IN THE SUPREME COURT OF FLORIDA

DAVID JOSEPH PITTMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC08-146
L.T. No. CF90-2242A1-XX
DEATH PENALTY CASE

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

References to the direct appeal record, including the trial transcripts [volumes 1-24] and pleadings and exhibits [volumes 24-27] will be designated by the record volume number and appropriate page number (DA-R/page #). References to the instant post-conviction record on appeal will be designated as (PCR Vol. #/page #). References to the post-conviction "Evidence" will be designated as (PCR Evid. V#/page #).

PITTMAN'S 17-PAGE "INTRODUCTION" IS, INSTEAD, AN UNAUTHORIZED RE-ARGUMENT AND SHOULD BE STRICKEN

Under the guise of an "Introduction," the Appellant/Defendant, David Pittman, has, instead, set forth a 17-page convoluted defense account which is replete with impermissible argument, reasserts distorted defense conclusions, and completely ignores the trial court's comprehensive 100+ page order denying post-conviction relief. The State does not accept Pittman's skewed "Introduction," emphatically disputes Pittman's distorted and self-serving conclusions of fact and law, and respectfully submits that Pittman's "Introduction" is, in reality, an unauthorized and impermissible re-argument and should be stricken. See, Rule 9.210(b), Florida Rules of Appellate Procedure.

STATEMENT OF THE CASE AND FACTS

Trial and Direct Appeal Proceedings

The Appellant/Defendant, David Pittman, was charged in a seven count indictment with the first degree murders of Bonnie Knowles, Barbara Knowles, and Clarence Knowles; Pittman was also charged with two counts of arson, with burglary and with grand theft. (DA-R/4636-4640) On April 19, 1991, Pittman's jury trial resulted in guilty verdicts on six of the seven counts – three counts of first degree murder, the two counts of arson, and the one count of grand theft. (DA-R/5108-5114). Following the penalty phase, the jury returned death recommendations by a vote of 9 - 3. On direct appeal, this Court affirmed Pittman's multiple convictions and sentences. Pittman v. State, 646 So.2d 167 (Fla. 1994). Pittman filed a Petition for Writ of Certiorari, which was denied by the U.S. Supreme Court on May 15, 1995. Pittman v. Florida, 514 U.S. 1119, 115 S.Ct. 1982 (1995). On direct appeal, Pittman, 646 So. 2d at 168-70, this Court set forth the following summary of the facts:

> The record reflects that, shortly after 3 a.m. on May 15, 1990, a newspaper deliveryman in Mulberry, Florida, reported to law enforcement authorities that he had just seen a burst of flame on the horizon. When the authorities investigated they found the home of Clarence and Barbara Knowles fully engulfed in fire. After the fire was extinguished, the police entered the house and discovered the bodies of Clarence and Barbara, as well as the body of their twenty-year-old daughter, Bonnie. Although all of the bodies were burned in the fire, a medical examiner determined that the cause of death in each instance was massive bleeding from multiple stab wounds. In addition, the medical examiner testified that

Bonnie Knowles' throat had been cut. A subsequent investigation revealed that the fire was the result of arson, that the phone line to the house had been cut, and that Bonnie Knowles' brown Toyota was missing.

A construction worker testified that, when he arrived at work at 6:30 a.m. on the morning of the fire, he noticed a brown Toyota in a ditch on the side of the road near his job site. Other testimony revealed that the location of the Toyota was about one-half mile from the Knowles residence. The worker also observed a homemade wrecker, which he later identified as belonging to Pittman, pull up to the Toyota and, shortly thereafter, saw a cloud of smoke coming from that direction. Another witness who lived near the construction site also saw the smoke and observed a man running away from a burning car. This witness later identified Pittman from a photo-pack as the man she saw that morning. Investigators determined that the car fire, like the earlier house fire, was the work of an arsonist.

At the time of the murders, another of the Knowles' daughters, Marie, was in the process of divorcing Pittman. The divorce was not amicable and the State introduced testimony that Pittman had made several threats against Marie and her family. The State also produced evidence that Pittman had recently learned that Bonnie Knowles had tried to press criminal charges against him for an alleged rape that had occurred five years earlier.

Carl Hughes, a jailhouse informant, testified that Pittman told him that he had gone to the Knowles' house on the evening of the murders to speak with Bonnie Knowles about the problems he was having with her family. Bonnie let Pittman in the house and, when she refused his sexual advances, he killed her to stop her cries for help. Pittman then admitted to killing Barbara Knowles in the hallway outside Bonnie's bedroom and to killing Clarence in the living room as Clarence tried to use the phone. Pittman also told Hughes that he burned the house, stole the Toyota and abandoned it on the side of the road, and later returned to the Toyota and burned it as well.

The record further reflects that Pittman feared that the police suspected his involvement in the murders, and, at the prompting of his mother, Pittman turned himself in

to the police on the day after the murders.

