appeared to be in exactly the same handwriting.

She agreed that on some of the notes were the initials H.O.P. She said it was not that H.O.P. meant nothing to her, she did not know the context of the rest of it. She said that she knew the notes were from 1981, but she did not know if they were really just notes from a deposition as opposed to a witness interview. She said that she knew the notes that reflected what was going on with regard to the claim that Mr. Smith was a state agent were important, but she did not know the context of them. She said that she was not given the opportunity to develop that context. She said that she did not view the 3.850 hearing as a time to do an investigation. She said that she did not pick up the phone during the two months that she had to investigate and call Mr. Pickard. She agreed that she could have asked him about them at the hearing. If something had come up, she could have told the Court this was new information and that she needed a recess.

On redirect examination, Ms. Brewer agreed that she would have expected the State to alert her if the witness made a statement at trial that contradicted their deposition, testimony, etc. She agreed that pursuant to Giglio the State should alert the defense to false or misleading testimony. She agreed that when Judge Bentley wrote his Order, and he said that he believed what Mr. Pickard said was absolutely true, he did not have the benefit of the notes. She agreed that Judge Bentley thought that Ben Wilkerson was telling the truth that he hadn't given directions to Mr. Smith. She agreed that the notes would have corroborated what Mr. Smith said at the evidentiary hearing. Her understanding of Brady was that the burden was on the State to disclose what was favorable to the defense. Just because she had possession of the notes did not mean that she knew what they were. She agreed that one of the reasons that she asked for the deposition was so she could have Mr. Pickard's sworn testimony. She was not sure a phone call to Mr. Pickard would have been fruitful. She was denied the opportunity to depose the state attorneys and get a sworn statement as to what the notes were. She did not deny that the reason for deposing the state attorneys was to find out if any other files existed, but she would not say that would be the sole reason.

Testimony of Lee Atkinson, Esq., pages 135 - 179, from Transcript of Evidentiary Hearing Volume II, held on December 4, 2007.

The Defense called Lee Atkinson Esq., an attorney in private practice as a witness. Mr. Atkinson was employed by the Hillsborough County State Attorney's Office from 1985 to 1992. He said that he was appointed on a governor's appointment to retry Mr. Johnson's case after it has been reversed on appeal. Mr. Atkinson was asked if he could give the date when his office or he was personally appointed. He said;

> No, I can't do that. I know it was prior to the attempt to select a jury here in Bartow. My recollection is the trial in Gainesville actually was 1988, so I would think it would have been sometime in 1987, we came here, we

> picked a jury, we had a mistrial. The judge recused himself—or not recused himself. I think it was — there was a motion and the judge removed himself. The case was also moved by change of venue from here to Gainesville, we tried it up there in '88, as I recall.

See page 140 from transcript of evidentiary hearing Volume II, held on December 4, 2007.

He recalled that when the case was returned to Polk County for trial, the person who had been the Public Defender for the first trial was now the State Attorney. This created an obvious conflict for the State Attorney's Office in Polk County. He agreed that one of the first things that he would have done would have been to try to collect all of the information that he would need in order to prosecute the case. He did not remember if they made any additional requests for discovery, beyond the discovery that was made in the first trial. Defense Exhibit Number 3 was admitted into evidence without any objection from the State.

Mr. Atkinson was handed Defense Exhibits 1, 2, and 3, and he was asked if these documents had been provided to him when he was preparing for Mr. Johnson's trial. He said that he believed he was provided with them as part of a larger group of material that would have been notes of Hardy Pickard. He thought that he had reviewed them prior to starting the trial in 1987, but he was not 100 percent certain. He said that not all of the pages have H.O.P. at the bottom. He was asked if he recalled any contact with Mr. Pickard to clarify the notes. He said;

> I do not — I believe I had what would be very rudimentary cursory contact with Hardy because of the fact that it much less than I would have in a typical case where I would have been taking over a retrial from another state prosecutor because of the conflict issue.

> And my recollection is that because of that we didn't really have much in exchange. And I certainly wouldn't have — in light of the nature of these notes and having reviewed them just recently, you know, in the last weeks, took an hour to go through all of them, there would be no reason to confer with him because some of them are clearly his impressions, some of them are apparently the rendition of what he might have found in a police report. Others contain obvious hearsay. And — and so they—they weren't really useful to me because I had trial transcripts and I had deposition transcripts and I was going to reprep all those witnesses and prepare them to testify at trial. So as much as I respect Hardy, his notes were really of little—I saw nothing of any real value or interest that I needed to talk to him about.

See pages 146- 147 from transcript of evidentiary hearing Volume II, held on December 4, 2007.

He said that he did not have reason to believe that the documents reflected a summarization of Mr. Pickard's understanding of what somebody was saying in a state attorney investigation, pursuant to a State Attorney subpoena. He said that it was his practice to use a court reporter and not to rely on notes when he took state attorney subpoena statements. He said he did not believe that the notes would have been discoverable. In his opinion it was attorney work product. He said that some of it was double hearsay, and some of it is clearly mental impressions. None of it appeared to be verbatim. He was shown Defense Exhibit 1, (notes regarding an interview with Amy Reid). He agreed that he had no way of telling whether they were actually the product of an interview, the product of notes from a deposition, or the product of notes from her testimony. He did not think you could generally tell from the notes whether they were the product of an interview or just work product notes. He was asked if he discerned anything in the notes that was particularly significant in preparing for trial. He said;

> I did not discern anything in them that I thought was – was, in my opinion, contrary to the trial testimony or that I needed to concern myself with. I certainly didn't see anything in them I considered at the time to be Brady/Giglio material. Again, because of the context they were – they appeared to have been created in, there's no way that you could say that they accurately reflect what a witness would actually testify to.

See page 151 from transcript of evidentiary hearing Volume II, held on December 4, 2007.

Mr. Atkinson was asked about a reference in Defense Exhibit 1 from Amy Reid where there is a reference to meth. Mr. Atkinson said that he did not believe that this necessarily indicated that Ms. Reid said something about meth. He was asked if it was in dispute or not that Mr. Johnson was experiencing psychosis due to crystal meth. He said;

> Oh, sure that part is in dispute. And ultimately the very facts of his own actions disprove that fact. But this statement doesn't say anything about his having acquired crystal meth in Amy Reid's presence or that he was on crystal meth in Amy Reid's presence or that he was on crystal meth at the time that he was in her presence, so it – it becomes irrelevant. You have to understand in the course of the testimony, any prosecutor facing an insanity defense in a capital case is not going to win the case on the basis of dueling experts. Dueling experts isn't what the case is about. What the case is about is the actual facts, the things that the jury will see, touch, hear, understand and believe. Are they consistent or inconsistent with the fundamental opinion concerning the insanity defense? In this case the facts were inconsistent and the most glaring example of that was Dr. McClane. Dr. McClane's a good, reputable psychiatrist. He originally opined that in –

> that Mr. Johnson was in the state of a crystal meth psychosis when he killed the taxi driver; that he was in the state of a crystal meth psychosis when he killed Ray Beasley; but that he was probably not in a state of psychosis when he killed Deputy Burnham and fired the shots at the two responding deputies. That it would appear from the facts of that incident that his psychosis had probably worn off. On cross-examination Dr. McClane was presented some facts that were inconsistent with his opinion, but which were the true facts of the case. And if you go back and look at the transcript, he actually changed his opinion as to the second murder and decided that he could not say that, in fact, Mr. Johnson was suffering from insanity, psychosis induced by the use of crystal meth in the second murder because the nature of the acts were inconsistent with that diagnosis. So once that happened, what you had was a jury who saw that the facts of what happened are inconsistent with the claim and therefore whether he had some crystal meth before he left his home or at some later time becomes less important because he didn't act like he was under the influence.

See pages 154-156 from transcript of evidentiary hearing Volume II, held on December 4, 2007.

Mr. Atkinson agreed that whether or not the psychosis constituted insanity for purposes of the guilt phase, it may still establish a mitigating circumstance at the penalty phase. Mr. Atkinson said that he recalled that Mr. Smith testified to a statement made by Mr. Johnson concerning attempting to beat the case by acting crazy. He disagreed that he would have been relying on that testimony to counter the defense's claim of insanity. He said that from the time he got the case he never intended to rely on Mr. Smith as being the linchpin in their ability to convict Mr. Johnson, and he gave serious thought to not using him as a witness. He said that he told Mr. Smith that if he told him now about anything that was

untrue, he would not be punished. However, if Mr. Smith tried to recant later, he would see that Mr. Smith was prosecuted for perjury. Mr. Atkinson was asked if a defense attorney would want to know if Amy Reid put crystal meth in Mr. Johnson's hand or his shirt. He said that all the defense attorney would have to do was ask at the deposition or at the trial. He said he thought the notes could not be used to impeach her even if she was asked a question and gave a different answer, because they were attorney work product. He said that he was familiar with Young v. State, and in some instances a prosecutor's notes might be discoverable. He said that the notes in question were not something he believed were discoverable. He agreed that the use of crystal meth could be used in the penalty phase to provide some basis for a sentence of less than death, and he said that as far as he knew the jury had a fair opportunity to consider it.

Mr. Atkinson was asked about Defense Exhibit 2. He was asked if he recalled reviewing the documents to see if there was any Brady material in them. He said it was not clear to him that page 2 or 3 of the notes were actually notes by Hardy Pickard, because the handwriting did not appear to be the same. He said that he would not have drawn a conclusion that Mr. Pickard was recording his understanding of what Ben Wilkerson had told him with regard to Mr. Smith. He said that he would not have been relying on the transcript of the August 28, 1981 suppression hearing or the Florida Supreme Court's decision on admissibility when he made his decision as to how Mr. Smith became involved in the case. He would have been aware of what was in there, but he looked at a lot of things including going over the issue with Mr. Smith. He said that his review of page 2 of Defense Exhibit 2, indicating that Mr. Smith had been talking to Mr. Johnson, seemed to reflect that a relationship had already developed between Mr. Smith and Mr. Johnson before Mr. Smith had a conversation with detectives. His review of the page did not indicate any Brady information. He said that from his review of the page it is not clear who wrote it, and it is not clear when it was written. He said that his conversation with Mr. Smith, that he could recant without punishment or

forever hold his peace, was something that he did with every snitch witness. Mr. Atkinson said that given the overwhelming evidence in the case, he did not think that Mr. Smith's testimony regarding Mr. Johnson's statement about using a sham psychosis defense had any particular impact on the outcome of the trial. He said that he used it anyway because it was his job to put on all of the evidence. Mr. Atkinson was asked about page 14 from the suppression hearing on August 28, 1981, where Mr. Smith indicated that it was his idea to take the notes. He said that Hardy Pickard's notes did not clearly say to him that law enforcement had told Mr. Smith to take the notes.

