IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC08-1385

J.B. PARKER,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR MARTIN COUNTY, FLORIDA, (Criminal Division)

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ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Appellant, J.B. Parker, was the defendant at trial and will be referred to as the "Defendant" or "Parker". Appellee, the State of Florida, the prosecution below will be referred to as the "State." References to the records will be as follows: Direct appeal record - "R"; Postconviction record - "PCR"; Postconviction transcripts - "PCT"; any supplemental records will be designated symbols "SR", and to the Appellant's brief will be by the symbol "IB", followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

In 1983 Parker was convicted of kidnaping, robbery with a firearm, and first-degree murder. Parker was sentenced to death for the first-degree murder conviction, following an eight-to-four jury recommendation. In 1985, the Florida Supreme Court affirmed both the conviction and the death sentence in Parker v. State, 476 So.2d 134 (Fla. 1985). The Florida Supreme Court found the following facts in the first appeal:

> On April 27, 1982, the 18-year-old victim was working the late shift in a convenience store in Stuart, Florida. The appellant and his codefendants, John Earl Bush, Alfonso Cave, and Terry Wayne Johnson, had set out in Bush's car from Fort Pierce to West Palm Beach. Appellant's taped statement reflects that, during the

course of the trip, Bush told the appellant, “We're going to rob something.” Later, Bush and Cave went into the convenience store where the victim was working, after previously visiting the store to stake it out. Bush and Cave took the money and the woman, placing her in the back seat of the car. The victim pleaded, “You aren't going to hurt me,” and Bush responded, “Man, I'm going to kill this bitch. I done been to prison for six years and I ain't going back, 'cause this whore going to identify us.” At an isolated location the victim was dragged out of the car by her hair. During the course of the 20-minute trip, the victim had pleaded that she not be hurt. At trial, Bush's girlfriend testified that, after the victim was removed from the car, Bush stabbed her and the appellant shot her. The victim apparently sank to the ground in a kneeling posture after being stabbed and was shot in the back of the head, execution-style, from a distance of approximately two feet. Medical testimony established that the gunshot-not the stabbing, which was a two-inch shallow wound-killed the victim. The appellant and the codefendants then drove back to Fort Pierce and split the money four ways, the appellant receiving twenty to thirty dollars.

A few days after the victim was found, the codefendant Bush made a statement to the police implicating Parker along with the other codefendants. The appellant was arrested and taken to the Martin County jail where, aware that Bush had made a statement, he advised a jailer that he wanted to talk about the case. The jailer told the appellant that he could not talk to him, and that appellant had to talk to his attorney. The appellant responded that he did not want to talk to his attorney, but indicated that he wanted to talk to the sheriff. The sheriff also told appellant that he could not talk to him and that counsel had been appointed to represent him. The sheriff called the public defender's office, which sent a representative to the jail who advised the appellant not to say anything.

Notwithstanding this advice, appellant stated that he wanted to go ahead and speak anyway to clear his conscience and to tell them that he did not kill the girl. The sheriff repeatedly advised appellant that a lawyer had been appointed to represent him and that nobody was going to force the appellant to make a statement. In response, Parker advised the sheriff that he still wanted to make a statement. In his statement, appellant denied participating in the killing and stated that Bush both stabbed and shot the victim. The appellant later retraced with law enforcement officials the route he and the codefendants had taken and showed them where they had taken the victim out of the car and where they had put the body.

The evidence also reflects that Bush's girlfriend, Georgeanne Williams, went to visit Bush in jail, during which time she also visited Parker. She testified concerning her conversation with Parker as follows:

Williams: I asked him what had happened. He said, “Didn't John [Bush] tell you.” I said, “No, John didn't tell me anything.” I said, “I just want to know who shot the girl, that's all.”

Prosecutor: Okay. And after you told J.B. Parker you just wanted to know who shot the girl, what did J.B. Parker tell you, Georgeanne?

Williams: He told me, he said, “I shot her and John stabbed her.” And he said if I mentioned it, it would be my word against his. He said that John already had a past record, it would be on him, anyway.

Williams recited Parker's admission to her mother and sister and they in turn testified about that fact at the trial. The defendant testified on his own behalf and denied participation in the killing. The jury returned a verdict of

> guilty of first-degree murder, in addition to kidnaping and robbery with a firearm.

Parker v. State, 476 So.2d at 135-136.

Following the direct appeal, Parker filed 3.850 motions with the trial court, which were denied. The Florida Supreme Court affirmed the trial court's denial of the 3.850 motions in Parker v. State, 542 So.2d 356 (Fla.1989). He then filed a petition for a writ of habeas corpus that the Florida Supreme Court denied in Parker v. State, 550 So.2d 459 (Fla.1989). Parker subsequently filed a petition for writ of habeas corpus in federal district court, which was denied. On appeal, the Eleventh Circuit affirmed that denial of Parker's habeas petition in Parker v. Singletary, 974 F.2d 1562 (11th Cir. 1992).

Parker discovered that Michael Bryant ("Bryant") had testified at Alphonso Cave's ("Cave")1993 re-sentencing, saying that Cave was the actual shooter rather than Parker. Parker filed a successive 3.850 claiming a Brady violation. The trial court held an evidentiary hearing on that claim and granted a new penalty phase. The Florida Supreme Court affirmed the trial court's findings and its ruling. State v. Parker, 721 So.2d 1147, 1149 (Fla. 1998).

A new sentencing trial occurred in October 2000. On October 25, 2000, the jury recommended death by a vote of 11-1. [R. Vol. 6 p. 1161] On December 6, 2000 the court held a Spencer hearing where it took additional evidence from the

defense and both parties submitted sentencing memoranda. [R. 35, 2880-2917] On December 13, 2000, the trial court entered an order sentencing Parker to death. [R. 7, 1328-1336). Parker had repeatedly moved to suppress his May 5 & 7, 1982 statements to the police and did so in the months preceding the second penalty phase trial. On October 17, 2002 the Florida Supreme Court relinquished jurisdiction to the trial court to conduct an evidentiary hearing on the suppression motion filed October 1, 1999 regarding the May 7, 1982 statement. (SR Vol. 1, 9-14) The trial court held the hearing and denied the motion to suppress.

Parker then appealed the suppression hearing, the penalty phase trial and verdict. He raised the following fourteen issues:

> Whether the trial court erred when it refused to hear and address on the merits Parker's motion to suppress his May 7 statement;
>
> Whether the trial court impermissibly excluded defense evidence;
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> Whether the State's improper introduction during closing argument of an inadmissible statement of a co-defendant stating Parker was the shooter violated Parker's Sixth Amendment right to confront the witnesses against him;
>
> Whether Parker's right to a fundamentally fair trial was irreparably compromised when the trial court erroneously informed the venire that Parker had been convicted of the unlawful and premeditated murder of the defendant;
>
> Whether the evidence does not support the aggravating factors found by the trial court;

> The death penalty is disproportionate;
>
> Whether the felony murder aggravating circumstance is unconstitutional on its face and as applied;
>
> Whether the trial court erred in allowing the State to rehabilitate a witness with inadmissible statements of unidentified persons in violation of defendant's rights to confrontation;
>
> Whether Parker's death sentence violates due process;
>
> Whether the order appointing the trial court was entered by a predecessor judge after disqualification and is therefore void;
>
> Whether the death sentence violates Apprendi;
>
> Whether the eighteen year delay between Parker's indictment and the re-sentencing violates the Eight Amendment;
>
> Whether the trial court erred when it denied Parker's requested jury instruction concerning the evaluation of circumstantial evidence;
>
> Whether the Florida death penalty violates the Sixth Amendment as interpreted by the Supreme Court of the United States in Ring v. Arizona.

The Florida Supreme Court then affirmed both the denial of the suppression motion and the death sentence. Parker v. State, 873 So.2d 270 (Fla. 2004). That Court found the following facts for the second penalty phase trial:

> In 1998, Parker was granted a new penalty phase due to the discovery of favorable evidence withheld by the State in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). See Parker, 721 So.2d at 1149. During the new penalty phase, the State presented

witnesses to establish the facts of the original crime and Parker's culpability, including codefendant Johnson, who recounted the events leading to Slater's murder.

Johnson testified that the first time the defendants went to the convenience store, all four went in to buy potato chips and that when they returned to the store later that evening, Parker went into the store with Cave and Bush to commit the robbery. Johnson also testified that when they arrived at the location where Slater was killed, Parker took the gun from Cave. Johnson stated that he heard a shot but did not know who shot Slater, that after the murder Parker told Bush to get rid of the knife, and that the four later split the money taken from the store.

The State also introduced a statement made by Parker on May 7, 1982, when he went with Detective David Powers to the area where the victim was killed. During this time, Parker stated that Bush both stabbed and shot the victim, indicated where Bush had thrown the knife after the murder, and recounted that the four defendants discussed killing a sheriff's deputy, Timothy Bargo, who stopped the car in which they were riding on the night of the murder.

Parker presented several witnesses in mitigation. Of significance for the purposes of Parker's appeal is the testimony of Richard Barlow, who was the prosecutor during Cave's 1993 penalty phase. Barlow stated that he relied on the testimony of Michael Bryant, who was in the same cell as Cave at the Martin County jail, to establish that Cave was a principal in Slater's murder. Barlow testified that Bryant went to Arthur Jackson, who was running the jail at the time, and told Jackson that he overheard a conversation between Cave and Bush, in which Cave admitted that he “popped a cap” in the back of Slater's head.

In addition, portions of Michael Bryant's testimony given

> during Cave's 1993 penalty phase were read into the record. Bryant testified about the conversation he overheard between Cave and Bush:
>
> Well what I overheard, Bush was a couple of cells down and what it was, you know, they started talking about it and Bush told Cave, says, we wouldn't never be in here if you didn't try to burn her with a cigarette butt. He says, well, you stabbed her in the stomach and Bush told Cave, he says, well, you popped a cap in the back of her head.