In response to the prosecution's case, the defense presented testimony critical of the police investigation and attempted to establish that Marie, Pittman's former wife, and her new husband had a motive to commit the murders. Pittman testified in his own defense and stated that he had nothing to do with the crimes charged. He also denied that he had told anyone he had committed the murders. The jury found Pittman guilty of three counts of first-degree murder, two counts of arson, and one count of grand theft, and found him not guilty of burglary.

In the penalty phase, the State established that Pittman was convicted of aggravated assault in 1985. In mitigation, Pittman presented the testimony of his mother that he was a difficult child to deal with and that she had disciplined him severely. A clinical psychologist testified that Pittman's father was a paranoid schizophrenic; that as a child Pittman suffered from a severe attention deficit disorder with hyperactivity; and that Pittman has organic personality syndrome, which causes paranoia and an unstable mood. After hearing this testimony, the jury recommended the death penalty for each murder conviction by a vote of 9 to 3. In his sentencing order, the judge found two aggravating circumstances for each murder: (1) previous conviction of another capital or violent felony, and (2) the murders were heinous, atrocious, or cruel. [n1] The judge then expressly rejected the mitigating factors of Pittman's being under the influence of extreme mental and emotional disturbance and concluded that the aggravating factors outweighed the proven mitigating factors. [n2] The judge imposed the death penalty for each murder. . .

Pittman, 646 So. 2d at 169-170

Post-Conviction Proceedings

Pittman filed his initial motion to vacate on March 24, 1997. (PCR V4/553-592) The motion was amended several times.

A [second] Huff hearing/case management conference was held on January 20, 2006, before a successor judge, the Honorable Harvey

Kornstein. (PCR V22/3353-3406) The trial court granted an evidentiary hearing on the following post-conviction claims: #1 [Brady/Giglio & "Newly Discovered" Evidence]; #2 [Brady/Giglio/IAC-Guilt Phase]; #3 [IAC-Guilt Phase]; and #7 [IAC-Penalty/Sentencing]. (PCR V22/3408-3409). Evidentiary hearings were conducted May 8 - 11, 2006 on claims #1, #2, #3, and #7. (PCR V22/3445-3470)[1]

The trial court subsequently conducted evidentiary hearings on two additional sub-claims.

On November 5, 2007, the trial court entered a 113-page written order denying post-conviction relief. (PCR V34/5313-5425). The trial court's written order of November 5, 2007, (PCR V34/5313-5425), summarized the testimony presented at the evidentiary hearings as follows:

> **Testimony of Carlos Battles from Transcript of Proceedings Volume 1, pages 12 —34, transcript of evidentiary hearing on May 8, 2006.**
>
> The defense called Carlos Battles, an information

1 On February 15, 2007, a limited evidentiary hearing was held on the prosecutor's handwritten notes of his pre-trial interview with Barbara Marie Pridgen [Marie], Pittman's ex-wife. (PCR V29/4528-4597, V30/4598-4647). On March 8, 2007, Pittman filed an Amendment to Second Amended Motion to Vacate, alleging a lethal injection claim based on the December, 2006 execution of Angel Diaz. (PCR V30/4695-4716) A case management hearing was held on April 23, 2007; and the trial court summarily denied this claim in its final order of November 5, 2007. (PCR V34/5313-5425). On June 1, 2007, Pittman filed a Second Amendment to Second Amended Motion to Vacate, this time seeking to add a hearsay witness, Chastity Eagan, as alleged "newly discovered" evidence. (PCR V32/4939-4947) An evidentiary hearing was held on July 27, 2007, concerning Pittman's alleged "newly discovered" hearsay witness--Chastity Eagan. (PCR V32/4982-5055).

specialist with the 1CT group, as a witness. Mr. Battles was previously employed as a child protective investigator with the Department of Children and Families, and in that capacity he was involved in an investigation of a child named Cindy Pittman. Defense counsel showed Mr. Battles Defense Exhibit 1 which was part of a case file Mr. Battles compiled of that investigation. The top of the file indicated a closure date of June 18, 1998. Mr. Battles testified that the mother told him that Cindy may have witnessed a murder. Mr. Battles read the following from his report: "Mom states child Cindy needs counseling for the sexual abuse and states the child witnessed her grandmother being killed by her brother-in-law." See page 16 transcript of evidentiary hearing held on May 8, 2006. Mr. Battles also read the following from an assessment he prepared: "Sex abuse counseling for Cindy. Child also witnessed her uncle kill her grandmother." See page 18 transcript of evidentiary hearing held on May 8, 2006. The Court admitted Defense Exhibit I into evidence over the objection of the State that the exhibit was a very thick report that contained many pages that were irrelevant to the case. The Court agreed with the defense that it was best to keep the exhibit together for completeness but advised the parties that the focus would be on the two portions identified by the witness. After looking at the records Mr. Battles agreed that Cindy would have been 4 years old at the time of the incident. Mr. Battles testified that he did not know if in fact Cindy had seen a murder, and he did not talk to her about it because it was not part of his investigation. In the report five children are mentioned along with the parents Chalmes and Barbara Pridgen. Mr. Battles identified Barbara Pridgen as the mother of the children.