The defense announced their intention to call Ms. Sabella, an assistant attorney general, as a witness. The State objected to her being called as a witness because of her position as an assistant Attorney General. The court took a brief recess to review cases mentioned by the parties and to research the issue. The Court noted that it had reviewed the cases of State v. Donaldson, 763 So.2d 1252 (Fla. 3d DCA 2000), Scott v. State, 717 So.2d 908 (Fla. 1998), and Lamarca v. State, 931 So.2d 838 (Fla. 2006). Based on the latter two cases, the Court found that it would allow the defense to call Ms. Sabella for the limited purpose of asking her questions about the Attorney's General's Office having possession of the State Attorney file and regarding the contents of that file.

Testimony of Candance Sabella, Esq., pages 196 - 207, from Transcript of Evidentiary Hearing Volume II, held on December 4, 2007.

Candance Sabella, an assistant attorney general, was called as a witness. She has been an assistant attorney general since 1984, and she first became involved with the Paul Beasley Johnson case on the direct appeal from the third trial. She agreed that in 1996 there was an ongoing issue regarding finding the State Attorney trial file. She said that the State Attorney file is usually in the State Attorney's office that handled the prosecution, and this matter was the first one she had ever seen that it wasn't. Ms. Sabella described her memory regarding attempts to locate the file;

> My memory is that we had several evidentiary proceedings where we had records custodians come in, assistant state attorneys come in and because Mr. Atkinson had left the State Attorney's Office before then, and — so there really was nobody involved that had actually done the trial and they were trying to discover what had happened to it and nobody knew.

See pages 199-200 from transcript of evidentiary hearing Volume II, held on December 4, 2007.

Ms. Sabella was shown an Order entered by Judge Doyle in July 1996, from pages 118-121 of the 3.850 Record on Appeal, that indicated that the public record situation was over. She said that she was aware that Ms. Brewer was looking for the file, but she had no idea that it had somehow ended up at the Attorney General's Office. She was asked if she had any indication when the file got to the Attorney General's Office. She said;

> The only thing that was pure conjecture on our part is trying to figure out how it happened, because it never did, is that he borrowed the direct appeal transcript from 1981 in preparation for the subsequent retrials. When he finished with that, it was boxed up and sent back to us, and I believe it was much later after the trial was over. But then we got the record on appeal for the — that—the third trial and that was the one that I was working with. I really had no reason to go back to the 1981 record. It was stuck in a file cabinet and I did not look at it again until they said they were coming to look at the file.

See pages 20 1-202 from transcript of evidentiary hearing Volume II, held on December 4, 2007.

Ms. Sabella said that she did not look at the file or discover that they had possession of the file

up until December 1996. She was asked if they discovered the documents after the appointment was made by Ms. Brewer's investigator or someone on her behalf to come and look. She said;

> Absolutely. Because our policy — generally, what happened at the time is when they would set up an appointment, we would pull all the records out, put them on a cart, go through and make sure if there was any exempt material, we could mark that as exempt material so we could present that to the judge. And when I pulled it out and started going through it, I recognized that there were handwritten notes which appeared to be from the state attorney. There were N.C.I.C.s, which are not something that we ever get. So there were things in there that looked to be state attorney files. Mr. Cervone went through it and agreed with me that they were, we told them when they came, "I believe these are the state attorney files. I'm not sure. Again, I don't know. But that's what they look like and here they are. They're yours."

See pages 202-203 from transcript of evidentiary hearing Volume II, held on December 4, 2007.

She agreed that they had gone through the materials and pulled exempt material before the inspection by Ms. Brewer or somebody on her behalf. She said that she had no memory of seeing Defense Exhibits 1, 2, and 3. She had no memory of the first point in time when she became aware that the documents were written by Hardy Pickard. She said that she had no recollection of looking at the documents prior to receiving the motion where they were attached. When she received the motion, she had her research associate go through the file and compare them to what copies they had. She said that she did not look at them until it became time for her to do a response.

Testimony of Martin McClain, Esq., pages 207 - 219, from Transcript of Evidentiary Hearing Volume II, held on December 4, 2007.

The defense called Martin James McClain, an attorney in private practice, as a witness. He first went into private practice in 2001, and he had previously worked at the Wyoming Public Defender's Office, C.C.R.C., the Missouri Public Defender's Office, and in Legal Aid Capital Unit in New York City. He became aware of the Paul Beasley Johnson case as litigation director at the C.C.R.C. Mr. McClain was a defense attorney involved in the David Pittman case in July and August of 2006. He said that it had some interesting issues that he discussed with Ms. [Backhus] over dinner that summer. He discovered that Hardy Pickard had been involved in Mr. Johnson's case, and he was aware of the use of state attorney subpoenas because of the Juan Melendez case and the David Pittman case. Some state attorney notes were disclosed in the David Pittman case, and he had also seen documents in the Melendez case. He suggested that Ms. [Backhus] look through the files to see if there were any such documents in Mr. Johnson's case. He said that Ms. [Backhus] sent him a packet of materials which he believed were the materials attached to the 3.850, and she asked him if these were the kinds of documents he was referring to. He was asked if the notes were similar to what he had seen in Melendez and Pittman. He said; "Yes, It was. - - it was — many of the documents were in exactly the same format where there's a date, there's the witness's name, it's underlined at the top and sometimes the documents only a page long, at the bottom it will say witness sworn. Sometime it's more than one page and sometimes the witness is sworn isn't on there and sometimes it is." See pages 211-212 from transcript of evidentiary hearing Volume II, held on December 4, 2007.

Mr. McClain said that he gave Ms. [Backhus] a copy of a John Doe subpoena, and she did not provide him with any of those from the Paul Beasley Johnson case. Mr. McClain said that the John Doe subpoenas were used by Mr. Pickard both before and after the indictment. He said that Mr. Pickard used the state attorney subpoenas in the Melendez case to force witnesses listed by the defense to come and appear in front of him without the defense's knowledge. He said that he did not have a specific recollection of

talking to Ms. [Backhus] about the ins and outs of the Melendez case. Ms. [Backhus] advised the Court that she wanted this testimony from Mr. McClain to counter an argument that she should have known earlier about the state attorney subpoenas because of the Melendez case. Mr. McClain was asked if the materials he reviewed in this matter were essentially the same kind of documents that he had seen in the other cases and had advised Ms. [Backhus] about in the summer of 2006. He said;

> Based on what I learned from Melendez and from Pittman, when I - - saw these documents I was able to know that they're the product of Hardy Pickard and able to know from his testimony the format he used and that these would have been taken - - prepared during the course of a state attorney investigation where a witness had been subpoenaed and he was talking to them and that these would represent his understanding of what the witnesses said to - -to him. And I was able to explain that context to you as to these documents.

See page 218 from transcript of evidentiary hearing Volume II, held on December 4, 2007.

Defense Exhibits 4 and 5 were admitted into evidence without any objection from the State.

Testimony of Terri [Backhus], Esq., pages 219-237, from Transcript of Evidentiary Hearing Volume II, held on December 4, 2007.

The defense called Terri [Backhus] as a witness, and she was examined by Mr. McClain. Ms. [Backhus] is an attorney in private practice. Prior to being in private practice, she worked for C.C.R.C. from 1991 until 1997. Prior to that she was a public defender in the Jackson County Public Defender's Office in Kansas City. She said that she was involved very early in Mr. Johnson's case, and then it was handed off to Heidi Brewer. She said that she became involved again in 2005 to handle the Ring vs. Arizona Huff hearing. She said that she was appointed at that time pursuant to

the Registry. She said that she learned of the author of the notes in Defense Exhibits 1, 2, and 3 after having dinner with Mr. McClain in the summer of 2006. He discussed the Pittman case and notes from Hardy Pickard. Prior to this time, she said that she did not know what the documents were or how they came to be. She said that when she had gotten the files from Ms. Brewer her focus was on the Ring v. Arizona issue. She said that the defense did anticipate doing a federal habeas. As soon as they had finished with the Ring Huff hearing, she started going through the file in anticipation of doing a federal habeas. She did know the notes were in the file. She said that she received several boxes marked State Attorney's office and two boxes in particular said; "Received January 3rd, '97. Received from the A.G.'s office. State Attorney file." See page 223 from transcript of evidentiary hearing Volume II, held on December 4, 2007.

She said that she was not able to find any state attorney subpoenas. After she found the notes she sent them to Mr. McClain. She wanted him to see if he could tell if they were Mr. Pickard's notes like he had seen in the Pittman case. After she heard back from Mr. McClain that the notes were in the same kind of handwriting, she started researching the possibility of putting together a 3.850 motion. She said that the Diaz execution happened while she was working on that, and she saw that she was going to raise a lethal injection claim. She decided to put the two claims together in a 3.850. She said that prior to talking to Mr. McClain in the summer of 2006, she assumed that the notes were probably taken pursuant to trial testimony. She agreed that in her experience handling a number of capital postconviction cases that it was common to have handwritten notes that were summaries of depositions or transcripts of trial testimony.

On cross-examination, Ms. [Backhus] said that she got involved in the Paul Beasley Johnson case again in 2005, and she received the files from Ms. Brewer. She said that she was aware that the notes were in there. Ms. [Backhus] said that she was aware that Ms. Brewer had testified that she knew the notes were in the file before the initial 3.850. Ms. [Backhus] was asked if to her knowledge anyone had put any thought on behalf

of Mr. Johnson in 1998, 1999, 2000, or any point in time as to what the notes were. She said;

> Well, yes, I think we did put thought into it and we thought they were notes from either trial testimony or depositions. Because, typically - - after you do this for a while you're typically are getting notes from that, and if you're going to get something more than that it's usually exempt and you have to fight over it. That's my experience.

See pages 226-227 from transcript of evidentiary hearing Volume II, held on December 4, 2007.

Ms. [Backhus] was asked how she could think that this is what the notes were when they had the date 1981 on them. She said this could refer to any number of things, and this did not necessarily indicate the date that someone was talked to. She said that she was aware of the dates of the depositions and trial testimony, and what she saw did not jump out at her as being a state attorney statement. Ms. [Backhus] was asked what Ms. Brewer did to follow up on the notes. She said;

> Well, she did a motion to depose, it was denied. She — she asked for discovery, that was denied. And, typically, what you do when you're an appellate attorney, you make your record and you do the best you can and then — and then you go up on appeal and you — and you raise it on appeal, which I think she did. But — but I guess it's an interpretation of — of, you know, what— whether I should have known that these were Hardy Pickard's notes of witness statements pursuant to a state attorney subpoena? No way.

See page 229 from transcript of evidentiary hearing Volume II, held on December 4, 2007.