Parker, 873 So.2d at 275-276. The U.S. Supreme Court denied Parker's petition for writ of certiorari on January 10, 2005. Parker v. United States, 543 U.S. 1049 (2005).

Bush and Cave were convicted of the same offenses in separate trials and both were sentenced to death. See Bush v. State, 461 So. 2d 936 (Fla. 1984) and Cave v. State, 476 So. 2d 180 (Fla. 1985). Johnson was convicted of felony murder and kidnapping for which he received two life sentences. Johnson v. State, 484 So.2d 1347 (Fla. 4th DCA 1985), review denied, 494 SO.2d 1151 (Fla. 1986). Bush was executed in 1995. Cave remains on death row.

On January 8, 2006 Parker filed an "Initial Postconviction Motion." On or about September 6, 2006 Parker filed his initial amended postconviction relief motion. After litigating access to public records and accepting various amendments to the motion and responses from the State, the trial court held a Case

Management/Huff Hearing[1] on April 11, 2007 and granted an evidentiary hearing on issues I.A.2, I.A.3, I.A.4, I.B.1, I.B.2, I.C.2, I.C.3, and III, reserving ruling on II. It summarily denied all the remaining claims. The court held a hearing on issue II regarding mental retardation on October 29, 2007 where both sides stipulated to and relied upon an October 3, 2007 report from Dr. Sal Blandino, Ph.D. Based upon the doctor's report the court found that Parker was not mentally retarded and, therefore, not entitled to relief on that issue. The hearing on the remaining issues occurred on March 7 and 11, 2008. During the hearing, Parker presented the testimony of his investigator Sue Gent ("Gent"), former ASA Richard Barlow ("Barlow"), trial counsel David Lamos ("Lamos"), co-defendant Terry Johnson ("Johnson"), and attorney Kevin Anderson ("Anderson").

Gent testified that she was the investigator on this case in the post conviction proceedings. (PCT 20/181-83) Beginning in December 2005 she reviewed the files of David Lamos, Parker's trial counsel during the second penalty phase trial, as well as the court files of Parker and his co-defendants. (PCT 20/183-84, 188) She also reviewed both civil and criminal court files on Georgeann Williams. (PCT 20/184) She met with Parker, Cave, William Makemson (Parker's original trial counsel), Richard Barlow (the prosecutor at Cave's resentencing trial) and Tim Ferguson, the

[1]Huff v. State, 622 So. 2d 982 (Fla. 1983).

father of one of William's children. (PCT 20/184-87)

Gent prepared a time line of William's criminal history gleaned from her review of law enforcement and court records, although she did not differentiate between contacts, arrests, and convictions. (PCT 20/190-91, 371, 376) Lamos had some certified copies of her criminal convictions in his files. (PCT 20/220) She acknowledged that many of the records were for arrests and offenses not involving dishonesty. (PCT 21/371) She found and reviewed a "Green Bar Report" about Williams which included statements that Bush tried to sell the gun used in the shooting and that Williams may have helped him do so. (PCT 20/197-201) The report also indicated that Ferguson heard Williams acknowledge that Bush told her that he was the shooter. (PCT 20/202) Gent said that she did not see any of this information in Lamos's files although his files were partially destroyed by a hurricane. (PCT 20/206, 373-74)

Gent also investigated Bryant who had overheard a conversation between Cave and Bush where Bush admitted stabbing Slater and Cave did not deny being the shooter. (PCT 20/234) She also said that jailer Jackson witnessed Cave beating Bryant and found a deposition by him relating the events. (PCT 20/234-35, 247) Gent discovered the report Bryant made about the statements as well as the beating. She also discovered records placing Bryant in the same cell with Cave at the time

he allegedly admitted being the shooter. (PCT 20/236-341, 245) These reports also were not in the Lamos files.

Gent also reviewed Johnson's criminal history. (PCT 21/265) She reviewed a statement his mother Christine Watson ("Watson") gave to the police saying Johnson said that Cave was the shooter. (PCT 21/267) She reviewed all his statements to the police and found one from May 5, 1982 where he stated that Bush stabbed Slater and told the others that it was necessary to eliminate her as a witness. (PCT 21/272-73) Gent also read the transcripts of Johnson's grand jury testimony and opined that there were conflicts in it. (PCT 21/276) Gent uncovered arrests of Johnson that he denied to the police including a deposition of Watson in Lamos's file where she detailed a series of arrests Johnson denied. (PCT 21/282-89) Gent also read Johnson's deposition where he said that Williams was afraid of Bush who was violent and had threatened her. According to Johnson, Bush confessed to Williams and Parker was not a violent person. (PCT 21/292-93) Finally, she reviewed a number of documents from Lamos and the State Attorney regarding Johnson's cooperation agreement to testify against Parker, assurances made to his family about cooperating, and polygraph tests on him. (PCT 21/300-307, 320) She saw a letter stating that Johnson refused to testify against Cave in his retrial. (PCT 21/353-54)

Gent found numerous newspaper articles about the case and crime that Lamos could have found including one where Parker's mother said that Johnson told her that Bush and Cave killed Slater. Other articles told how Johnson was asleep at the time of the crime and the culpability of the various participants. (PCT 21/362-67)

Barlow testified that he prosecuted Cave at his second penalty phase trial. (PCT 21/340) At that trial he had Bryant testify about overhearing a conversation between Bush and Cave where Bush admitted stabbing Slater and Cave conceded that he was the shooter. (PCT 21/343-47) Barlow stated that he thought Bryant was truthful and a very credible witness. (PCT 21/347-48) He said that he would have said that if Lamos had asked him on re-direct at trial. (PCT 21/350)

Lamos, Parker's retrial counsel, has been a criminal defense attorney for 20 years. He said that he received a set of the files on Parker's prior court proceedings from co-counsel Francis Landrey. (PCT22/386, 427-28) He read the opinion of this Court granting Parker a retrial of the penalty phase and used it as the framework for the second penalty phase trial. (PCT22/392, 401) He read the transcript of Parker's original trial. (PCT22/428-29) He also used mitigation material Landrey had prepared for use in an earlier post conviction proceeding. (PCT22/393-94) He stated that he had a "wonderful" relationship with the defendant. (PCT22/390) He

acknowledged that Landrey's relationship with Parker was better. (PCT22/391)

He did not recall discussing with the prosecutor using depositions in lieu of live testimony regarding certain aspects of the penalty phase retrial but did discuss stipulating to some of the other evidence regarding that retrial if it was in Parker's best interests. (PCT22/398-99) He did speak to Parker about stipulating to evidence. (PCT22/399) His plan was for Bryant called to show that Cave was the shooter and the Johnson's affidavit would be used to impeach Johnson. (PCT22/400) Lamos used a new witness, Audrey Rivers, during the second penalty phase as well as Dr. Fisher to put on "a full mental health mitigation." (PCT22/402-03) Lamos had handled one other death case that went to trial but it was settled prior to the actual trial. (PCT22/406-09) He could not recall reading the clerk's files related to his client prior to representing Parker, but he did remember looking at the clerk's files regarding the co-defendants. (PCT22/413) He felt that his best issue on appeal was related to the order denying the motion to suppress Parker's May 7, 1982 statement to law enforcement. (PCT22/414) He did not recall whether he asked to be appointed to handle the direct appeal of the resentencing order. (PCT22/416)

Lamos turned over all his files to post-conviction counsel although a number of boxes were destroyed in a hurricane. He recalled someone from Barone's office picking up some of his files. (PCT21/386-89) Post conviction counsel questioned

Lamos about a jest between him and the prosecutor. (PCT 22/417-22)

Lamos said that he used Johnson's affidavit to impeach him. (PCT22/423-24) However, he could not recall whether he studied Johnson's grand jury testimony to impeach him further. (PCT22/424-25) He acknowledged filing a motion to waive the mitigator related to a lack of a significant criminal conviction history. (PCT22/425) He added that he recalled filing a motion in limine to prevent the state from admitting evidence as to Parker's prior criminal history as well as a motion to prevent the state from advising the jury that Parker's original jury recommended death. (PCT22/426) He later decided to have the jury know that Parker had previously been sentenced to death in order to show how close Parker had come to being executed, was saved from that fate only when information that Parker was not the shooter came to light, and how well behaved he was in prison despite the harsh condition of death row. (PCT21/448- 50) He noted that Parker agreed to the strategy. (PCT21/455) Lamos added that there was no issue regarding mental retardation. (PCT21/458)

Lamos remembered preparing to cross examine Williams. (PCT22/430) He decided to use the recorded testimony of Bryant rather than have him appear live because Bryant was "a live wire." (PCT22/431-32) Although he did look for Bryant, he preferred to have the prior testimony introduced to avoid any

backtracking by the witness or an attack on him. (PCT22/444-47, 461)

Lamos said that Parker had a leg weight on during the retrial but he was not chained to anything. (PCT22/438-40) He had no problem communicating with him during the trial nor was the weight visible to the jury. (PCT22/440-41) The weight also did not interfere with Parker's ability to stand or move during the trial when the jury entered or exited. (PCT22/443)

Johnson then stated that he had testified at Parker's retrial but refused to testify at Cave's resentencing. He never wanted to testify at any hearing. (PCT22/468-69) The prosecutor told Johnson he would only ask one question which he had already answered in his written statement. The state attorney would then "inform my officer not to pursue you of getting out of prison." (PCT22/470-71) He wrote the prosecutor advising that he did not want to testify against Parker, but he felt he had to since he had a parole hearing coming up and he did not want the state opposing him. (PCT22/473-74) When he went before the parole commission, a presumptive parole release date of the year 2032 was set. (PCT22/476) Johnson was then shown his affidavit on which only the defense questioned him. Only portions of it were truthful. (PCT22/478-81) He acknowledged that it was his signature on it. (T22/480-81) He could not recall Lamos asking him about his grand jury testimony or, for that matter, trying to get in

touch with him prior to the 2000 penalty phase retrial. (PCT22/484-86)