Testimony of Thomas W. Cosper from Transcript Of Proceedings Volume I, pages 34 - 95, transcript of evidentiary hearing on May 8, 2006.

The defense called Thomas W. Cosper, a truck dispatcher for Laser Spot Truck Yard Management Company, as a witness. Mr. Cosper testified that he was assigned as a homicide detective for the Polk County Sheriff's Office in 1990 and 1991 and became involved in the investigation of the David Pittman case. Mr. Cosper testified that he had been contacted about whether or not he had retained any notes about the Pittman case and he had sent the notes he had to Mr. Bergdoll. The defense handed a letter, marked for identification as Defense

Exhibit 2, to Mr. Cosper. The letter was dated July 12, 2001 from Mr. Cosper to Mr. Bergdoll, and it indicated that Mr. Cosper was providing the material he had found on the matter. Mr. Cosper also identified and briefly answered questions about the following defense exhibits when they were marked for identification:

Defense Exhibit 3 — An interview of David Pounds bearing a date of June 19, 1990 and a time of 9:07 a.m.

Defense Exhibit 4 — An interview of David Pounds with a date of June 25, 1990.

Defense Exhibit 5 — An interview of Elton Roger Ard at the Central Florida Reception Center in Orlando on June 28, 1990.

Defense Exhibit 6 — A deposition of Mr. Cosper taken on October 3, 1990.

Defense Exhibit 7 — A phone message to Mr. Cosper from Mr. Pounds with a date of June 15.

Defense Exhibit 8 - A report from the Polk County Sheriff's Office initiated on October 4, 1990 showing the name of Carl Hughes on page 1. There was reference to an incident where Mr. Hughes was allegedly cut or received some sort of injury from Mr. Pittman. The report indicated that the incident took place on June 27th at 4:30.

Defense Exhibit 9 - A cover sheet and three page handwritten letter from Mr. Pickard to Mr. Cosper regarding Mr. Hughes and his involvement in the Pittman case. Mr. Cosper said he did not remember it.

Defense Exhibit 10 - A need sheets from Mr. Pickard regarding certain items he would need. There were four of them dated July 2, 1990; July 24, 1990; October 1, 1990; and January 22, 1991. Mr. Cosper said that check marks next to some items on the sheet indicated that he had accomplished that task. On one of the need sheets there was a reference to an individual named Mr. Smith. Mr. Smith had indicated that he recognized the Defendant as the same person he had seen two or three weeks previously at a used car lot.

Defense Exhibit 11 - A notepad of an interview of Mr. Pounds on June 4, 1990. Mr. Battles [sic] testified that he did not remember what relationship David Pounds had to the case.

Defense Exhibit 12 - An interview in Mr. Cosper's handwriting of Eugene Pittman taken on May 30, 1990 at 1300 hours. The Exhibit had SAO-Bartow on it, and Mr. Cosper was asked what that meant. Mr. Cosper testified that it could mean the statement was taken at the State attorney's office in Bartow, or that Mr. Pickard took the

statement. Mr. Cosper said he did not recall if the interview was pursuant to a State Attorney subpoena. Mr. Cosper said he did not remember sitting in on the interview. Mr. Cosper said that these were his notes. He did not know if he asked the questions or if Mr. Pickard was there and asked the questions.

Defense Exhibit 13 — An interview of Barbara Marie Pittman on May 31, 1990. Mr. Cosper testified that the notes were in his handwriting.

Defense Exhibit 14 - An interview of Carl Hughes on June 26, 1990. There was a time marked on the notes indicating that the interview took place at 10:10. Mr. Cosper testified that he did not have any recollection of the interview.

Defense Exhibit 15 - An interview of Carl Hughes on July 6, 1990 at 9:20 a.m. Mr. Cosper agreed that there was a notation on the note that appeared to say "real off on time of occurrence." Mr. Cosper said he did not have any recollection of what that was about.

Mr. Cosper said he did not have any recollection of whether or not the interview was written up in a report, but it should have been.

Defense Exhibit 16 - A subpoena to Mr. Cosper to appear before the grand jury. The subpoena indicated it was on July 12, 1990.

Defense Exhibit 17 - A police report from Mr. Cosper concerning David Pittman and David Pounds being confined in a cell together which indicated that it was prepared on April 17, 1991. Mr. Cosper acknowledged that included in the report are records from the jail showing the cell location of the inmates at the jail during the period of May 18 — 21, 1990. Mr. Cosper testified that he did not have any recollection of why he would be getting that information.