She said that she knew that Melendez was decided a few years ago. She said that she did not think that she had ever read the full Melendez case, and she did not know that it was about state attorney subpoenas. Ms. [Backhus] was asked if like Ms. Brewer she never thought that prosecutors would interview witnesses and make notes about them pre and post indictment prior to trial. She said that she thought they did, but they did not turn over the notes to her. Mr. Cervone pointed out to Ms. [Backhus] that the notes had been given to her, and she said that she did not know what they were. She thought that they were notes of trial testimony and a deposition.

On redirect examination, Ms. [Backhus] agreed that a number of depositions were conducted prior to the trial and were included in the record on appeal. Ms. [Backhus] was asked to look at page 2 of Defense Exhibit 2. She said that it had the names of three different people on it, and it looked like two different people wrote it. She agreed that one of the names was James Smith. She agreed that in his testimony in 1997, he indicated that the State told him to listen and take notes. There was nothing on page 2 of Defense Exhibit 2 to tell her when it was written. She said there was nothing on the page to tell her that she needed to talk to someone other than James Smith. She said that the page had the name Ben on it, but she would not have known that Ben is Ben Wilkerson until she looked at the notes in the context of a state attorney subpoena. She said that never in a million years would she have thought that both handwritings on the page were written by the same person. She did not know whose notes they were, and who to call to ask a question about them. She agreed that she was not representing Mr. Johnson when the Melendez case came out. She said that she was not representing anyone who had been prosecuted by Hardy Pickard when the Melendez case came out. She agreed that nobody from the State contacted her to tell her that the notes were written by Hardy Pickard. She saw nothing in the file to indicate that somebody had notified her or Ms. Brewer that the notes were written by Hardy Pickard. She agreed that she did not find anything in the record to indicate that anyone from the State notified the defense that there was some

> contrary evidence to the testimony of Mr. Wilkerson at the Motion To Suppress and to Mr. Pickard's closing argument. Both Mr. Wilkerson's testimony and Mr. Pickard's closing argument indicated that nobody had told Mr. Smith what to do with regard to taking notes.
>
> (2SPC-R 14/2211-45)

Following the evidentiary hearing, the trial court denied all relief on April 9, 2008. Rehearing was denied May 21, 2008. (2SPC-R 14/2279)

This appeal ensued.

SUMMARY OF THE ARGUMENT

Johnson's claim that the information contained in state attorney notes admittedly in Johnson's possession since the public records litigation in the initial postconviction proceeding in 1996-97 qualifies as newly discovered evidence was properly rejected by the court as barred and for failing to satisfy either prong of the newly discovered evidence standard. Finding that the evidence presented at trial by the state that the defendant was guilty of the crimes he was charged with "was extensive and nothing contained in the notes is of such a character separately or cumulatively that it would probably produce an acquittal on retrial," the lower court had competent substantial evidence to support its' denial of relief.

The trial court also properly summarily denied the challenge to the lethal injection protocols as this Court has repeatedly denied similar challenges.

The court also properly summarily denied Johnson's claim that the ABA report constituted newly discovered as this claim has also been consistently rejected by this Court as procedurally barred and without merit.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED JOHNSON'S CLAIM OF NEWLY DISCOVERED EVIDENCE, *BRADY V. MARYLAND*, 373 U.S. 83 (1963), AND *GIGLIO V. UNITED STATES*, 405 U.S. 150 (1972).

In his second successive motion for postconviction relief, Johnson is once again urging this Court to vacate his conviction and sentence of death based on a claim that the state violated *Brady* or *Giglio*.[1] Johnson now claims that "newly discovered evidence" in the form of handwritten notes, admittedly in his possession for ten years, supports his previously made claim that jailhouse informant James Smith was acting as a state agent in speaking to Johnson during his incarceration.[2] In addition,

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

[2] The circumstances surrounding the public records litigation resulting in the production of the state attorney files were thoroughly addressed by this Court in the initial post conviction appeal. This Court stated in pertinent part:

> Here, there has been no showing that the state attorney's files were intentionally concealed. Furthermore, the record reflects that the Attorney General's office had procedures for reviewing its files in October 1995 and that its records were made available during the public records hearings held in July 1996. Notwithstanding Johnson's delay in examining the files, the circuit court permitted Johnson to raise any new claims discovered in these records as late as February 8, 1997, and to use any evidence discovered in support of his rule 3.850 claims at the March 3, 1997, evidentiary hearing.

he now adds that the notes contain evidence that Amy Reid could support Johnson's claim that he was going to Lakeland to buy meth when he committed the murders. An evidentiary hearing was held on the newly discovered evidence claim. At the conclusion, the lower court found this claim to be both procedurally barred for failure to raise in the prior postconviction proceedings and that it did not qualify as newly discovered evidence. Specifically, the court stated:

> The notes from the State Attorney's Office that form the basis of this Claim were not known to the defense at the time of the trial and could not have been discovered at that time through due diligence. However, to describe them as newly discovered evidence seems inappropriate given the fact that various counsel for the Defendant have had these notes since January 1997. The defense alleges that they constitute newly discovered evidence because they were not in a position to understand what the notes represented until defense counsel talked with attorney Martin McClain regarding the practice of Assistant State Attorney Hardy Pickard to use John Doe state attorney subpoenas to interview witnesses without the knowledge of defense counsel and to take some notes during the interviews. In an abundance of caution after consideration of recent case law, including Cherry v. State, 959 So.2d 702 (Fla. 2007), the Court thought it prudent to allow the Defendant to have an evidentiary hearing on his claim of newly discovered evidence involving the state attorney notes.

> Accordingly, we find no abuse of discretion in the circuit court's refusal to allow Johnson additional time to review the records.

Johnson v. State, 769 So. 2d 990, 995 (Fla. 2000)

The defense has not convinced the Court that it could not have raised the claim based on the state attorney notes in one of the Defendant's prior Motion's to Vacate. The defense has been in possession of the State Attorney notes since January 1997. The defense claims that it did not know if the notes were from trial testimony or a deposition, but there were some dates on the notes that could have easily been compared to trial and deposition dates. The initials HOP were on some of the pages of the notes. This is a strong indication that Assistant State Attorney Hardy Pickard may have authored the notes, yet the defense did not ask him questions about the notes when he was questioned at the evidentiary hearing held with regard to Mr. Johnson's first Motion To Vacate. When a claim is raised in a successive motion a Defendant has the additional burden of demonstrating why the claim was not raised before. See Reichman v. State, 966 So.2d 298 (Fla. 2007). If there is no reason for failing to raise the issues in the previous motion a motion for postconviction relief can be denied on the ground that is it an abuse of process. See Pope v. State, 702 So.2d 221, 223 (Fla. 1997).

In Owen v. Crosby, 854 So.2d 182 (Fla. 2003), the Florida Supreme Court opined;

> Although claims that could have been raised in a prior postconviction motion are procedurally barred, this Court has held that a defendant may file successive postconviction relief motions that are based on newly discovered evidence. See White v. State, 664 So.2d 242, 244 (Fla. 1995). In order to overcome a procedural bar, a defendant must show that the newly discovered facts could not have been discovered with due diligence by collateral counsel and raised in an initial rule 3.850 motion.

The Court finds that a claim based on the state attorney notes could have and should have raised by collateral counsel through the exercise of due diligence in the initial Motion To Vacate or in the

> Defendant's Second Motion To Vacate, and Claim 1 of Defendant's Motion is procedurally barred.
>
> Even if Claim I of Defendant's Motion was not procedurally barred, the Court finds that Claim I of the Defendant's Motion should be denied with regard to a claim of newly discovered evidence. Regardless, of whether the notes that make up this claim qualify as newly discovered evidence, the evidence contained in the notes certainly does not meet the requirement in Jones, that it is of such a character that it would probably produce an acquittal on retrial. The defense alleges that the testimony of James Smith and Amy Reid could have been impeached with information contained in the notes. The notes are not verbatim witness statements and were not adopted by the witnesses.
>
> (2SPC-R 14/2253-55) (emphasis added)

Finding that the evidence presented at trial by the state that the defendant was guilty of the crimes he was charged with "was extensive and nothing contained in the notes is of such a character separately or cumulatively that it would probably produce an acquittal on retrial," the lower court reaffirmed the circuit court's denial of relief after the prior postconviction consideration of the recantation testimony from James Smith. (2SPC-R 14/2256) *See Johnson v. State*, 769 So. 2d 990, 999 (Fla. 2000):

> Even if the court were to accept Mr. Smith's testimony as being true, the court is confident that the verdict would not have been different. Evidence of the defendant's guilt was overwhelming. At trial, the state presented eyewitness testimony, circumstantial evidence and evidence of the defendant's conduct which indicated the defendant committed the crimes and that he was not insane at the time of the offenses.

The court also concluded that there was no support for allegations establishing either a *Brady* or *Giglio* violation. (2SPC-R 14/2260) As the following will show, the lower court properly denied relief.

The standard of review applied by an appellate court when reviewing a trial court's ruling on a rule 3.850 motion to vacate following an evidentiary hearing is: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."'" *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997), quoting *Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984), quoting *Goldfarb v. Robertson*, 82 So. 2d 504, 506 (Fla. 1955). However, the circuit court's legal conclusions are reviewed de novo. *Lowe v. State*, 2 So. 3d 21 (Fla. 2008), citing, *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

As previously noted, the lower court first denied this claim relying on this Court's decision in *Owen v. Crosby*, 854 So. 2d 182, 187-188 (Fla. 2003), because it was an issue that could have been raised during the initial postconviction proceeding. (2SPC-R 14/2254-55). **It is uncontroverted that the**

notes in question were in the possession of collateral counsel at the time of the initial postconviction hearing and that, despite being given repeated opportunities to raise any claims concerning those documents, no such issue was raised until ten years later.[3]

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[3] This Court previously held that the lower court allowed Johnson sufficient time to amend the pleadings based on any evidence discovered in the state attorney files both before and during the evidentiary hearing. Quoting the trial court's order, this Court set forth the relevant facts and found no abuse of discretion,

> Although CCR's delay in examining the records at the attorney general's office was inexcusable, this court permitted CCR to amend the rule 3.850 motion based upon the newly discovered information. CCR filed an amended motion on January 28, 1997. The amended motion did not raise any new claims for relief, but made references to the materials recently discovered. This court accepted the amended motion and allowed CCR to utilize the new material to support any of the claims for relief. An evidentiary hearing was held on March 3, 4 and 5, 1997.

State v. Johnson order at 3-4. The circuit court concluded that the public records issue had been litigated fully and denied further relief.