Anderson testified next and established his experience in criminal law. (PCT23/495) He listened to Lamos' post conviction hearing testimony and reviewed the files regarding the Parker case. (PCT23/497-98) He also studied the repository records regarding Michael Bryant as well as Parker's original trial transcript. (PCT23/499) He reviewed Lamos' motion in which Lamos waived the mitigator of an absence of a significant prior criminal record (PCT23/499) and Lamos' notice of supplemental discovery containing a death row video (PCT23/500). The trial court allowed Anderson to testify as to what a reasonable investigation in the case would have consisted of. (PCT23/502-04)

Anderson stated that Parker's family members could have testified on any childhood abuse or exposure to toxic substances. (PCT23/505) He noted Lamos had several affidavits from family members and witnesses in his file that the trial court refused to admit into evidence. (PCT23/506, 508-10) He indicated that it was normally best to have mitigation witnesses appear in person and to use an investigator to assist in trial preparation. (PCT23/516-17) He added that Dr. Fisher inadvertently testified as to Parker's prior criminal record based upon Lamos opening the door for this testimony. (PCT23/511)

Anderson noted that Parker's statement of May 7, 1982 was a major part of the state's case-in-chief against Parker and that it would be appropriate to try to suppress that statement. (PCT23/526-27) Anderson opined that, except for Parker's May 7 statement, there was no other credible evidence linking him to the shooting of the victim. (PCT23/528)

Anderson saw that Lamos chose not to have Bryant testify live but instead used his prior recorded testimony. (PCT23/511-12) He said that Lamos' files indicated that Bryant had no prior criminal record. (PCT23/513) Anderson felt that Bryant's testimony was very important in part because he was an unbiased witness. (PCT539-40) Anderson also acknowledged that Bryant had a reason to be biased against Cave because Cave had physically and sexually attacked him when they were in jail together. (PCT23/565-67) He was familiar with Williams' testimony to the effect that Parker admitted to her that he shot the victim. (PCT23/541-42) He carefully reviewed Lamos' cross examination of Williams and determined that he failed to use a lot of impeachable material during that cross examination. (PCT23/542-44)

Anderson reviewed the statement that the prosecutor had provided to Johnson's attorney and found that Lamos had not used it to impeach Johnson. (PCT23/344-45) He also opined that there was a difference between what the

prosecutor said in his Rule 3.220 disclosure statement (that Johnson was to testify truthfully against Parker) and the agreement itself (which provided that Johnson was to testify truthfully in a manner consistent with his grand jury testimony and other statements to law enforcement) but that Lamos failed to highlight that difference while impeaching Johnson. (PCT23/545-48)

He studied the state attorney's files. (PCT23/559) He found Johnson's and grand jury testimony. (PCT23/ 559) He saw nothing in Lamos' file which indicated preparation to cross examine Johnson. (PCT23/560) He did say that Lamos used the Johnson affidavit to impeach him and that he also brought in a handwriting expert to say that Johnson signed it. (PCT23/564) He saw the certified copies of Williams' criminal record. (PCT23/560) This included information that she was on probation at the time she testified and that at least one jail sentence was reduced around the time she was to testify against Parker. (PCT23/561) He noted that Dr. Fisher's testimony concentrated more on Parker's prior criminal history than on his mental problems. (PCT23/562)

Based upon the evidence and appellate record, Parker failed to meet his heavy burden under Strickland and Brady. The trial court properly denied relief on his post-conviction claims.

SUMMARY OF THE ARGUMENT

Issue I - The trial court properly summarily denied Parker's ineffective assistance of counsel claim since he failed to demonstrate ineffectiveness since hearsay is admissible in suppression motions nor did he demonstrate prejudice given the record.

Issue II - There was competent, substantial evidence supporting the court's denial of the ineffectiveness claim regarding Lamos's cross-examination and impeachment of Williams.

Issue III - The trial court properly denied the ineffectiveness claim that Lamos should have questioned Barlow about his belief that Bryant's testimony was truthful since the information was presented to the jury through the State's questioning.

Issue IV - Lamos was not ineffective in his impeachment of Johnson regarding his agreement to cooperate with the State and the trial court's decision was supported by competent, substantial evidence.

Issue V - The issue of whether the State committed no Brady error since it ws procedurally barred and without merit.

Issue VI - The trial court did not abuse its discretion in limiting the scope of Anderson's expert testimony.

ARGUMENT

ISSUE I

COUNSEL WAS NOT INEFFECTIVE FOR STIPULATING TO PRIOR TESTIMONY AND AFFIDAVITS IN THE MOTION TO SUPPRESS PARKER'S STATEMENT. (Restated)

Parker asserts that the trial court erred in summarily denying his post-conviction claim that his trial counsel was ineffective for stipulating to prior testimony and affidavits at his motion to suppress hearing. He argues that prejudice resulted since his May 7, 1982 statement was the one piece of evidence implicating him in the crime if his trial attorney had properly impeached Williams and Johnson. He goes on to contend that some of the testimony and affidavits were inadmissable hearsay which could not be used to establish that Parker both initiated that statement and signed a waiver indicating his desire to speak to the police. Hearsay is, however, admissible at suppression hearings under Florida law so trial counsel could not have been deficient for complying with that law. Furthermore, this Court already dealt with this issue on the direct appeal of the re-trial. This claim was properly summarily denied because there was competent, substantial evidence demonstrating that it was legally insufficient, without merit, and procedurally barred.

In order to demonstrate that counsel was ineffective, Parker must establish a prima facie case that defense counsel's performance was deficient and that the deficient performance affected the outcome of the trial. A court's summary denial of a postconviction motion will be affirmed where the law and competent, substantial evidence support its findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998). In Lucas v. State, 841 So.2d 380, 388 (Fla. 2003), this Court stated that: "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." See State v. Coney, 845 So.2d 120, 134-35 (Fla. 2003); Peede v. State, 748 So.2d 253, 257 (Fla. 1999). Also, "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." McLin v. State, 827 So.2d 948, 954 (Fla. 2002) (quoting Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993)).

For a defendant to prevail on an ineffectiveness claim, he must establish (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. 688-89.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla. 2001). At all times, the defendant bears the burden of proving not only counsel's representation fell below an objective standard of reasonableness, and was not the result of a strategic decision, but also actual and substantial prejudice resulted from the deficiency. See Strickland, 466 at 688-89; Gamble v. State, 877 So.2d 706, 711 (Fla. 2004).

In Davis v. State, 875 So.2d 359, 365 (Fla. 2003), this Court reiterated that the deficiency prong of Strickland requires the defendant establish counsel's conduct was "outside the broad range of competent performance under prevailing professional standards." (citing Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Davis, 875 So.2d at 365. In assessing the claim, the Court must start from a "strong presumption that

counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89 (citation omitted). The ability to create a more favorable strategy years later, does not prove deficiency. See Patton v. State, 784 So. 2d 380 (Fla. 2000); Cherry v. State, 659 So. 2d 1069 (Fla. 1995). Moreover, "[c]laims expressing mere disagreement with trial counsel's strategy are insufficient." Stewart v. State, 801 So.2d 59, 65 (Fla. 2001). "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986). From Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus is on **what** efforts were undertaken and **why** a specific strategy was chosen over another. Investigation (even non-exhaustive, preliminary one) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 (stating "[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.").

Here the trial court found:

> Parker alleges that absent Lamos' stipulation, Detective Powers' 2002 affidavit, the 1988 testimony of trial counsel, and the 1988 testimony of the public defender intern would not have been admissible at the suppression hearing. However, Parker does not explain how the

> stipulated evidence undermined the outcome of the suppression hearing or the outcome of resentencing in light of other admissible evidence; and Parker does not show that the evidence would differ if witnesses had testified at the suppression hearing. Further, Parker does not explain how live testimony at the suppression hearing would demonstrate that Parker's second statement to police was involuntary where the Florida Supreme Court found that "Parker signed a waiver of rights form, was allowed to call his mother as requested, and did not ask for an attorney during the May 7 interview." Parker, 873 So. 2d at 281. Consequently, Parker fails to demonstrate deficient performance and prejudice.

(PCR 8/ 1134).

The record provides the necessary support for the court's summary denial. This Court relinquished jurisdiction, directing the trial court to conduct an evidentiary hearing on the motion to suppress the May 7, 1982 statement. The parties entered into a stipulation to establish the evidentiary record. (SR. pp. 16-18). On February 12, 2003, the trial court denied Parker's motion to suppress finding that Parker initiated contact with Powers. (SR pp. 709-715).

The record reflects that Parker initiated contact with Sheriff Holt on May 5, 1982. (SR pp. 24, 27, 313, 666). At the motion's hearing Art Jackson testified that Parker asked to speak with the Sheriff. (SR p. 25). Sheriff Holt testified that Jackson contacted him on May 5th, 1982 and indicated that Parker had requested to see him. (SR. pp. 27-28). At the hearing in 1982, Powers testified that Captain Crowder told him to go and see Parker at the jail because he wanted to cooperate.

(SR p. 50). However, at his deposition in 1982, Powers could not recall who told him that Parker had contacted someone at the sheriff's office and indicated that he wished to cooperate with the investigation. (SR. p.625). In his 2002 affidavit Powers clarified his responses and stated that he had no personal knowledge who knew that Parker wished to cooperate and that Captain Crowder did not instruct him to go to the jail. (SR p. 672). However, Powers did say that the only two people who were superior to him in the chain of command were Captain Crowder and Sheriff Holt, therefore, Sheriff Holt must have given him the command. (SR p. 672). Moreover, Powers consistently testified that when he met with Parker at the jail, he had him sign a rights waiver form prior to touring the crime scene. (SR. 50, 672). At the motion to suppress hearing in 1982, Powers testified that when he arrived at the jail, he asked Parker if he wished to cooperate. (SR p. 50-51). Parker said he did but first wanted to call his mother. (SR p. 51). Parker was allowed to call his mother. (SR p. 51). After the telephone call Parker waived his rights. (SR p. 53, 655). Parker signed a rights waiver form and agreed that Powers had advised him that he had a court appointed attorney who had advised him not to speak with members of the sheriff's department yet Parker wished to cooperate anyway. (SR p. 655). After Parker spoke with his mother, he waived his rights. The written waiver contained the following statement:

> I have been advised by Lt. Powers that my court appointed attorney, the public Defender has advised me not to speak with members of the Sheriffs Dept ref my case. I wish to do so of my own volition and I wish to show Lt. Powers where I believe the knife which was used in the robbery/homicide may be located. This is done of my own free will and is voluntary.