Johnson cites to *Ventura v. State*, 673 So. 2d 479 (Fla. 1996), for the proposition that the circuit court should have allowed Johnson sixty days to review the newly discovered records. In *Ventura*, however, the State had affirmatively withheld the records being sought. *Id.* at 481. Here, there has been no showing that the state attorney's files were intentionally concealed. Furthermore, the record reflects that the Attorney General's office had procedures for reviewing its files in October 1995 and that its records were made available during the public records hearings held in July 1996. Notwithstanding Johnson's delay in

In *Owen*, this Court held that, "[a]lthough claims that could have been raised in a prior postconviction motion are procedurally barred, this Court has held that a defendant may file successive postconviction relief motions that are based on newly discovered evidence." *Owen v. Crosby*, 854 So. 2d at 188. In order to satisfy his burden to establish that this claim is newly discovered, Johnson must show it was "unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991). Second, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." *Id.* at 915.

Furthermore, even if Johnson could establish that this evidence qualified as "newly discovered," the procedural bar would still apply because it was not presented within one year of discovery. *Jimenez v. State*, 2008 Fla. LEXIS 2390, 9-10 (Fla. June 19, 2008) (finding subclaim is procedurally barred

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> examining the files, the circuit court permitted Johnson to raise any new claims discovered in these records as late as February 8, 1997, and to use any evidence discovered in support of his rule 3.850 claims at the March 3, 1997, evidentiary hearing. Accordingly, we find no abuse of discretion in the circuit court's refusal to allow Johnson additional time to review the records.
>
> *Johnson v. State*, 769 So. 2d 990, 995 (Fla. 2000)

where record established that Jimenez was aware of this information more than one year prior to filing of the successive rule 3.851 motion.) Finally, Johnson asserts that this evidence establishes that the state committed a *Brady/Giglio* violation. This Court has held that in order to establish a *Brady* claim, a defendant must show the state willfully or inadvertently suppressed material, favorable evidence and that there is a reasonable probability that had the suppressed evidence been disclosed, the jury would have reached a different verdict. *Byrd v. State*, 2009 Fla. LEXIS 494 (Fla. Apr. 2, 2009). In *Byrd,* this Court also explained that a "*Giglio* violation is demonstrated when the prosecutor knowingly presented or failed to correct false testimony that was material to the case." This Court explained that evidence is material if there is any reasonable likelihood that it could have affected the jury's verdict. *Id.*

In the instant case, the lower court found that the claim was procedurally barred for having failed to raise it in the prior postconviction proceeding and that "a claim based on the state attorney notes could have and should have [been] raised by collateral counsel through the exercise of due diligence." (2SPC-R 14/2255). Although the lower court did not repeat its factual findings with regard to the due diligence prong, the

court made extensive findings concerning the facts which established that collateral counsel was in possession of these documents since the initial postconviction hearing which refutes any contention that this evidence is "newly discovered."

Johnson's convoluted argument in defense of his failure to timely raise the claim is essentially that since none of the prosecutors who looked at the notes believed them to be *Brady* material, then defense counsel's failure to perceive the handwritten notes as significant when they were disclosed as part of a "large" (two boxes) public records disclosure was not unreasonable. Johnson bases this novel defense on a twisted reading of the holding in *Banks v. Dretke*, 540 U.S. 668 (2004) where, the Court warned that a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696. That statement was made in response to the state's contention that the "'prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence.' *Id.*" *Jennings v. McDonough*, 490 F.3d 1230, 1239 (11th Cir. 2007). Contrary to defendant's contention, *Banks* does not expand the state's obligation under *Brady* to "point the defense to specific documents within a larger mass of material that it has already turned over." *United States v. Pelullo*, 399 F.3d

197, 212 (3d Cir. 2005)(citing to *United States v. Mmahat*, 106 F.3d 89, 94 (5th Cir. 1997) (where government gave Mmahat access to 500,000 pages of documents) in rejecting Pelullo's claim that *Banks* required finding a *Brady* violation where exculpatory evidence was contained within 900 boxes of documents provided to the defendant prior to trial.) *See also*, *United States v. Runyan*, 290 F.3d 223, 245-46 (5th Cir. 2002) (where government afforded the defense full access to hard drive of seized computer, the government, in not identifying information helpful to the defense contained in the hard drive, did not suppress that information, as *Brady* does not require "the Government, rather than the defense, to turn on the computer and examine the images contained therein"); *United States v. Mulderig*, 120 F.3d 534, 541 (5th Cir. 1997) (rejecting *Brady* claim where contained in 500,000 pages of documents government gave the defense access to were two board resolutions that purportedly gave the officers the authority to negotiate and approve the loans for which they were prosecuted finding Mulderig "could not have been unaware of the alleged existence of the resolutions" and "nondiscovery of the resolutions was due to Mulderig's lack of diligence rather than any affirmative government misbehavior.")

This Court has likewise, rejected the argument that *Banks* has imposed some higher duty on the state and concluded that

even after *Banks,* the state has no duty to prepare the defense's case and where evidence is readily available to the defendant and there is no evidence that the state concealed the information, there is no *Brady* violation. *Smith v. State*, 931 So. 2d 790, 805-806 (Fla. 2006) (finding no *Brady* error where state did not "conceal" witness's prior convictions; they were a matter of public record and Smith never contended that the information about his witness was not readily available to him.)

In the instant case, the documents in question were turned over to collateral counsel as part and parcel of a large set of state attorney trial files that were discovered by undersigned counsel mixed in with the Paul Beasley Johnson appellate files at the Attorney General's Office as a result of a postconviction public records request in 1996. As previously noted, the issue of records production was thoroughly addressed in the initial postconviction appeal and this Court found that there had been no showing that the state attorney's files were intentionally concealed. *Johnson,* 769 So. 2d at 995. As *Banks* does not impose a burden upon the state to identify and explain each and every document turned over to counsel and as there is no evidence of any effort to conceal the notes, the trial court correctly denied relief.

In addition to his contention that the state has a duty to read, decipher material and create issues for a defendant that it discloses to him, Johnson is also apparently contending that a defendant can simply wait to assert a "newly discovered" evidence claim after another defendant does the work for him, even if it is a decade later. Despite acknowledging ASA Pickard's notes were in the records given to them and that this is not the first time that ASA Pickard has testified to his note taking methods in circuit court, Johnson's current counsel Ms. Backhus still maintains that her recent conversation with co-counsel Marty McClain concerning ASA Hardy Pickard's investigation techniques started the clock anew to raise the instant claims. In fact, co-counsel Marty McClain developed this same testimony in May of 2001, in *State v. Melendez*, Case No. CF84-1016A2-XX (10th Jud. Cir. Fla.) where ASA Pickard testified regarding the use of "John Doe" subpoenas and his trial preparation. (2SPC-R 13/2088) Mr. McClain admitted that he and Ms. Backhus had discussed Melendez when he was released from death row, but he could not remember if they discussed ASA Pickard at that time. (2SPC-R 13/2090-91) Ms. Backhus admitted she was aware of Melendez' release but testified she was "ashamed to say" that she lacked curiosity and didn't think she'd ever read the full Melendez case. (2SPC-R 13/2107)

All protestations of ignorance aside, the information does not now qualify as "newly discovered evidence" simply because it has, yet again, been the subject of another collateral proceeding. The bottom line is, counsel for Johnson have admitted that they knew they had these dated, handwritten notes describing witnesses' statements from the State Attorney's files bearing the prosecutor's initials and that a claim was not raised within one year of obtaining those files. As such, it not only does not qualify as newly discovered; even if it was, it is procedurally barred for having failed to be presented within one year. *Jimenez v. State*, 2008 Fla. LEXIS 2390 (Fla. June 19, 2008).

Further, while both Ms. Brewer and Ms. Backhus asserted they weren't sure when the notes were made, despite the dates being written in the upper left hand corner next to the witnesses' names and they claimed they weren't sure if they were trial notes or deposition notes even though none of those dates coincide with the dates on the notes, they still maintained that they were utterly ignorant of the fact that these were State Attorney investigative notes written by the prosecuting attorney whose initials were on many of the notes. (2SPC-R 12/2105-07) Both Ms. Backhus and Ms. Brewer admitted they had seen the notes upon receiving the file and knew they were witness notes but

thought they may have been from a trial or deposition because they never receive prosecutors' notes made during the course of an investigation. (2SPC-R 12/1980, 13/2102-07) Johnson's counsels' contention that they believed the notes to have been taken during trial or deposition undermines the contention that the notes were inconsistent with the trial testimony or that they showed the state presented false evidence.

Furthermore, ASA Pickard was available at the 1997 evidentiary hearing to be questioned regarding the content of the notes just as he was in *Melendez* and *Pittman*. The only excuse offered for failing to question Hardy O. Pickard was Ms. Brewer's claim that she would have looked like a fool at the evidentiary hearing if she had asked about the handwritten notes even thought she knew they were dated 1981, were initialed with the letters "HOP." (2SPC-R 12/1980) Nevertheless, she conceded that although she knew she could have, she did not pick up the phone during the two months prior to the evidentiary hearing and ask ASA Pickard about the notes. (2SPC-R 12/1981) Thus, even if counsel did not recognize these notes as being from a State Attorney questioning of witnesses, the fact remains the content of the dated and signed State Attorney notes, from whatever source they were derived, was available to Johnson to

investigate and challenge in the last proceeding and he simply failed to do so.

Finally, as the lower court found, Johnson has not met his burden to establish the second prong of the newly discovered evidence standard, i.e. "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." *See Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (*Jones II*). Newly discovered evidence satisfies the second prong of the *Jones II* test only if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones II*, 709 So. 2d at 526 (quoting *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996)). The evidence against Johnson is substantial and would not be undermined by the exclusion of James Smith's testimony.

First, Johnson must demonstrate that the evidence now obtained would have been admissible or lead to the discovery of admissible evidence. *Trepal v. State*, 846 So. 2d 405, 424 (Fla. 2003); *Rogers v. State*, 782 So. 2d 373, 383 n.11 (2001); *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000). ASA Pickard testified at the evidentiary hearing that these notes were not verbatim statements taken from witnesses but, rather, were merely his impression of what the witness was saying. He made these notes

to use later in preparing questions for the witness if the witness was going to be a trial witness. (2SPC-R 12/1882-83) "Non-verbatim, non-adopted witness statements are not admissible at trial as impeachment evidence." *Williamson v. Moore*, 221 F.3d 1177, 1183 (11th Cir. 2000). See also, *Williamson v. State*, 961 So. 2d 229, 239 (Fla. 2007) (affirming that prosecutor's trial preparation notes, which include nonverbatim and nonadopted notes of witness interviews, impressions of witness remarks, and discussions of trial strategy, are not admissible and are not properly part of an analysis of the cumulative effect of all admissible evidence in a newly discovered evidence claim.)

This Court in *Williamson* rejected a *Brady* claim based on the prosecutor notes, explaining:

> [W]e agree with the trial court's assessment that there is "absolutely no evidence to support these claims" of prosecutorial misconduct. The record reveals that most of the "withheld" evidence consisted of the prosecutor's trial preparation notes. The notes did not reflect the verbatim statements of any witness interviewed and had not been signed, adopted, or approved by the persons to whom they were attributed. The notes also included trial strategy notations by the prosecutor and his personal interpretation of remarks made by the witnesses. Such material is not subject to disclosure. *See Breedlove v. State*, 413 So. 2d 1, 5 (Fla. 1982) (finding that police reports were not discoverable as "statements" under Florida Rule of Criminal Procedure 3.220 because not signed, adopted, or approved by persons to whom attributed, not verbatim, and not recorded contemporaneously with their making); *see also* Fla. R. Crim. P. 3.220(g)(1)

> (disclosure not required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the attorneys or their legal staffs).
>
> *Williamson v. Dugger*, 651 So. 2d 84, 88 (Fla. 1994)

Noting the foregoing language, the lower court found that "Mr. Pickard testified that the notes were not verbatim statements of the witnesses, and they were his impressions of what the witness was saying to him. Mr. Pickard did not recall the interviews, and he could not say with certainty what his notes meant. He did not think his notes were of sufficient quality that he could say they contradicted testimony given by Mr. Smith and Mr. Wilkerson." (2SPC-R 14/2171-72) Since the notes in question here were clearly trial preparation notes, which include nonverbatim and nonadopted notes of witness interviews, impressions of witness remarks, and discussions of trial strategy, that are not admissible at trial, Johnson has failed to establish that he has discovered any admissible "new" substantive or impeachment evidence as a result of reading the notes. Johnson cannot show that knowledge of same would probably have produced an acquittal as it is not admissible evidence and is not likely to lead to the discovery of impeachment evidence.

Further, these notes add nothing to the evidence already considered and rejected in the prior proceeding. In Johnson's

initial motion to vacate, *Johnson v. State*, 769 So. 2d 990, 997 (Fla. 2000), this Court addressed this claim and concluded:

> Johnson claims that the State withheld material and exculpatory evidence in violation of *Brady*. Johnson claims that the State withheld the fact that it used another jail inmate, James Leon Smith, to obtain information from Johnson in violation of Henry and withheld the fact that it presented the false testimony of Smith in violation of *Giglio*.
>
> The basis of these claims rests on Smith's recantation testimony, which was presented during the rule 3.850 evidentiary hearing. The circuit court found with regard to Smith's testimony as follows:
>
> > James Leon Smith's [sic] testified at all three of the defendant's trials. He was deposed in 1981 and 1987 and testified at a motion to suppress [hearing] in 1981. His testimony, from 1981 through 1988, was substantially the same. There were minor differences in his testimony, which can be expected because Mr. Smith had to try to recall events that occurred almost seven years ago. Mr. Smith's 1988 trial testimony is summarized below:
> >
> > Mr. Smith met the defendant in the Polk County jail in 1981. Between February and March of 1981, Mr. Smith had several conversations with the defendant. The defendant admitted to three murders. He said that he had killed a cabdriver and burned the cab because his fingerprints were in it, that he had shot Mr. Beasley and stole $100.00, and that he had struggled with a deputy and that the deputy was shot twice.
> >
> > While in jail, Mr. Smith met with law enforcement officers and told them that the defendant had made the statements. No one made any promises to Mr. Smith for providing this information. The only assistance he received from the state came in the form of a letter written by the prosecutor in 1981 to a judge considering a motion to mitigate sentence. The mitigation motion was

granted and the defendant's sentence was reduced to one year of probation. Mr. Smith testified because "it's something that had to be done." No one suggested that Mr. Smith do anything but tell the truth.

On cross-examination, Mr. Smith provided the following additional information:

There was nothing promised to him for coming forward with information about the defendant. Law enforcement officers did not outright encourage him to go get more information from the defendant. While in the jail, Mr. Smith read the defendant's discovery materials to him because the defendant told Mr. Smith that he could not read. During their conversations, the defendant told him that he was pretty high when the murders occurred and that he could not remember certain details. The defendant also stated that he had done so many drugs that he lost control of himself and started flipping out.

On re-direct examination, Mr. Smith testified that the defendant said that "he could play like he was crazy and they would send him to the crazyhouse for a few years and that would be it."

The court has reviewed the numerous transcripts that contain Mr. Smith's testimony. In every court proceeding, Mr. Smith's testimony was essentially the same as that presented to the Alachua County jury in 1988.

At the evidentiary hearing on March 4, 1997, James Leon Smith testified that much of his previous testimony was untrue. On direct examination, Mr. Smith testified that Polk County Sheriff's Office Detective Wilkerson specifically told him what to ask the defendant. Mr. Smith also alleged that law enforcement told him to testify in court that law enforcement had not instructed him to speak with the defendant. Law enforcement also allegedly promised Mr. Smith that they would go speak to the judge and seek a reduction of his sentence, but that he should not

tell the jury about this promise. According to Mr. Smith, the defendant never stated that he would play crazy. Mr. Smith stated that he received most of the information that he originally testified about from either law enforcement or the defendant's discovery materials.

On cross-examination, Mr. Smith's testimony became very vague. He admitted that the defendant may have actually admitted to several of the crimes and provided some details about the crimes to him. However, in general Mr. Smith's memory was not that accurate as to where he received the information about the crimes. He also stated that he had suffered retribution, both in prison and in his hometown, for his prior testimony incriminating the defendant. Mr. Smith could not explain why his testimony had been consistent in numerous court proceedings and had suddenly changed. He alluded to the fact that he did not want someone to die because of his untrue testimony. However, Mr. Smith never came forward after the defendant was originally convicted and sentenced to death in 1981.

In *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994), *cert. denied*, 514 U.S. 1085, 115 S. Ct. 1799, 131 L. Ed. 2d 726 (1995), the Florida Supreme Court reaffirmed the proposition that "recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. *Brown v. State*, 381 So. 2d 690 (Fla. 1980), *cert. denied*, 449 U.S. 1118, 66 L. Ed. 2d 847, 101 S. Ct. 931 (1981); *Bell v. State*, 90 So. 2d 704 (Fla. 1956)." This Court must make two findings. First, the court must determine whether Mr. Smith's recantation is true. If so, the court then must determine whether Mr. Smith's new testimony would probably result in a different verdict at a new trial. *Glendening v. State*, 604 So. 2d 839 (Fla. 2d DCA 1992).

As to the first issue, the court finds that Mr. Smith's testimony is not credible. In general,

recanting testimony is “exceedingly unreliable.” *Bell v. State*, 90 So. 2d 704, 705 (Fla. 1956). Numerous factors indicate that James Smith’s recantation is likewise unreliable.

Lee Atkinson, the man who prosecuted the defendant in 1988, testified at the evidentiary hearing. After his appointment to the case in 1987, Mr. Atkinson prepared for the re-trial by reviewing the case file and the 1981 trial transcripts, reading the Supreme Court opinion and meeting with law enforcement. He then arranged a meeting with James Smith so that he could determine whether he wanted to use Mr. Smith as a witness. Mr. Atkinson testified that he told Mr. Smith that he wanted him to tell the truth and to tell the jury about any deals or promises he may have received in exchange for his testimony. The prosecutor specifically told Mr. Smith that he did not need his testimony to convict the defendant. Mr. Atkinson then asked Mr. Smith if his prior testimony was true. Mr. Smith said that it was. When asked about the defendant’s allegations that Mr. Smith was a state agent and was promised specific assistance from law enforcement for his testimony, Mr. Smith denied all the allegations and reaffirmed that he was coming forward voluntarily. Mr. Atkinson also told Mr. Smith that he would not prosecute him for perjury if he said that he lied in 1981, but that Mr. Smith had to tell him about it right now. Mr. Smith replied that everything he testified to was the truth. The prosecutor also stated that if it was within his power, he would prosecute Mr. Smith for perjury if he came forward ten years later and said that he had lied. As it turned out, Mr. Smith did not wait the full ten years before coming forward with a new story.

Looking to jury instruction 2.04 on the credibility of witnesses as a framework for analysis:

(a) Did James Smith seem to have an accurate memory? On direct examination, Mr. Smith appeared

to be able to answer many of CCR's leading questions. However, on cross-examination by the state attorney, Mr. Smith's memory faltered numerous times and he had difficulties answering questions. Many of his answers became less and less specific and Mr. Smith appeared to have trouble remembering certain details and events.

(b) Was James Smith honest and straightforward in answering the attorneys' questions? See, analysis under (a), above.

(c) Did James Smith have some interest in how the case should be decided or had any pressure or threat been used against James Smith that affected the truth of his testimony? As noted, Mr. Smith testified that he had suffered because of his original testimony. Apparently, it was well known in prison and on the street that he had testified against the defendant. By changing his story now, the state argued that Mr. Smith would no longer be a snitch in the eyes of the defendant's friends and others.

(d) Did James Smith at some other time make a statement that is inconsistent with the testimony he gave in court? As noted, Mr. Smith gave at least six prior (and consistent with each other) sworn statements that are inconsistent with his testimony given at the evidentiary hearing.

(e) Was it proved that James Smith had been convicted of a crime? It was undisputed that Mr. Smith had been convicted at least six times in the past.

Based upon the court's experience, common sense and personal observations of James Smith, the court is satisfied that his new testimony is false. Simply put, after listening to Mr. Smith, watching his demeanor and analyzing his testimony, the court does not believe his present testimony. Mr. Smith's testimony was consistent throughout the defendant's three trials, a period spanning over seven years. Mr. Smith never came forward with any allegations that his testimony

> was untruthful until 16 years after his first meeting with the defendant.
>
> Even if the court were to accept Mr. Smith's testimony as being true, the court is confident that the verdict would not have been different. Evidence of the defendant's guilt was overwhelming. At trial, the state presented eyewitness testimony, circumstantial evidence and evidence of the defendant's conduct which indicated the defendant committed the crimes and that he was not insane at the time of the offenses. Furthermore, Lee Atkinson testified that the result of the trial would have been the same had Mr. Smith never testified. This allegation was not challenged by the defendant during the evidentiary hearing.
>
> In conclusion, the court finds that the testimony of James Smith presented at the evidentiary hearing is false. Furthermore, even if the court were to accept the testimony, the court finds that the result of the trial would not have changed. Therefore, there were no violations of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), and *Giglio v. United States*, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972). There has been no competent evidence presented of either prosecutorial misconduct or improper and unconstitutional police practices. Finally, there has been no showing that trial counsel was ineffective in any way related to the testimony of James Smith.

State v. Johnson order at 6-10 (citations omitted).

Our review of the record demonstrates that the trial court's finding that Smith's testimony was not believable is supported by competent substantial evidence. This Court will not substitute its judgment for that of the trial court on issues of credibility. *See Demps v. State*, 462 So. 2d 1074 (Fla. 1984). We approve the trial court's denial of this claim.