(SR p. 655).

Furthermore, at the February 1988 evidentiary hearing held on Parker's motion for post-conviction relief, Robert Makemson ("Makemson") testified about the 1982 motion to suppress. Makemson, who had been Parker's trial counsel, testified that he had met with Parker many times with respect to the motion to suppress and Parker always indicated that he wanted to tell the Sheriff his side of the story because Bush was telling lies. (SR p. 192-193, 404-406). During the evidentiary hearing, Makemson testified to the following in response to the state's questions:

> Q: Why didn't you call the Defendant to the stand and that's the allegation here that you were ineffective for not doing so to explain to the judge, "That I really wanted an attorney and that I had asked my mother and I really wanted the sheriff to come in just so I could get an attorney."?
>
> A: Because that was contrary to what Mr. Parker had told me about the statement. His [Parker's] position was and what he told me and he never changed the position was that he wanted to talk to the sheriff. He wanted to tell the Sheriff his side of the story.

(SR p. 195).

During cross examination by Parker, the following occurred:

> Q: That's–that's correct. Did you ask Mr. Parker why he changed his mind and then made a statement?
> A: Yes.
> Q: And what did he tell you?
> A: Because he wanted to tell the Sheriff that what John Bush was saying about him was a lie, it was not true. He wanted to tell the Sheriff what happened that night. He wanted to tell the Sheriff that what John Bush was saying was not true. And that is the very testimony that I did not want to have Judge Trowbridge hear.

(SR p. 406).

Additionally, Steve Green ("Green"), the intern from the Public Defender's office, also testified at the same evidentiary hearing that Parker insisted on telling his side of the story. (SR p. 234-241). Parker never testified at the 1982 motion to suppress hearing. However, he did testify at the 1988 evidentiary hearing held on his post-conviction motion. Parker testified that in May of 1982, he was brought to the Fort Pierce State Attorney's Office. (SR p. 307-308). Parker said that a tape of Bush was played where Bush stated that Parker had stabbed Francis Slater. (SR p. 309). At that time Parker told the Detective that he had nothing to say. (SR p. 310). Parker voluntarily went to Martin county to take a lie detector test but when he and the Detective arrived Parker changed his mind and refused to do so and was subsequently arrested. (SR p. 311). At the evidentiary hearing, Parker admitted that he asked Jackson to contact the Sheriff. (SR p. 313). Parker testified that when

Sheriff Holt arrived, he asked to make a phone call and the Sheriff took him to a small room. (SR p. 315). Parker said that two other detectives arrived as well as Green (SR. p 315). Green informed Parker that he was representing him and he was from the public defender's office. (SR p. 316). Green also told Parker not to say anything. (SR p. 316). Parker subsequently confessed; as previously noted the Eleventh Circuit found that this statement was taken in violation of Parker's 5th Amendment right to counsel as Green was an intern and the Public Defender's office had ascertained that there was conflict of interest to represent Parker.

During cross-examination by the state, Parker admitted that he was mad about the statement that Bush had made. (SR. p. 329). Parker testified that he knew the importance of an attorney and that he did not recognize Green as his attorney. (SR p. 331, 333, 341). Parker also testified that on May 7th, Powers came to see him at the jail and Parker agreed to show him the road where they took Francis. (SR p. 344). During the statement given on May 5th, Parker said he would be willing to show the police where he thought the knife was thrown. (SR p. 493).

The trial court made following findings after reviewing the evidence and the arguments:

> The facts show that after Defendant initiated contact with Lieutenant Powers, he was read his Miranda rights and that he understood them. He further acknowledged that the Public Defender had advised him not to speak with any member of the Sheriff's

> Department and that he was going to make a statement and cooperate of his own free will. The statement taken by Lieutenant Powers does not violate either the Fifth Amendment or the Sixth Amendment of the United States Constitution.

(SR p. 714).

Although the trial court did not specifically find that the claim was procedurally barred, the claim was a central issue in the direct appeal, although in a slightly different guise. This Court affirmed the trial court's denial of Parker's Motion to Suppress, saying competent, substantial evidence supported the trial court's finding that Parker initiated the May 7 interview and that he knowingly and intelligently waived his Fifth and Sixth Amendment rights. Parker, 873 So.2d at 280. There, as here, Parker argued that Power's statement was inadmissable hearsay and, thus, not competent evidence to prove that Parker initiated the interview. In its discussion, the Court pointed out that statements of both the original trial counsel and Green confirmed that Parker wanted to speak to the detectives, corroborating Powers' testimony. Powers was not the sole witness to that fact. Furthermore, "Parker signed a waiver of rights form, was allowed to call his mother as requested, and did not ask for an attorney during the May7 interview." Id. p. 281.

Parker cannot ask to revisit an issue already covered on direct appeal by arguing ineffectiveness of counsel. Muhammad, 603 So.2d at 489(opining "[i]ssues which either were or could have been litigated at trial and upon direct

appeal are not cognizable through collateral attack."); Marajah v. State, 684 So. 2d 726, 728 (Fla. 1996)(finding it inappropriate to use collateral attack to relitigate issue). Although an ineffective assistance claim normally is cognizable in postconviction, presentation of the claim is not valid when used to relitigate an issue that was previously raised and rejected on appeal. Brown v. State, 775 So.2d 616, 621 n.7 (Fla. 2000)(precluding attempts to relitigate claim that defendant was entitled to additional peremptory challenges by couching issue as a claim of ineffective assistance of counsel); Valle v. State, 705 So.2d 1331, 1336 n. 6 (Fla. 1997) (precluding re-litigation of issue previously raised by couching it in terms of ineffective assistance of counsel); Medina, 573 So.2d at 295 (holding allegations of ineffectiveness may not be used to circumvent rule that postconviction litigation cannot serve as second appeal). Hence, such procedurally barred claims can be denied without an evidentiary hearing or the attachment of records. Jones v. State, 855 So.2d 611, 616 (Fla. 2003) (reaffirming that issues which were raised and rejected on direct appeal are procedurally barred in postconviction litigation); Gaskin v. State, 737 So.2d 509, 513 n. 6 (Fla. 1999) (holding issue procedurally barred in post-conviction proceedings when it had been raised and rejected in prior proceeding). This claim is procedurally barred. Denial was warranted.

Further, competent, substantial evidence supported the trial court summarily denying the claim since it was legally insufficient and without merit. Parker showed neither how trial counsel Lamos's actions were deficient nor how the outcome of the trial would have differed if he had failed to stipulate to that evidence. Lamos and the State stipulated that prior testimony, some of it given before the same judge, and depositions could act as evidence for the Motion to Suppress. Two of the witnesses necessary for the suppression motion were dead (Holt was one of them) so the only way to present their evidence was through the transcripts. Once the stipulation was accepted by the court, those transcripts and records *became* evidence, on the same level as live testimony. The burden of proof remained the same. Parker also failed to show any deficiency by his trial counsel since hearsay is admissible in pretrial motions, including suppression motions, so the State would have been allowed to proceed with the hearsay evidence even if Lamos had not stipulated to it. Parker also made no showing that any of the witness statements would have differed if the person had testified at the suppression hearing.

In Lara v. State, 464 So.2d 1173 (Fla. 1985) the witness who gave the police consent to search defendant's apartment was unavailable to testify and, thus, unavailable for cross-examination. At the suppression hearing the State proved that the witness gave the requisite consent by way of hearsay evidence from an officer.

This Court held that the hearsay evidence establishing consent was properly admitted. Lara, 464 So.2d at 1177. In State v. Cortez, 705 So. 2d 676 (Fla. 3rd DCA 1998) a witness called the police when an unknown car and two men were loitering around a neighbor's home. The police found pry marks on the door into the house. The police later arrested them and the witness identified their car as the one at the house. At the motion to suppress the confessions the officers testified as to what the witness had told them. The appellate court stated that procedure was proper since hearsay is admissible in such a proceeding. The court also commented that the testimony was properly not objected to by the defense. Cortez, 705 So.2d at 679. Clearly, the State would have been allowed to present hearsay evidence at the motion to suppress Parker's May 7 statement even without a stipulation. Lamos's actions were consistent with Florida law and not deficient.

Parker also failed to meet the second prong of the Strickland test, prejudice. Nowhere in his claim does he point out how the outcome would have changed if live testimony had been substituted for the transcripts. He assumes that had the court not allowed the hearsay evidence then the defense would have prevailed at the suppression hearing. However, as pointed out before, other witnesses testified that Parker initiated the contact and wanted to make a statement; Jackson testified that Parker contacted him asking Jackson to let the sheriff know he wished to talk. Even

if Holt's evidence was kept out because he was dead, Jackson would have provided the necessary evidence that Parker initiated the contact with law enforcement. Whether Lamos was incorrect about whether this hearsay was competent evidence in a suppression hearing is of little merit since it had no effect. The evidence was admissible and competent and Parker suffered no prejudice from Lamos's actions. A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. First, a claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied. Kennedy, 547 So. 2d at 913-14 (citations omitted). Simply stating that trial counsel performed deficiently and thereby concluding prejudice must have existed is not enough. LeCroy v. Dugger, 727 So. 2d 236, 239 (Fla. 1998) (upholding summary denial where no factual support provided for conclusory claim) ; Engle v. State, 576 So. 2d 698, 700 (Fla. 1992) (ruling motion legally insufficient absent factual support for claim); Foster v.

State, 810 So.2d 910, 915 (Fla. 2002)(Failure to allege specific facts which resulted in prejudice to the defendant.); Kennedy, 547 So.2d 913 (reasoning defendant may not file motion containing conclusory allegations of ineffectiveness and expect to receive evidentiary hearing); LeCroy v. State, 727 So. 2d 236, 240 (Fla. 1998)(affirming summary denial, reasoning claim was legally insufficient since claim that counsel did not hire an expert was conclusory because defendant presented nothing to substantiate allegations that an expert was necessary or the evidence was not authentic); Atwater v. State, 788 So. 2d 223, 229 (Fla. 2001) (stating that "defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden."). As noted above, the evidence given by multiple witnesses supported the trial court's finding that Parker initiated the May 7 interview. The outcome of the hearing, and the subsequent trial, would not have changed if counsel had opted to have witnesses testify. Competent, substantial evidence supported the trial court's denial of this claim. This Court should uphold that denial.

ISSUE II

THE TRIAL COURT PROPERLY DENIED THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AS WITHOUT MERIT SINCE LAMOS COMPETENTLY AND THOROUGHLY EXAMINED AND IMPEACHED WILLIAMS. (Restated)

Parker asserts that Lamos failed to competently and adequately impeach Williams by showing the jury the actual certified copies of various criminal convictions, even though he did extensively cross-examine her about her crimes, record, and habitual lying. Contrary to Parker's position, the trial court's findings are supported by competent, substantial evidence, and its legal conclusions comport with the dictates of Strickland and its progeny.

The standard of review for ineffectiveness claims following an evidentiary hearing is *de novo*, with deference given the court's factual findings. "For ineffective assistance of counsel claims raised in postconviction proceedings, the appellate court affords deference to findings of fact based on competent, substantial evidence, and independently reviews deficiency and prejudice as mixed questions of law and fact." Freeman v. State, 858 So.2d 319, 323 (Fla. 2003).

> ... we review the deficiency and prejudice prongs as mixed questions of law and fact subject to a de novo review standard but ... the trial court's factual findings are to be given deference. So long as the [trial court's] decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight

to be given to the evidence.

Arbelaez v. State, 898 So.2d 25, 32 (Fla. 2005). See Reed v. State, 875 So.2d 415 (Fla. 2004); State v. Riechmann, 777 So. 2d 342 (Fla. 2000).

To prevail on an ineffectiveness claim, the defendant must prove (1) counsel's representation fell below an objective standard of reasonableness and (2), but for the deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. 688-89.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla. 2001). At all times, the defendant bears the burden of proving counsel's representation fell below an objective standard of reasonableness, was not the result of a strategic decision, and that actual, substantial prejudice resulted from the deficiency. See Strickland; Gamble v. State, 877 So.2d 706, 711 (Fla. 2004).

In Davis v. State, 875 So.2d 359, 365 (Fla. 2003), this Court reiterated that the deficiency prong of Strickland requires the defendant establish counsel's

conduct was "outside the broad range of competent performance under prevailing professional standards." (citing Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989)). With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Davis, 875 So.2d at 365. In assessing the claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89. The ability to create a more favorable strategy years later does not prove deficiency. See Patton v. State, 784 So.2d 380 (Fla. 2000); Cherry v. State, 659 So.2d 1069 (Fla. 1995). "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986).

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

> In finding that [the] investigation did not meet *Strickland*'s performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions

> would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*.... We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." ... A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances."

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

The trial court made the following findings after the evidentiary hearing:

> Parker claims that counsel was ineffective for failing to impeach Georgeann Williams concerning Parker's confession. At Parker's resentencing Williams testified that she visited her boyfriend Bush at the Martin County Jail. After visiting Bush at his first-floor cell, Williams was able to walk over to Parker's cell in the same corridor and talk with him. Williams stated that Parker told her that Bush stabbed the victim and Parker shot the victim. Williams told the resentencing jury that she testified against both Bush and Parker at their earlier trials. (RH, Vol. 27, 1757-1762.)
>
> At Parker's resentencing evidence was presented that Williams had been convicted on at least two felonies (DWLS) and multiple crimes of dishonesty (petit theft). Lamos got Williams to admit that she told lies and was dishonest at times. Lamos established that during

a traffic stop Williams falsely used her sister Tina's name and that Williams did not tell her parents that Bush had been to prison for rape. Lamos elicited that Williams had already served six months in jail, was on felony probation at the time of Parker's resentencing in 2000, had been arrested for forgery but the charges were dropped, was arrested for a felony that was reduced to a misdemeanor, was excused from weekend jail in 1982 to testify, had drug charges dropped that belonged to her sister Sandra who falsely used Williams' name, and received travel money from the State to testify. (RH, Vol. 27, 1752-1829.)

In addition, at resentencing Lamos cross-examined Williams on her 1996 letters that stated "I don't know who shot or who stabbed who . . . ." Williams testified that she wrote the letters because she was tired of her family being harassed over the years every time an appeal came up and that she just wanted to be left alone. Williams stated that she testified truthfully that Parker told her Bush stabbed the victim and Parker shot the victim. (RH, Vol. 27, 1799-1823.)

...

At the evidentiary hearing Parker did not present any evidence or testimony in support of subclaims (a), (e), and (h). In addition, Parker failed to demonstrate prejudice to the outcome of resentencing in subclaims (b), (c), (d), (f), and (g) in light of the impeachment evidence that was elicited by Lamos (outlined above). Much of the testimony of postconviction investigator Gent focused on the absence of documentation in Lamos' files inferring deficiencies in Lamos' preparation to impeach Williams. But, no competent evidence was presented to undermine the impeachment evidence that was elicited by Lamos; or to corroborate Gent's claims of additional evidence that could have been used to impeach Williams, to authenticate the additional evidence, to show that the additional evidence was admissible for impeachment purposes, or to otherwise demonstrate that that the additional evidence was not merely cumulative to impeachment evidence already presented at resentencing. Consequently, Parker fails to demonstrate deficient performance and prejudice in Lamos' impeachment of Williams and has not met his burden to prove ineffective assistance of counsel as alleged in

subclaims (a) through (h).

(PCR 8/1144-47).

Competent substantial evidence supports the court's findings and ruling. The Williams testified for the State that Parker admitted to being the shooter when she first visited Bush and him in the Martin County Jail. The State brought out her four petit theft and several driving on a suspended license convictions accumulated over the last 20 years. (R. 27, 1752) Lamos went after her on cross, bringing out the lies she had told her parents and Parker, as well as her possible bias in protecting Bush since she had thought of marrying him just before this crime occurred. (R. 27, 1763-73) He also spent a very long time going through her prior convictions and any favorable treatment she received from the State on those arrests, so long in fact that she became outright hostile to him. (R. 27, 1774-1826) He used copies of the microfilmed documents to do so. (R. 27, 1777) Obviously, he had copies of her record and used it extensively to impeach her credibility and to show motives for her assistance to the State. Hence, this refutes Parker's claim that counsel did not have Williams's records. Lamos brought out the facts that: she was on probation when she first testified in 1982 (R. 27, 1774-1806); she had a felony reduced to a misdemeanor during the time she had to testify in 1999 (R. 27, 1787); she did little or no jail time for her five driving on a suspended license charges (R. 27, 1788);

and she had her weekend jail sentence rescinded altogether since she had to come to court at that time to testify (R. 27, 1791-93). Clearly, he did all he could with her criminal record, her admitted lies, and any bias resulting from either her relationship with Bush or from her own criminal escapades. Her history of shoplifting was in evidence; it is highly unlikely that the jury would believe her if they knew she had four and the other crimes detailed but would disbelieve her if they knew she might have actually had two additional shoplifting convictions. As such, Parker did not satisfy the requirements set out in Strickland for deficient performance, much less show prejudice resulting from Lamos's conduct.

Lamos also brought up a letter Williams wrote to an investigator Cox and the State. He impeached her with the inconsistencies between what she said in that letter and her testimony during this trial. (R. 27, 1800-14) He then proffered the letter into evidence. (R. 27, 1802) He brought to court a letter she wrote to the state asking for assistance with one of her cases. (R. 27, 1816-19) He also got her to admit that she faced perjury charges if she changed her testimony. (R. 27, 1824) The jail log Parker complains Lamos did not use against Williams actually verified that she visited the weekend she said she did and that Parker and Bush were where she said they were. (R. 27, 1833, 1836-45) As many trial judges have noted to dissatisfied defendants, defense attorneys are not magicians and they cannot change

the evidence that exists. Lamos could not stop Williams from repeatedly testifying that Parker confessed to her that he was the shooter, nor could he alter the fact that she had done so previously in his and his co-defendants' trials. (R. 27, 1758-62, 1772, 1822-23, 1824)

At the evidentiary hearing Gent presented a list of police and court contacts Williams had from 1982 through 2001. (PCT 20/190-92, 225-26) She admitted that many of the contacts were civil or for traffic offenses, nor did she differentiate between arrests and actual convictions. She did not know how many were actual convictions. (PCT 20/371, 376-77) She acknowledged that Lamos had some of the police reports on Williams's crimes in his files. (PCT 20/207-08) She also acknowledged, as did Lamos, that the file she reviewed was not complete, having been scattered and destroyed by a hurricane. (PCT 20/372, 384-88) Anderson testified that Lamos had certified copies of Williams's convictions in his file and other impeachment material. Lamos brought out before the jury that she was on probation although Anderson did not concede that Lamos "proved" it. (PCT 23/533, 559-60) Both of these witnesses refuted Parker's allegation that Lamos did not properly prepare for Williams's testimony or that he lacked these documents.

As detailed above, Lamos brought out Williams's convictions, probation, and bias before the jury. He testified that he tried to show that it was impossible for her

to have heard the statements given the cell positions and generally impeached her credibility. (PCT 22/429) The jury heard the information and had it to consider in evaluating her testimony and veracity. Parker's contentions of ineffectiveness of counsel are refuted by the record itself. Whether Lamos followed technical procedures of introducing certified copies into evidence is not something in which a juror would be interested. Since the impeachment came in as evidence Parker cannot, and does not, show the requisite prejudice under Strickland. The trial court properly denied this claim, finding it without merit.