Johnson v. State, 769 So. 2d 990, 997-1000 (Fla. 2000)

The addition of the inadmissible non-verbatim notes to the already exhaustive review of Smith's testimony does not satisfy Johnson's burden of showing that there is any newly discovered evidence of such a nature as to probably produce an acquittal on retrial.

Another factor considered by the court was the testimony of the prosecutor, Lee Atkinson, who was the prosecuting attorney for both the second and third trials. Atkinson testified at the 1997 hearing and reaffirmed that testimony during the most recent evidentiary hearing, that he specifically told Smith that he didn't have to testify, that he would not prosecute him for perjury and they did not need him. (2SPC-R 13/2033-35)

Lee Atkinson also testified in the instant proceedings, consistent with his 1997 testimony, that the result of the trial would have been the same had Smith never testified. He stated that he never intended to rely on anything Smith said as being a linchpin of the state's ability to convict Johnson and that he gave serious thought to not using him as a witness at all. (2SPC-R 13/2034) This testimony was not challenged by the defendant during either evidentiary hearing, and was considered by this Court to support its finding that Johnson had failed to establish that a different result would have been obtained if Smith's testimony would have been excluded and stands

unchallenged after the latest evidentiary hearing where Atkinson was called by the defendant as a witness. *Johnson v. State*, 769 So. 2d at 999 (quoting Judge Bentley's order noting Lee Atkinson testified that the result of the trial would have been the same had Mr. Smith never testified and that this allegation was not challenged by the defendant during the evidentiary hearing.)

Relying on out-of-context excerpts and pure innuendo, Johnson continues to assert that he only just discovered evidence which supports the rejected recantation testimony of James Smith presented during the 1997 evidentiary hearing. Specifically he contends that ASA Pickard's notes contradict Detective Wilkerson's testimony at the suppression hearing regarding his directions to Smith, Wilkerson's testimony at trial and, finally, ASA Pickard's testimony at the 1997 evidentiary hearing regarding Smith. Even assuming that was true, a proposition with which the court below and the state strongly disagrees, to establish a *Brady/Giglio* violation, this Court considers whether there is any reasonable possibility that the allegedly false evidence could have affected *the jury's verdict or sentencing recommendation*. See *Guzman v. State*, 941 So. 2d 1045, 1050 (Fla. 2006). Even if the state had actually presented misleading testimony at the suppression hearing or the evidentiary hearing, Johnson still did not suffer any prejudice

because it was not before a jury and, therefore, could not have affected the jury's verdict or any sentence under *Giglio*. *Walton v. State*, 2009 Fla. LEXIS 136, 25-24 (Fla. Jan. 29, 2009) (denying *Giglio* claim where evidence was not presented to jury.) See, also, *Pardo v. State*, 941 So. 2d 1057, 1066-67 (Fla. 2006) (noting skepticism that impeachment of search warrant affidavit could implicate *Brady*, as confidence in conviction must be undermined); *Elledge v. State*, 911 So. 2d 57, 66, n.10 (Fla. 2005) (finding postconviction counsel's ignorance of report to be of no moment, since *Brady* focuses on suppression from trial counsel only).

As for the testimony presented at trial, Detective Wilkerson's testimony was not inconsistent, much less false. In fact, Det. Wilkerson specifically testified at the first trial that he told Smith it would be in his best interest to write it down and he agreed that it was possible he told Smith to write down any future conversations. (TR V16/1923-24) He also testified that he received notes from Smith three or four times and these notes were introduced. (TR V16/1924.) Wilkerson testified that Smith called him and they met for the first time on this case on February 5, 1981. (TR V16/1924) Smith initiated the contact and gave him information on Johnson. (TR V16/1925) Any prior contact with Smith would have been before

Johnson was arrested on January 9th and Wilkerson was not assigned to the Johnson case at the time. (TR V16/1923-26) This was entirely consistent with his testimony at the suppression hearing.[4]

As for ASA Pickard's testimony at the 1997 postconviction hearing, after admitting that he had not looked at his notes from the trial almost two decades before, all he could say was he had not given Smith instructions; "The only thing I told Mr. Smith is that he would be required to testify truthfully. As far as I know that's what he did." (PC-R10/357-58). Even if *Giglio* applied to postconviction evidentiary hearings, which it does not, there is nothing false about that statement.

After considering the foregoing, the lower court denied the claim with regard to Smith and made the following factual finding:

> The defense alleges that the information in Mr. Pickard's notes contradicts testimony given by Mr. Wilkerson that he did not give Mr. Smith any instructions on what to do in the future as far as talking to Mr. Johnson again and getting more information. The Court does not find that the information in the notes or Mr. Pickard's testimony regarding the notes shows that Mr. Smith was an agent for law enforcement in obtaining information from Mr. Johnson. The trial court in the first Motion To Vacate

[4] As Det. Wilkerson's testimony was in the trial record, defense counsel Norgard's latest testimony that he was not provided any information by the state about law enforcement sending Smith back into the jail with instructions to keep his ears open and take notes is refuted by the record.

> spent considerable time addressing this issue and deciding that Mr. Smith's recantation of his trial testimony was not credible. The information contained in the state attorney notes does not clearly show that Judge Bentley's conclusion was in error. At a hearing on a Motion to Suppress held on August 18, 1981, Mr. Wilkerson testified that Mr. Smith first contacted him, and he told Mr. Smith it was in his best interest to write down what Mr. Johnson told him. Mr. Wilkerson agreed in his testimony that it was possible that he had told Mr. Smith to write down future conversations.
>
> (2SPC-R 14/2258)

No relief is warranted.

Similarly, with regard to the defendant's alleged statement to Amy Reid that he was in town to buy crystal meth, the lower court found:

> In his Motion, the Defendant alleges that the notes indicate that Mr. Johnson told Ms. Reid that he came to town to get crystal meth. The defense alleges that Ms. Reid made no mention of the Defendant having come to Lakeland to buy Crystal Meth. This claim was not addressed at the evidentiary hearing. Mr. Pickard was not asked what this handwritten note indicated. Presumably, if Mr. Johnson had said something like this to Ms. Reid, Mr. Johnson should have known about it. The defense would have been aware of it. The Court finds that the defense has not supported a basis for it to conclude that the State's failure to advise the defense about this information was a Brady violation. There is no Brady violation where the information is equally accessible to the defense and the prosecution, or where the defense had the information or could have obtained it through the exercise of reasonable diligence. *See Provenzano v. State*, 616 So.2d 428 (Fla. 1993).
>
> (2SPC-R 14/2259)

As the lower court found, if Johnson made such a statement to Reid, Johnson would have known about it. His own failure to follow up on it cannot be addressed decades later in a second successive postconviction motion. "Although the 'due diligence' requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant." *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000).

Johnson's attempt to excuse his failure to previously assert this claim is not excused by the fallback position of ineffective assistance of counsel as this is a successive motion and the claims now being asserted are barred for not having been presented in the prior motion. In order for this excuse to succeed, Johnson would have to show that *collateral counsel* was ineffective for failing to pursue the claim in the initial postconviction motion. As "this Court has held, and, in fact, 'all courts' have held, that the Sixth Amendment does not guarantee a right to the effective assistance of postconviction counsel," that argument must fail also. *Hartley v. State*, 990 So. 2d 1008, 1016 (Fla. 2008), citing, *Lambrix v. St*ate, 698 So. 2d 247, 248 (Fla. 1996) ("[C]laims of ineffective assistance of

postconviction counsel do not present a valid basis for relief.") and *Zack v. State*, 911 So. 2d 1190, 1203 (Fla. 2005) ("Under Florida and federal law, a defendant has no constitutional right to effective collateral counsel.").

Finally, Johnson cannot show that the addition of these notes would probably produce an acquittal at retrial. Upon rejecting the claim, the lower court stated:

> For a *Brady* violation to be established it is necessary that the evidence withheld from the defense be of such a material nature that there exists a reasonable probability that the jury verdict would have been different had the suppressed information been used at the trial. *See Smith v. State*, 931 So. 2d 790 (2006), and *Tompkins v. State*, 872 So.2d 230 (Fla. 2003). None of the information from the notes comes close to being of such a material nature, and the Court does not find that the State's failure to disclose the notes or the information contained in the notes constitutes a *Brady* violation. With regard to the Defendant's claim of *Giglio* violations, the Defendant has not supported a claim, that false testimony of a material nature was presented in Court, or that the State allowed false testimony of a material nature to be presented in Court. The information from the notes and testimony at the evidentiary hearing regarding the meaning of the notes does not support a conclusion that the testimony given by James Smith or Amy Reid or any other witness was false or that the prosecutor knew false testimony was being presented to the Court. The Court does not find that the defense has supported allegations that there were *Brady* or *Giglio* violations, or that it is entitled to relief pursuant to *Jones* on a claim of newly discovered evidence. Claim 1 of the Defendant's Motion is denied.
>
> (2SPC-R 14/2259-60)

Moreover, as this Court has previously recognized, the "evidence of the defendant's guilt was overwhelming" based on the state's case presented at the third trial. *Johnson v. State*, 769 So. 2d 990, 999 (Fla. 2000), quoting, *State v. Johnson* order at 6-10 (citations omitted). This evidence included eyewitness testimony, circumstantial evidence and evidence of the defendant's conduct which indicated the defendant committed the crimes and that he was not insane at the time of the offenses. Accordingly, even if Johnson could overcome the procedural hurdles caused by his failure to timely present the claim, he cannot establish that the "discovery" of this evidence would produce an acquittal. Furthermore, as the lower court found, the record does not support either a *Brady* or *Giglio* claim. All relief was properly denied.

ISSUE II

THE LOWER COURT PROPERLY SUMMARILY DENIED APPELLANT'S CHALLENGE TO FLORIDA'S PROCEDURES FOR CARRYING OUT A LETHAL INJECTION EXECUTION AS VIOLATIVE OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In Johnson's third motion to vacate he also alleged a lethal injection claim based on the execution of Angel Diaz in December of 2006. Inasmuch as Johnson already had two previous postconviction motions ruled upon, his 2007 motion was a second successive motion for postconviction relief, which was subject to summary denial. *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006) (A successive motion for postconviction relief may be summarily denied if conclusively refuted by the record or facially invalid).