ISSUE III

THE TRIAL COURT PROPERLY FOUND LAMOS WAS NOT INEFFECTIVE IN NOT QUESTIONING BARLOW ON HIS BELIEF IN THE VERACITY OF BRYANT'S TESTIMONY SINCE THAT INFORMATION WAS ALREADY PRESENTED. (Restated)

Parker also claims that the court erred in summarily denying his ineffective assistance of counsel claim regarding his failure to present the testimony of Barlow's belief in Bryant's truthfulness that Cave was the shooter. Given that the information was brought out inadvertently by the State, the defense did not demonstrate prejudice from counsel's failure to reiterate the point during his re-direct of Barlow. Competent, substantial evidence supported the trial court's finding

Parker had not met his burden of proving both ineffectiveness and prejudice as required under Strickland.

As detailed previously, Parker must establish a prima facie case that defense counsel's performance was deficient and that the deficient performance affected the outcome of the trial. A court's summary denial of a postconviction motion will be affirmed where the law and competent, substantial evidence support its findings. Diaz, 719 So.2d 868. To warrant summary denial the claims must be either facially invalid or conclusively refuted by the record. Lucas, 841 So.2d 388. See Coney, 845 So.2d 134-35; Peede, 748 So.2d 257.

A defendant must prove both deficient performance, by serious errors, by trial counsel and that it without it the result of the trial would have been different. Strickland, 466 U.S. 688-89. Valle, 778 So.2d 965. Judicial review must be highly deferential and evaluate counsel's conduct from his perspective at the time. Strickland, 466 U.S. at 689; Davis, 875 So.2d at 365. The defendant bears the burden of proving counsel's representation fell below an objective standard of reasonableness, was not the result of a strategic decision, and that actual, substantial prejudice resulted from the deficiency. See Strickland; Gamble, 877 So.2d 711. If the defense cannot demonstrate prejudice then a court need not determine if the performance was deficient. Maxwell, 490 So.2d 927. Reviewing courts must focus

on what counsel did and what particular strategy he pursued. Wiggins, 539 U.S. 533; Williams, 529 U.S. 362.

In denying the claim, the trial found:

> Parker claims that counsel failed to question former prosecutor, Richard Barlow, on redirect concerning Barlow's professional considerations in evaluating the credibility of Michael Bryant's testimony. Barlow prosecuted Cave at his second penalty phase conducted in 1993. Barlow presented Bryant's testimony in 1993 to establish that Cave was the shooter. Parker fails to demonstrate deficient performance and prejudice in failing to question Barlow on redirect, where the State elicited that Barlow believed Bryant, where Barlow testified that Bryant had no motive to lie in implicating Cave as the shooter, and where Parker does not allege what more would have been brought out on redirect concerning Bryant's credibility. (R Vol. 29, 2085, 2093-97, 2117, & 2124.)
>
> Although an evidentiary hearing was not granted on this claim, Richard Barlow testified concerning the importance of Michael Bryant's testimony in Claim I.A.2. Barlow's evidentiary hearing testimony is largely cumulative to his resentencing testimony. (EH, Vol. III, 176-189.)

(PCR 8/1109)

This Court addressed the facts surrounding this issue in Parker, 873 So.2d at 283 when it ruled on the trial's exclusion of Barlow's testimony his evaluation of Bryant's statements. That opinion found this testimony to be cumulative, something which would not have changed even though the State "opened the door" to this line of questioning. Any error was thus harmless.

Barlow was the former prosecutor who prosecuted Cave in his second penalty trial where he presented the testimony of Bryant who stated that Cave was the shooter. Lamos called him as a witness in this trial and tried to elicit his analysis of Bryant's credibility but was prohibited from doing so. [R. 29, 2060-2078] On cross, the State explored Barlow's reasoning in presenting Bryant. Although the State brought out Bryant's possible bias against Cave, it also elicited that Barlow believed Bryant (2085) as well as some of the reasons why, including that Bryant's beating by Cave supported his statements in Barlow's eyes [R. 29 2093-97). In his redirect, Lamos had Barlow reiterate that Bryant heard Cave admit that he shot Slater and heard nothing from Parker. [R. 29, 2117] "Q: He had no motive to lie against Mr. Cave? A: No acceptable, believable, rational motive." [R. 29, 2124] That was the state of the evidence when Lamos decided to not pursue the matter further.

The record clearly supports the trial court's finding that this issue was without merit. Lamos tried to go into this area but was precluded by the Court. However, the State did indeed go into it exhaustively, bringing out Barlow's belief in Bryant's credibility. Once again, the information was before the jury and Lamos did not need to do anything further. Parker has not shown how Lamos's performance was deficient, nor has he identified how the outcome of his trial would

have been altered if his attorney had replowed the field on re-direct. Under the Strickland standards, the trial court properly denied relief.

ISSUE IV

THE TRIAL COURT PROPERLY DENIED THE INEFFECTIVENESS CLAIM REGARDING THE IMPEACHMENT OF JOHNSON BY HIS COOPERATION AGREEMENT. (Restated)

In his next issue, Parker asserts that the trial court erred in denying his ineffectiveness claim for counsel's alleged failure to impeach Johnson with his plea agreement, specifically that he testify in accord with his grand jury testimony and prior statements to the police. He contends that the agreement given to the defense that Johnson was required to testify truthfully was materially different than that and Lamos should have focused on the requirement that Johnson remain consistent (presumably rather than truthful). Contrary to those assertions, there was competent, substantial evidence in the trial record and the evidentiary hearing supporting the court's denial of this claim. Since Parker failed to meet his burden under Strickland, the denial was appropriate.

As detailed above, the standard of review for ineffectiveness claims following an evidentiary hearing is *de novo,* with deference given the court's factual findings. Freeman, 858 So.2d 323. This Court will not substitute its judgement for

that of the trial court and the weight it gave to the evidence if its findings are supported by competent, substantial evidence. Arbelaez, 898 So.2d 32. See Reed, 875 So.2d 415; Riechmann, 777 So. 2d 342. A defendant must prove both deficient performance, by serious errors, by trial counsel and that it without it the result of the trial would have been different. Strickland, 466 U.S. 688-89. Valle, 778 So.2d 965. Judicial review must be highly deferential and evaluate counsel's conduct from his perspective at the time. Strickland, 466 U.S. at 689; Davis, 875 So.2d at 365. The defendant bears the burden of proving counsel's representation fell below an objective standard of reasonableness, was not the result of a strategic decision, and that actual, substantial prejudice resulted from the deficiency. See Strickland; Gamble, 877 So.2d 711. If the defense cannot demonstrate prejudice then a court need not determine if the performance was deficient. Maxwell, 490 So.2d 927. Reviewing courts must focus on what counsel did and what particular strategy he pursued. Wiggins, 539 U.S. 533; Williams, 529 U.S. 362.

The trial court detailed the portions of the record and the evidence presented at the hearing on this claim:

> Parker claims that counsel was ineffective for failing to investigate, depose, and prepare for the resentencing testimony of prosecution witness, codefendant Terry Johnson. Contrary to the allegation on page 39 of the amended motion, Johnson did not testify that Parker was the shooter. At resentencing Johnson testified that he saw Bush stab the victim but did not see whether Bush or Parker shot

the victim. (RH, Vol. 28, 1924-25, 1936, 1952, Vol. 33, 2472, 2574.) Johnson stated that Parker asked Cave for the gun and reached for the gun before the victim was shot. But Johnson did not actually see Parker with the gun. (RH, Vol. 28, 1925-26, Vol. 33, 2572-73.) In addition, Johnson's 1989 affidavit was read to the jury, where Johnson stated that Bush had the gun before the victim was shot, casting doubt on whether Parker was the shooter. (RH, Vol. 32, 2511.))

> Parker contends that in preparing for impeachment of Johnson, Lamos failed to:
> (a) obtain Johnson's clemency application;
> (b) obtain a copy of the written agreement between Johnson and the State that required Parker [sic] to testify "consistent with his grand jury testimony and initial statements to police";
> (c) discover whether the State had obtained an attorney for Johnson for clemency or other purposes;
> (d) impeach Johnson with his prior statements;
> (e) explore the issue of the prosecutors not believing Johnson after his first day of grand jury testimony and requiring him to execute a waiver of immunity before testifying the next day; and
> (f) object to former prosecutor, David Morgan, testifying that he used Johnson at Cave's second resentencing and bolstering Johnson's credibility by stating that Johnson passed two lie detector tests.

At the evidentiary hearing Parker did not present any competent evidence in support of subclaims (a), (b), (c) or (e). [fn 5]. And the resentencing record refutes the allegation in subclaim (f) where Morgan stated that Johnson did not testify at Cave's second resentencing, and where Morgan did not mention Johnson's lie detector tests. (RH Vol. 33, 2582-83.)

> Fn 5. For some subclaims Parker merely relied on the absence of material in Attorney Lamos' files to demonstrate inadequate resentencing investigation. However at the

> evidentiary hearing, Parker presented insufficient evidence to show that Parker obtained all available files from defense co-counsel, Frances Landry at Proskauer Rose. (EH, Vol. IV, 222-23, 226, 265, 429.) Further, it is undisputed that several boxes of unidentified defense files were destroyed in a hurricane. (EH, Vol. IV, 222-23, 429.) And Lamos' files were not entered into evidence.

As to subclaim (d), postconviction investigator Gent testified that Lamos could have investigated potential impeachment evidence of Johnson's 1982 statement to his mother that Cave was the shooter, Johnson's 1982 statement to police that Bush was the shooter, Johnson's statement at the initial 1982 interview that he had never been arrested, and information related to Johnson's first inconclusive polygraph. (EH, Vol. 3, 105, 108, 120-23, 157-73.) However, Parker presented no competent evidence in support of subclaim (d); and failed to demonstrate how this potential impeachment evidence would have changed the outcome of resentencing in light of Johnson's testimony that he did not know whether Bush or Parker was the shooter (consistent with Johnson's grand jury testimony), Michael Bryant's preserved testimony that Cave was the shooter, and Georgeann William's testimony that Parker confessed to being the shooter. (RH Vol. 27, 1760-61, Vol. 28, 1924-25, 1936, 1952, Vol. 29, 2131-42, Vol. 33, 2472, 2574; EH Defense/Johnson exhibit 2 34-37.)

Further there is ample evidence that Lamos had prepared to examine Johnson at Parker's resentencing. Lamos cross-examined Johnson on his agreement with the State to testify against Parker, his attitude toward testifying against Parker, his grand jury testimony, and his original statement to police. (R., Vol. 28, 1936-69.) In addition, Lamos impeached Johnson's disavowal of his 1989 affidavit through a handwriting expert who verified Johnson's signature on the affidavit and the affidavit was read to the jury. (R., Vol. 28, 1936-69; Vol. 32, 2480-2513.) It is clear that Lamos anticipated problems with Johnson's resentencing testimony, where at the evidentiary hearing Lamos testified that despite the State's invitation to depose Johnson, Lamos

> decided not to depose Johnson to prevent the State from learning of any problems with his testimony, which ultimately occurred when Johnson denied his signature on the 1989 affidavit in front of the jury. (EH, Vol. V, 422-25.)
>
> In addition, Johnson's limited evidentiary hearing testimony did not undermine the resentencing testimony and evidence elicited by Lamos, and would not change the outcome of resentencing in light of other evidence presented. (EH, Vol. 4, 301-319.) Consequently, Parker has failed to show that Lamos' preparation for Johnson's testimony was deficient, that Parker was prejudiced, or that Lamos' decision not to depose Johnson was unreasonable under the circumstances. Id. Thus, Parker has not met his burden to prove ineffective assistance of counsel as alleged in subclaims (a) through (f).

(PCR 8/1115-17)

The State memorialized its plea agreement with Johnson, filed that with the trial court, and provided the defense with a copy. (R. 5, 864-866) Johnson was eligible for his first parole hearing in 2007. The State "agreed" that it would inform the parole board of any cooperation, or lack thereof, by Johnson in Parker's re-trial. It made no promises other than that. (R. 28; 1903, 1946) No other written agreement between the State and Johnson existed. Lamos had this agreement and knew about it when Johnson took the stand.

At the evidentiary hearing Johnson testified that he never wished to participate in any of his co-defendants' trials; he testified in Parker's 2000 trial because he had a parole hearing pending and he believed it would be just one

question. (PCT 22/ 467-72, 486) At the 2000 trial Lamos cross-examined Johnson extensively when he testified. Lamos brought out that Johnson was subpoenaed by the State and met before the trial with the State Attorney who provided him with copies of his previous statements and transcripts. (R. 28, 1938-41) Johnson testified that the prosecution never asked him in 2000 about his affidavit, only the defense attorney kept asking him all kinds of questions. (PCT 22/476-486) Lamos questioned Johnson closely on whether the signatures on his original advice of rights form and on his 1989 affidavit were genuine. (R. 28, 1940-45) Obviously, Lamos had Johnson's prior statements in his possession and in the courtroom. Lamos brought out all the details of the State's meetings and discussions, including the peripheral ones with Johnson's classification officer, to show whatever pressure, influence, and/or promises the State exerted and made to ensure Johnson's testimony at the trial. Because of this extensive cross-examination, the jury was fully informed of Johnson's attitude about testifying (he was not excited about it) and what he expected to receive from the State because of it. (R. 28, 1946-51)

> Q: But you were led to believe after speaking with him that it would help if you gave testimony today by your classification?
> A: Yeah, it would help if he don't stand in my way of me getting out of prison, yeah, it would help."

Id. Additionally, Lamos questioned him about his grand jury testimony and his

original statement to the police. Lamos effectively did impeach Johnson with this plea agreement, highlighting the benefits Johnson might get if he cooperated with the police. Any questioning about an alleged requirement to remain consistent with his earlier statements rather than to testify truthfully would have elicited no further information; Johnson's motive to lie or to shade the evidence was clearly visible for the jury. Unfortunately for Parker, and this particular claim, Johnson's testimony at this trial was completely consistent with those previous accounts. (R. 28, 1966-70) Further, no evidence was presented indicating that Johnson would have testified differently from those earlier statements.

Lamos also deftly handled Johnson's disavowal of his 1989 affidavit which had cast some question on whether Parker was the shooter. Johnson denied that the signature on the affidavit, shown to him by Lamos during his cross examination, was in fact his. (R. 28, 1941-44) Lamos then sought out a handwriting expert and put her on during his case. She testified that the signature on the affidavit was indeed Johnson's and then read the affidavit for the jury. (R. 32, 2480-2513) The jury had the information in that affidavit, including any inconsistencies favorable to Parker, when it evaluated Johnson's testimony and deliberated on Parker's guilt or innocence.

Gent testified at the evidentiary hearing that Lamos's file was disorganized and partially destroyed from hurricane damage. (EH: 210) She verified that Lamos had in his file Johnson's deal agreement, 1989 affidavit, signature samples, letters from the State Attorney's office outlining the deal agreement. Those letters were essentially the same as the deal agreement. (PCT 21/289-90, 307) At the time of the penalty phase retrial, Lamos affirmed that he had all the original trial and post conviction materials for all the defendants as well as all the material from the New York law firm which had assisted Parker in his post-conviction litigation. He reviewed these files before the trial. Lamos testified that he turned over all of his files which were not previously destroyed. He estimated that 3 boxes of papers were destroyed by hurricane damage. (PCT 22/ 384-88, 412, 427) Lamos also testified that he deliberately did not depose Johnson prior to the trial for strategic reasons. He said that the State urged him to depose Johnson which made him suspicious that the State was unsure of what he would say. A deposition would give the State warning of any problems with his testimony. Lamos wanted any time bomb in Johnson's testimony to explode before the jury, which it did. (PCT 23/584-87) This strategy decision is firmly within trial counsel's permissible range of decision. Brown, 894 So. 2d at 147; Occhicone, 768 So. 2d at 1048. See Bolender, 503 So.2d at 1250; Stewart, 801 So.2d at 65. Parker failed to meet his burden under Strickland

and his contentions are refuted by the record. There was competent, substantial evidence supporting the trial court's denial of this claim.

ISSUE V

THERE WAS NO BRADY ERROR IN THE STATE ATTORNEY PROVIDING THE TERMS OF THE JOHNSON COOPERATION AGREEMENT SINCE IT WAS WITHOUT MERIT AND PROCEDURALLY BARRED. (Restated)

Parker next claims that the State failed to disclose exculpatory evidence to the defense in violation of Brady v. Maryland, 373 U.S. 83 (1963) when it did not provide a copy of the agreement it reached with Terry Johnson to secure his testimony. Parker alleges that the State deliberately withheld that actual cooperation agreement with Johnson which misrepresented the exact terms of the agreement. He argues that the trial court erred in denying this claim after the evidentiary hearing. As mentioned in the previous claim, the notice given to the defense said that Johnson had to testify truthfully while the agreement given to Johnson said that he must testify in accordance with his grand jury testimony and statements to the police. The trial court properly found this claim procedurally barred and without merit when it denied it.

Recently, in Pagan v. State, 2009 WL 3126337, 3 (Fla. Oct. 2009), this Court set forth the proof necessary to prove a Brady violation and the standard of review:

> Pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), the State is required to disclose material information within its possession or control that is favorable to the defense. See Mordenti v. State, 894 So.2d 161, 168 (Fla. 2004). To establish a Brady violation, the defendant has the burden to show (1) that favorable evidence-either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. See Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936 (1999); see also Way v. State, 760 So.2d 903, 910 (Fla.2000). To meet the materiality prong, the defendant must demonstrate a reasonable probability that had the suppressed evidence been disclosed the jury would have reached a different verdict. See Strickler, 527 U.S. at 289, 119 S.Ct. 1936. A reasonable probability is a probability sufficient to undermine confidence in the outcome. See Way, 760 So.2d at 913; see also Strickler, 527 U.S. at 290, 119 S.Ct. 1936. The remedy of retrial for the State's suppression of evidence favorable to the defense is available when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Strickler, 527 U.S. at 290, 119 S.Ct. 1936 (quoting Kyles v. Whitley, 514 U.S. 419, 435, 115 S.Ct. 1555 (1995)). Giving deference to the trial court on questions of fact, this Court reviews *de novo* the application of the law and independently reviews the cumulative effect of the suppressed evidence. See Mordenti, 894 So.2d at 169; Way, 760 So.2d at 913.

Pagan, 2009 WL 3126337, 3. Brady claims are mixed questions of law and fact so this Court applies a mixed standard of review, "defer[ring] to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but review[ing] de novo the application of those facts to the law." Lightbourne v. State, 841 So.2d 431, 437-38 (Fla.2003) (citing Stephens v. State, 748 So.2d 1028, 1031-32 (Fla.1999)); Johnson v. State, 921 So.2d 490, 507 (Fla. 2005). See Stephens v. State, 748 So.2d 1028, 1031-32 (Fla. 1999); Rogers v.

State, 782 So.2d 373 (Fla. 2001); Way v. State, 760 So.2d 903 (Fla. 2000); Jones v. State, 709 So.2d 512, 519 (Fla. 1998); Hegwood v. State, 575 So.2d 170, 172 (Fla. 1991); Strickler v. Greene, 527 U.S. 263, 280-82 (1999); High v. Head, 209 F.3d 1257, 1265 (11th Cir. 2000); U.S. v. Starrett, 55 F.3d 1525, 1555 (11th Cir. 1995).