Johnson acknowledges that this Court repeatedly has denied similar lethal injection claims, but renews his lethal injection argument only to allegedly "exhaust for purposes of seeking federal habeas relief." (Initial Brief at 54, fn. 18). In light of Johnson's proper concession and this Court's repeated rejection of similar claims, the trial court's summary denial of Johnson's successive postconviction motion must be affirmed. See, *Mann v. State*, 2009 Fla. LEXIS 344 (Fla. Feb. 6, 2009) (affirming circuit court's order denying successive motion for

postconviction relief, citing *Lightbourne v. McCollum*, 969 So. 2d 326, 330 (Fla. 2007) (denying claim that Florida's method of lethal injection is unconstitutional); *Tompkins v. State*, 994 So. 2d 1072, 1080 (Fla. 2008) (rejecting claim that litigant was entitled to his own individual hearing on his challenge to Florida's lethal injection procedures); *Ventura v. State*, 2 So. 3d 194 (Fla. 2009) (denying constitutional challenges to sections 27.702 and 945.10, Florida Statutes (2007) [and rejecting challenges to the lethal injection protocols]); See also, *Burns v. State*, 2009 Fla. LEXIS 199, 2-4 (Fla. Jan. 29, 2009) (Order affirming postconviction court's summary denial of successive postconviction motion asserting lethal injection claim, and citing, *inter alia*, *Ventura*, *Lightbourne*, *Tompkins*, *Schwab v. State*, 969 So. 2d 318 (Fla. 2007), and *Henyard v. State*, 992 So. 2d 120 (Fla. 2008)).

Standards of Review

In *Ventura v. State*, 2 So. 3d 194 (Fla. 2009), this Court reiterated the following standards of review applicable to the trial court's summary denial of Ventura's successive postconviction motion alleging a lethal injection claim based on the execution of Angel Diaz on December 13, 2006:

A. Standard of Review

Florida Rule of Criminal Procedure 3.851 governs the filing of postconviction motions in capital cases.

Rule 3.851(d)(1) generally prohibits the filing of a postconviction motion more than one year after the judgment and sentence become final. An exception permits filing beyond this deadline if the movant alleges that "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2)(A). Here, Ventura alleges that he was unaware of the potentially unconstitutional nature of Florida's lethal-injection protocol until the "botched" execution of Angel Diaz on December 13, 2006.

Rule 3.851 also provides certain pleading requirements for initial and successive postconviction motions. For example, the motion must state the nature of the relief sought and must include "a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought." Fla. R. Crim. P. 3.851(e)(1)(C), (e)(1)(D), (e)(2)(A). As alluded to above, a successive motion based upon newly discovered evidence must also include:

> (i) the names, addresses, and telephone numbers of all witnesses supporting the claim;
>
> (ii) a statement that the witness will be available, should an evidentiary hearing be scheduled, to testify under oath to the facts alleged in the motion or affidavit;
>
> (iii) if evidentiary support is in the form of documents, copies of all documents shall be attached, including any affidavits obtained; and
>
> (iv) as to any witness or document listed in the motion or attachment to the motion, a statement of the reason why the witness or document was not previously available. Fla. R. Crim. P. 3.851(e)(2)(C) (emphasis supplied).

> Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends upon the written materials before the court; thus, for all practical purposes, its ruling is tantamount to a pure question of law and is subject to de novo review. See, e.g., *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008). In reviewing a trial court's summary denial of postconviction relief, we must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. See *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000). The Court will uphold the summary denial of a newly-discovered evidence claim if the motion is legally insufficient or its allegations are conclusively refuted by the record. See *McLin v. State*, 827 So. 2d 948, 954 (Fla. 2002).
>
> At the outset, Ventura failed to comply with rule 3.851(e)(2)(C) because he never attached any of the relevant lethal-injection documents to his successive postconviction motion and he did not proffer any witnesses to support his claims. For these reasons, Ventura's successive motion is legally insufficient. See *Hunter*, 33 Fla. L. Weekly at S722, S725 (holding that the defendant-appellant failed to comply with rule 3.851(e)(2)(C) because he did not attach relevant documents and did not proffer any expert witnesses to support his claim). However, even if Ventura had attached supporting documents and provided sufficient notice regarding expert witnesses, his lethal-injection claim would nonetheless remain meritless.
>
> *Ventura*, 2 So. 3d at ---

Analysis

On April 9, 2008, the trial court entered a detailed written order which denied Johnson's second successive motion to vacate and cogently explained:

CLAIM II

THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA USES FOR LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

To the extent the Defendant may be asserting that this claim is based upon any ground other than the December 2006 execution of Angel Diaz, the Court finds that those grounds are procedurally barred as being untimely. The Defendant should have raised the claims within one year of the release of Sims v. State, 754 So. 2d 657 (Fla. 2000). In Sims, the Florida Supreme Court found that the statute permitting death by lethal injection was constitutional.

The Court is aware that following the Diaz execution an "All Writs" petition was filed in the Florida Supreme Court on behalf of death row inmates represented by CCRC-South in Ian Deco Lightbourne et. al. vs. Charles J. Crist, Jr. Etc. et al., FSC Case No. SCO6-2391. The Florida Supreme Court relinquished jurisdiction to the Circuit Court For the Fifth Judicial Circuit in and for Marion County to consider the impact of the events of the Angel Diaz execution on the issue of the constitutionality of the lethal injection procedures in Florida. After conducting an extensive evidentiary hearing, the Honorable Carven D. Angel, Circuit Judge for the Fifth Judicial Circuit, on September 10, 2007, signed an order titled Order Denying Defendant's All Writs Petition To Declare Florida's Lethal Injection Procedure Unconstitutional. On November 1, 2007, the Supreme Court of Florida issued an opinion that affirmed the Circuit Court's Order. In Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007), the Florida Supreme Court stated: "Lightbourne has failed to show that Florida's current lethal injection procedures, as actually administered through the DOC, are constitutionally defective in violation of the Eighth Amendment of the United States Constitution.

Barring a new decision from the Florida Supreme Court or the United States Supreme Court, this Court

> is bound by precedent from decisions of the Florida Supreme Court holding that execution by lethal injection does not constitute cruel and unusual punishment. See Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007), Diaz v. State, 945 So. 2d 1136 (Fla. 2006), Rolling v. State, 944 So. 2d 176 (Fla. 2006), Rutherford v. State, 926 So. 2d 1100 (Fla. 2006), and Hill v. State, 921 So.2d 579 (Fla. 2006). Claim II of the Defendant's Motion is denied.
>
> (2SPC-R 14/2260-61)

For the following reasons, the trial court correctly summarily denied Johnson's lethal injection claim. First, here, as in *Ventura*, Johnson's successive motion failed to comply with the requirements of Rule 3.851(e)(2)(C) and, therefore, was legally insufficient. Second, any *per se* challenge to lethal injection was untimely and procedurally barred. Therefore, to the extent that Johnson asserted that his "lethal injection" claim is based upon any ground other than the December, 2006, execution of Angel Diaz, those grounds are procedurally barred because they were not raised within one year of the time that lethal injection became a method of execution in Florida. Lethal injection became a method of execution in 2000, and Johnson could, and should, have raised any challenge to lethal injection within one year of the release of the *Sims v. State*, 754 So. 2d 657 (Fla. 2000) decision in February of 2000. See, Fla. R. Crim. P. 3.851(d)(2). Any *per se* challenge to lethal injection is procedurally barred. See, *Farina v. State*, 937 So.

2d 612, 618, fn. 4 (Fla. 2006); *Jones v. State*, 928 So. 2d 1178, 1183, fn. 5 (Fla. 2006); *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005); *Suggs v. State*, 923 So. 2d 419, 441 (Fla. 2005).

Third, any *per se* lethal injection claim is not only procedurally barred, but also without merit. The trial court was correctly bound by this Court's clear precedent that execution by lethal injection does not constitute cruel and unusual punishment. See, *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006); *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006); *Rutherford v. State*, 926 So. 2d 1100, 1113 (Fla. 2006); *Hill v. State,* 921 So. 2d 579, 583 (Fla. 2006).

Fourth, as to any claim predicated on the Diaz execution and lethal injection protocol, this Court has "repeatedly and consistently rejected Eighth Amendment challenges to Florida's current lethal injection protocol." See, *Ventura v. State*, 2 So. 3d 194 (Fla. 2009); *Tompkins v. State*, 994 So. 2d 1072, 1080-82 (Fla. 2008); *Power v. State*, 992 So. 2d 218, 220-21 (Fla. 2008); *Lightbourne v. McCollum*, 969 So. 2d 326, 350-53 (Fla. 2007); *Schwab v. State*, 982 So. 2d 1158, 1159-60 (Fla. 2008).

Fifth, Johnson's continued reliance on the Dyehouse/DOC memos regarding the BIS monitor is wholly misplaced. In *Lightbourne v. McCollum*, 969 So. 2d 326, 350-53 (Fla. 2007),

this Court expressly considered the Dyehouse memos regarding the BIS and found that they did not show that lethal injection was unconstitutional. *Id.* at 334, 352. Since that time, this Court has repeatedly affirmed the summary denial of this claim based on *Lightbourne*. See, *Walton v. State*, 2009 Fla. LEXIS 136, 34 Fla. L. Weekly S 89, S 93-94 (Fla. Jan 29, 2009); *Sexton v. State*, 997 So. 2d 1073, 1089 (Fla. 2008); *Woodel v. State*, 985 So. 2d 524, 533-34 (Fla. 2008); *Lebron v. State*, 982 So. 2d 649, 666 (Fla. 2008).

Sixth, at pages 59-60 of his initial brief, Johnson highlights *Baze v. Rees*, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008). However, as this Court emphasized in *Reese v. State*, 2009 Fla. LEXIS 466, 14-15 (Fla. Mar. 26, 2009), with regard to any suggestion that *Baze* requires a different result, this Court has held that "Florida's current lethal-injection protocol passes muster under any of the risk-based standards considered by the *Baze* Court." *Id.*, quoting *Ventura*. See also, *Henyard v. State*, 992 So. 2d 120, 130 (Fla.) ("We have previously concluded in *Lightbourne* and *Schwab* that the Florida protocols do not violate any of the possible standards, and that holding cannot conflict with the narrow holding in *Baze*."), *cert. denied*, 129 S. Ct. 28, 171 L. Ed. 2d 930 (2008)."

Seventh, in *Tompkins v. State*, 994 So. 2d 1072, 1080-83, 1085 (Fla. 2008), *cert. denied*, No. 08-8614, 2009 U.S. LEXIS 1009 (U.S. Feb. 11, 2009), this Court squarely addressed and rejected another death row inmate's virtually identical postconviction arguments. At pages 61-64 of his initial brief, Johnson repeats that he was entitled to his "own" evidentiary hearing in order to present the following witnesses: Sara Dyehouse, Secretary McDonough, Gretl Plessinger, and Dr. David Varlotta. These *same witnesses* were also named in *Tompkins* and this Court rejected the same defense arguments and thoroughly explained:

> Lethal Injection
>
> We first address and reject Tompkins's claim that he was deprived of his due process rights of notice, opportunity to be heard, and presentation of evidence on his challenge to Florida's lethal injection procedures. Although Tompkins acknowledges that these issues were litigated in the emergency all writs petition filed in *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007), *cert. denied*, 128 S. Ct. 2485, 171 L. Ed. 2d 777 (2008), he claims that the trial court erred in denying him the opportunity to present his own witnesses in support of his challenge to the procedures. n5 Specifically, Tompkins sought to present the following evidence to the trial court that he claimed was not presented in Lightbourne: (1) testimony from Sara Dyehouse concerning the memorandum she wrote in 2006 on the revisions to the lethal injection protocol; (2) testimony from DOC Secretary McDonough regarding the Dyehouse memorandum; (3) testimony from Gretl Plessinger concerning the Dyehouse memorandum; and (4) testimony from Dr. David Varlotta, an anesthesiologist who was a member of the Governor's Commission on Administration of Lethal

Injection ("the Commission") that was created after the Diaz execution to investigate and make recommendations to the Governor.