"[F]avorable evidence is material and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 435 (1995). "As noted by the United States Supreme Court, '[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.'" Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988) (quoting United States v. Agurs, 427 U.S. 97, 109-10 (1976)). Evidence has not been suppressed, and therefore, "'[t]here is no Brady violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence.'" Freeman v. State, 761 So. 2d 1055, 1061-62 (Fla. 2000) (quoting Provenzano v, State, 616 So. 2d 428, 430 (Fla. 1993). Prejudice is shown by the suppression of exculpatory, material evidence, that is where "there is a reasonable probability that the result of the trial

would have been different if the suppressed documents had been disclosed to the defense." Stickler, 119 S. Ct. at 1952. "Reasonable probability" is "a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985) (plurality); Kyles, 514 U.S. at 435. When pleading a Brady claim, a petitioner must show that counsel did not possess the evidence and could not have obtained it with due diligence, and the prosecution suppressed the favorable, material evidence.

In order to satisfy prejudice under Brady, a defendant must show the evidence was exculpatory and material. Way v. State, 630 So.2d 177, 178 (Fla. 1993). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id. Prejudice is measured by determining whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 435 (1995). "As noted by the United States Supreme Court, '[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.'"

Gorham v. State, 521So.2d 1067, 1069 (Fla. 1988) (quoting U.S. v. Agurs, 427 U.S. 97, 109-10 (1976)). Parker did not meet any of the three prongs necessary to establish a Brady violation.

The trial court found:

> Parker claims that the State failed to disclose the terms of Johnson's 1999 witness agreement which required Johnson to testify consistent with his 1982 and 1983 testimony implicating Parker as the shooter. And Parker contends that the State was aware of Johnson's 1989 "recantation" affidavit indicating that Parker was not the shooter but at the 2000 resentencing hearing the State allowed Johnson to falsely deny his signature on the affidavit. In his motion, Parker does not identify the 1982 and 1983 testimony, or explain the specifics of the "recantation."
>
> Further, Parker did not allege, and this court did not admit at the evidentiary hearing, any newly discovered evidence of "recantation," suppression, or false testimony that was not available at the time of the 2000 resentencing hearing. Consequently, the Brady and Giglio violations could have been raised on the resentencing appeal, and thus, are procedurally barred on collateral review. Rose v. State, 675 So. 2d 567, 569 (Fla. 1996) n.1.

(PCR 8/1122-23)

The trial court properly found the matter procedurally barred. Parker should have raised this issue on direct appeal. This Court has long held that proceedings under rule 3.850 are not to be used as a second appeal; nor is it appropriate to use a different argument to relitigate the same issue. Likewise, issues that could have been raised on direct appeal, but were not, are not cognizable through collateral attack. Parker v. State, 904 So. 2d 370 (Fla. 2005); Torres-Arboleda v. Dugger, 636

So. 2d 1321 (Fla. 1994).

The State actually did file a statement or notice detailing its agreement with Johnson which specified that he was to testify truthfully in exchange for the State informing the parole board of his cooperation or lack thereof. ®. 5, 864-866) Parker contends that the State violated Brady by this procedure since the exact wording of the notice differed from the actual agreement. Obviously the State believed that Johnson was truthful in his police statements and grand jury testimony since they decided to use him as a witness against the more culpable defendants. The prosecutor's statement at trial bears this out. Parker did not show that "material" evidence was withheld. The record clearly shows both the nature of the agreement as well as the fallacy of this argument. In fact, Lamos did use the agreement to impeach Johnson as shown by multiple questions during his cross examination. [R. 28, 1946-70) At the evidentiary hearing Johnson testified that the State Attorney's office informed him that it would not oppose his parole if he testified about who was in the back seat with him. (PCT 22/469) The only agreement the State gave him was that it would not show up at his parole hearing. (PCT 22/486-87) Parker has failed to show how the agreement the State provided differed substantially from that to which Johnson testified to or how it would have provided any additional impeachment. He failed to demonstrate the necessary prejudice, that if Lamos had

cross examined Johnson using the words “in accord with the sworn testimony...” rather than “truthfully” the trial result would have differed in any way. Parker did not meet his burden under Brady and this Court should uphold the trial court’s denial of this claim.

ISSUE VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING ANDERSON’S EXPERT TESTIMONY. (Restated)

In Parker’s final issue he claims that the trial court erred in ruling that expert testimony was not appropriate on the issue of attorney ineffectiveness. He argues that the court misapplied Casey v. State, 969 So.2d 1055 (Fla. 4th DCA 2007), review denied, 984 So.2d 1250 (Fla.2008) and Anderson should have been allowed to give his opinion on Lamos’s performance. The State disagrees. The trial court did not abuse its discretion in limiting Anderson’s testimony. Relief should be denied.

"The standard applicable to a trial court's ruling on the admission of evidence is whether there has been an abuse of discretion. See Zack v. State, 911 So.2d 1190 (Fla. 2005). The trial court's ruling will not be disturbed on appeal absent a clear showing of abuse. See Boyd v. State, 910 So.2d 167 (Fla. 2005)." Schoenwetter v. State, 931 So.2d 857, 869 (Fla. 2006). See Dessaure v. State, 891 So.2d 455, 466

(Fla. 2004); Ray v. State, 755 So. 2d 604 (Fla. 2000; Cole v. State, 701 So.2d 845 (Fla. 1997). Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable. Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), *citing* Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

Post-conviction counsel Barone put Anderson on the stand and went through all the files and records he reviewed in the Parker case. She then asked him the following question: "Do you have an opinion as far as Mr. Lamos' conduct in this 2000 resentencing trial?" (PCT 23/500) It was that question to which the State objected, citing Casey. In arguing the objection, Barone also argued that Anderson should be allowed to testify as to whether a particular strategy or tactic followed by Lamos was reasonable as well. (PCT 23/502) The court then ruled:

> So I think it would permit you to question this witness as to what a reasonable investigation might have been, but I don't think you can ask questions as to whether or not Mr. Lamos rendered effective or ineffective assistance.
> ...
> I don't know what you examination entails, but I'm sustaining objections to any questions that ask this witness to comment on the impermissible or unreasonableness of any tactical decision made by Mr. Lamos.

(PCT 23/502, 504) The trial court did not abuse its discretion in its ruling or its interpretation of Casey.

In Casey the defense post-conviction attorney wished to call an attorney as an expert witness to offer an opinion on whether the trial attorney rendered effective assistance, claiming that testimony was necessary to prove that the attorney's performance fell below that of a competent attorney. Casey, 969 So. 2d at 1057. Citing Provenzano v. Singletary, 148 F.3d 1327, 1331-32 (11th Cir.1998), the Casey court held that the question of whether or not an attorney is ineffective or reasonable in his decisions if a pure matter of law and not open to expert opinion. "There is no due process or other violation in the trial court's excluding expert testimony in the post-conviction evidentiary hearing." Casey, 969 So. 2d 1058. As in Casey, Parker wished to present evidence into the "reasonableness" component under Strickland. The Casey court said that "whether the attorney made a strategic decision (meaning, understood the possible choices and purposefully took one as opposed to the other) is the factual portion, and the determination of whether that strategic decision was reasonable is the legal portion. ... Testimony is not required as to whether the actions taken were "reasonable," as this is a matter of law to be made by the judge after consideration of the factual testimony." Id. The Casey court, and the trial court here, agreed that an expert attorney could give an opinion on what a reasonable investigation might entail. Anderson did indeed testify on various investigative inquiries and preparation were reasonable in this case given its

history. There was no abuse of discretion.

As to Parker's final point that the State was allowed in the late 1980's to present the trial prosecutors as witnesses as to the original trial counsel's performance, the standard of review for the admissibility of evidence is still abuse of discretion. The fact that one court in a particular situation admitted evidence does not mean another court may not reach a contrary reasonable decision in another situation. The law, both federal and state, interpreting Strickland and its standards have evolved over the last twenty-five years. All of the cases relied on by the Casey court other than Stirckland came about in the last ten or so years, including Asay v. State, 769 So.2d 974 (Fla. 2000) (holding that under Florida law that both the performance and prejudice components of an ineffectiveness claim are mixed questions of law and fact.) and Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (discussing the focus on whether counsel's actions or strategy was reasonable.). In the present case, the defense attempted to introduce evidence specifically prohibited by an appellate court in its own jurisdiction. The defense also did not attempt to proffer the testimony so this Court is left to speculate on what Anderson may have said. Even if he had been allowed to render an expert opinion on Lamos's competence, effectiveness, and trial strategies, that would not have discharged the trial court's independent duty to assess and to

evaluate whether Parker had met his burden under Strickland to prove ineffectiveness. Here the trial court did indeed make such a determination and found that Parker had failed to meet that burden. Anderson's testimony would not have altered the record or the other evidence presented at the hearing on the post-conviction motion upon which the trial court relied in reaching its conclusions.

Parker also argues that this trial court was bound by the evidentiary ruling of a previous trial court twenty years before. That is not law of the case. These were different evidentiary hearings involving different witnesses and issues. The law of this case would involve questions of law actually decided upon on its merits, like the suppression of Parker's May 5 statement to the police.

> Under the law of the case doctrine, a trial court is bound to follow prior rulings of the appellate court as long as the facts on which such decision are based continue to be the facts of the case. *See McGregor*, 162 So. at 327. Moreover, even as to those issues actually decided, the law of the case doctrine is more flexible than res judicata in that it also provides that an appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a "manifest injustice." *Strazzulla*, 177 So.2d at 5.

Florida Dept. of Transp. v. Juliano, 801 So.2d 101, 106 (Fla. 2001). The facts here are different from those in the prior hearing. Furthermore, the law has changed over the years on this issue. Without further discussion, and presumably using the abuse of discretion standard of review, this Court stated: "we find no merit in Parker's fourth claim that the trial court improperly admitted expert testimony concerning

the effectiveness of his trial counsel." Parker, 542 So. 2d at 357. That statement did not address whether expert testimony would forever be appropriate on these Strickland issues no matter the evolution in the law, only that that prior trial court did not abuse its discretion at that point in time. This trial court was not bound by the evidentiary decisions on testimony made by another trial court in the first post conviction proceedings nor did not abuse its discretion in limiting Anderson's testimony given the current law and the reasons presented for that evidence at the most recent hearing. Relief should be denied.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Baya Harrison, III, Esq., 310 North Jefferson St., Monticello, FL 32344 this 4th day of January, 2010.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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