> n5 Tompkins was a member of the group of death row inmates who filed an emergency all writs petition in Lightbourne, requesting that this Court address whether Florida's lethal injection procedures violate the Eighth Amendment in the wake of the allegedly "botched" execution of Angel Diaz in December 2006. See id. at 328-29. This Court dismissed the claims of all of the petitioners except petitioner Lightbourne without prejudice. *Lightbourne v. McCollum*, No. SC06-2391 (Fla. order dated February 9, 2007).

Florida Rule of Criminal Procedure 3.851 governs the filing of postconviction motions in capital cases. Rule 3.851(d)(1) generally prohibits the filing of a postconviction motion more than one year after the judgment and sentence become final. An exception permits filing beyond this deadline if the movant alleges that "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2)(A). As the State acknowledges, Tompkins's challenge to the lethal injection protocol satisfies the rule 3.851(d)(2) exception because it was based on the allegedly botched December 13, 2006, execution of Angel Diaz. Rule 3.851 also provides certain pleading requirements for initial and successive postconviction motions. Fla. R. Crim. P. 3.851(e)(1)-(2). For example, the motion must state the nature of the relief sought, Fla. R. Crim. P. 3.851(e)(1)(C), and must include "a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought." Fla. R. Crim. P. 3.851(e)(1)(D).

Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." A postconviction court's

decision regarding whether to grant a rule 3.851 evidentiary hearing depends on the written materials before the court; therefore, for all intents and purposes, its ruling constitutes a pure question of law and is subject to de novo review. See, e.g., *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008). In reviewing a trial court's summary denial of postconviction relief, this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. See *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006).

Although Tompkins's fourth successive postconviction motion met the pleading requirements of rule 3.851, we conclude that the trial court did not err in summarily denying his lethal injection claims. This Court has repeatedly rejected appeals from summary denials of Eighth Amendment [n6] challenges to Florida's August 2007 lethal injection protocol since the issuance of *Lightbourne*. See *Power v. State*, 992 So. 2d 218, 33 Fla. L. Weekly S717, S718 (Fla. Sept. 25, 2008); *Sexton v. State*, 33 Fla. L. Weekly S686, S691 (Fla. Sept. 18, 2008); Henyard v. State, 992 So. 2d 120, 33 Fla. L. Weekly S629, S631-32 (Fla. Sept. 10, 2008), cert. denied, 129 S. Ct. 28, 171 L. Ed. 2d 930 (2008)]; *Schwab v. State*, 995 So. 2d 922, 33 Fla. L. Weekly S431, S431-34 (Fla. June 27, 2008), petition for cert. filed, No. 08-5020 (U.S. June 30, 2008); *Woodel v. State*, 985 So. 2d 524, 533-34 (Fla. 2008), petition for cert. filed, No. 08-6527 (U.S. Sept. 24, 2008); *Lebron v. State*, 982 So. 2d 649, 666 (Fla. 2008); *Schwab v. State*, 982 So. 2d 1158, 1159-60 (Fla. 2008); *Lightbourne*, 969 So. 2d at 350-53. n7 As this Court stated in *Schwab v. State*, 969 So. 2d 318 (Fla. 2007), "Given the record in *Lightbourne* and our extensive analysis in our opinion in *Lightbourne v. McCollum*, we reject the conclusion that lethal injection as applied in Florida is unconstitutional." Id. at 325. Moreover, there have been two developments since we issued our opinion in *Lightbourne* that support our conclusion that Florida's lethal injection protocol does not constitute cruel and unusual punishment under the Eighth Amendment. The first development was the decision of the Supreme Court of the United States in *Baze v. Rees*, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008), finding this same method of

execution, consisting of lethal injection through the same three-drug combination under similar protocols, to be constitutional. Moreover, we have rejected contentions that *Baze* set a different or higher standard for lethal injection claims than *Lightbourne*. See, e.g., *Henyard*, 33 Fla. L. Weekly at S631-32 (rejecting Henyard's argument that *Baze* sheds new light on this Court's decisions because the standard for reviewing Eighth Amendment challenges was changed and noting that "[w]e have previously concluded in *Lightbourne* and *Schwab* that the Florida protocols do not violate any of the possible standards, and that holding cannot conflict with the narrow holding in *Baze*"). The second development was the performance of two executions in Florida, those of Mark Dean Schwab and Richard Henyard, with no subsequent allegations of any newly discovered problems with Florida's lethal injection process, such as the problems giving rise to the investigations following the Diaz execution.

> n6 The Florida Constitution's prohibition against "cruel or unusual punishment" "shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution." Art. I, § 17, Fla. Const.
>
> n7 This Court also rejected this claim in *Marquard v. State*, No. SC08-148, 993 So. 2d 513, 2008 Fla. LEXIS 1837 (Fla. order dated Sept. 24, 2008).

Further, the trial court did not err in not allowing Tompkins to present additional witnesses because the proposed testimony of these witnesses does not support a departure from this Court's precedent, since it has already been considered by this Court. The Dyehouse memorandum was addressed by this Court in Lightbourne: With regard to the Dyehouse memorandum recommending the use of a BIS monitor to more accurately assess the level of consciousness of the inmate, it might be beneficial to incorporate a device that could monitor the inmate's level of sedation to ensure the inmate will not experience subsequent pain

> of execution. However, the Court's role regarding the executive branch in carrying out executions is limited to determining whether the current procedures violate the constitutional protections provided for in the Eighth Amendment. 969 So. 2d at 352. Further, as Tompkins admits, Plessinger already testified in the Lightbourne evidentiary hearing and her testimony was before this Court in *Lightbourne*. Finally, in our previous decisions, we fully considered the report and recommendations of the Commission, of which Dr. Varlotta was a member, and the implementation of the report and recommendations by the DOC. See *Schwab*, 969 So. 2d at 324; *Lightbourne*, 969 So. 2d at 329-30. Based on the foregoing, we conclude that the trial court did not err in summarily denying relief on this claim. [n8 omitted]
>
> *Tompkins, 992 So. 2d at 1080-82* (e.s.)

In light of the foregoing arguments and authorities, and as this Court undeniably concluded in *Tompkins*, 994 So. 2d 1072, (collecting cases), the trial court did not err in summarily denying Johnson's lethal injection claim.

ISSUE III

THE LOWER COURT PROPERLY DENIED JOHNSON'S CLAIM THAT THE ABA REPORT CONSTITUTED NEWLY DISCOVERED EVIDENCE DEMONSTRATING THAT HIS CONVICTION AND SENTENCE OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This claim is also procedurally barred and without merit. Like the lethal injection claim presented in this second successive motion, the "ABA report" claim was also summarily denied. Relying upon this Court's decisions in *Rutherford v. State*, 940 So. 2d 1112 (Fla. 2006) and *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006), the lower court concluded:

> As the Florida Supreme Court held in *Diaz*, the ABA report in [sic] not newly discovered evidence. The alleged failures mentioned by Mr. Johnson to differentiate his case from the defendant in Rutherford are not described with adequate specificity. Also, as was the case with Diaz, the failures alleged by Mr. Johnson could have been litigated on his direct appeal and in earlier postconviction proceedings. Claim III of the Defendant's Motion is denied.
>
> (2SPC-R 14/2263)

Since *Diaz* and *Rutherford*, this Court has continued to reject this claim. Most recently in *Walton*, this Court explained:

> ii. The ABA Report
>
> Walton has separately asserted that the ABA report entitled *Evaluating Fairness and Accuracy in the State*

Death Penalty System: The Florida Death Penalty Assessment Report, published September 17, 2006, constitutes newly discovered evidence which reveals that the imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment. Just as this Court has previously considered *The Lancet* report, we have also reviewed the ABA report and concluded that it does not constitute newly discovered evidence because the report is "a compilation of previously available information related to Florida's death penalty system and consists of legal analysis and recommendations for reform, many of which are directed to the executive and legislative branches." *Rutherford v. State*, 940 So. 2d 1112, 1117 (Fla. 2006); *see also Tompkins*, 994 So. 2d at 1082-83; *Power*, 992 So. 2d at 220-23; Schwab, 969 So. 2d at 325-26 ("[T]his Court has not recognized 'new opinions' or 'new research studies' as newly discovered evidence."); *Diaz*, 945 So. 2d at 1136; *Rolling*, 944 So. 2d at 181. Moreover, nothing in the report would cause this Court to recede from its past decisions upholding the facial constitutionality of the death penalty. *See Rolling*, 944 So. 2d at 181 (*citing Rutherford*, 940 So. 2d at 1118).

Though Walton attempts to allege that the report's conclusions render his individual death sentence unconstitutional, the specific allegations in his motion merely refer to generalities that are noted in the report but do not relate in any specific way to Walton's death sentence. *See Tompkins*, 994 So. 2d at 1083; *Power*, 992 So. 2d at 222. Walton also fails to assert that had a hearing been granted, he would have presented additional evidence or testimony regarding the lethal injection protocol that would yield a less severe sentence than those already rejected in *Tompkins*, *Power, Diaz, Rolling*, and *Rutherford*. Thus, for the same reasons that we expressed in our previous decisions, we again hold that the ABA report does not constitute newly discovered evidence demonstrating the unconstitutionality of Florida's capital sentencing mechanisms.

Walton v. State, 2009 Fla. LEXIS 136, 35-36 (Fla. Jan. 29, 2009)

Like Walton, Johnson has failed to show how the report establishes he is entitled to relief. Relief was properly denied.

CONCLUSION

Based on the foregoing arguments and authorities, appellee, the State of Florida, respectfully urges this Court to AFFIRM the order of the lower court denying Johnson's second successive motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Terri L. Backhus, Esquire, Backhus & Izakowitz, P.A., 13014 N. Dale Mabry Highway, #746, Tampa, Florida 33618-2808; and to William P. Cervone, State Attorney, Eighth Judicial Circuit, P.O. Box 1437, Gainesville, Florida 33602-1437, this 28th day of April, 2009.

CERTIFICATE OF FONT COMPLIANCE

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

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COUNSEL FOR APPELLEE