Defense Exhibit 18 - A letter from Carl Hughes to Mr. Cosper. Mr. Cosper testified that he did not recall the letter. Mr. Cosper agreed that it was a lengthy letter with a lot of information regarding Mr. Hughes's contact with Mr. Pittman. The letter talked about FDLE Agent Randy Dey, David Pittman, and Mr. Hughes's wife Kathy.

Defense Exhibit 19 - A transcript of a taped interview from Carl Hughes given to him 10:37 a.m. on September 11, 1990.

Defense Exhibit 20 - Two or three pages from a written report of a June 26, 1990 interview of Carl Hughes.

Defense Exhibit 21 - A typed transcript of a taped interview of David Alan Pounds on June 4, 1990. Mr. Cosper testified that he did not have any independent recollection of the interview.

Mr. Cosper testified that he did not remember if he talked to any of the other jail inmates that either Mr. Pounds or Mr. Hughes suggested that he talk to such as Lamar Pins. On cross-examination, Mr. Cosper testified that he was the lead investigator on the case and had been in law enforcement for twenty eight years at the time of the investigation. Mr. Cosper testified that the notes he takes are a memory jogger and not verbatim. Mr. Cosper testified that he interviewed Barbara Marie Pittman, Cindy's mother who was the Defendant's wife at the time. Mr. Cosper testified that Barbara Marie Pittman never told him that Cindy had witnessed the murders. He had never heard that information until defense counsel mentioned it during an earlier interview.

The Court expressed concern that it would not be able to read and interpret the notes for consistency and relevancy. Mr. Cosper was not able to provide any information to explain his handwritten notes. He was asked by defense counsel if going through the notes line by line would jog his memory, and he answered that it wouldn't. Mr. Cosper testified that he had not had contact with the report for 16 years, and it was unlikely he could say what the notes meant. Mr. Cosper also testified that if somebody said to him that it looked like his notes were saying so and so, he would not be able confirm or deny that by looking at the notes.

Testimony of Kathleen Anders from Transcript Of Proceedings, Volume 1, pages 95—107, transcript of evidentiary hearing on May 8, 2006.

The defense called Kathleen Anders as a witness. Ms. Anders testified that she was from Nashville, Tennessee, and she was the ex-wife of Carl Hughes. Ms. Anders testified that she got married to Carl Hughes around 1980 and divorced in 1994. Defense counsel asked Ms. Anders what information was conveyed by Mr. Hughes to her regarding David Pittman and himself. Ms. Anders responded: "The purpose of the phone call was to — he was in need of some money and he wanted me to give some money to a friend, and I didn't have it, and he became very angry and told me that he was trying to keep me from being arrested along with him and that he had been asked

by the FDLE to obtain information regarding this case that had been in the newspapers, which, in fact, was Mr. Pittman's case." See page 98 transcript of evidentiary hearing. Ms. Anders testified that Mr. Hughes told her that the FDLE had her and the house under surveillance, and they were watching her come and go. Ms. Anders testified that Mr. Hughes told her that what he needed to do was necessary to protect her, and he was told to gather information for FDLE by befriending Mr. Pittman while they were both incarcerated. Ms. Anders said she had a constant connection with FDLE agent Randy Dey who was involved deeply in her husband's case. Ms. Anders asked Mr. Dey about being under surveillance, and he told her it was mainly to watch her husband's comings goings. She testified that her husband was always concerned about how much time he would have to spend in jail, and he related to her that if he did certain things for them that it could possibly lower his time in jail. On cross-examination, Ms. Anders testified that the local charges her ex-husband had involving HUD were being prosecuted by Mr. Bergdoll from the State Attorney's office and were being investigated by FDLE agent, Randy Dey. On redirect examination, Ms. Anders testified that Mr. Bergdoll asked her to come in, and she was asked questions about how she paid the rent and other financial things. She testified that she was given a polygraph test, and it was very frightening. Ms. Anders testified that Carl Hughes told her that he had direct contact with Mr. Dey on occasion, but she did not know how he did it.

Testimony of Dennis Gerald Waters from Transcript Of Proceedings Volume 1, pages 107—123, transcript of evidentiary hearing on May 8, 2006.

The defense called Dennis Gerald Waters, an employee of Mosaic Chemical Plant in Riverview, Florida as a witness. Mr. Waters said that he remembered testifying at Mr. Pittman's trial in 1991 about a vehicle on the side of the road and a wrecker he had seen. Mr. Waters testified that he was about 50 percent sure the wrecker he had seen on the side of the road was the wrecker he saw reassembled at Bob Barker's lot. Mr. Waters was concerned that his testimony at trial had not shown the doubt that he had that the wrecker at Bob Barker's lot was the same wrecker he had seen on Prairie Mine Road. Mr. Waters was asked to recall his testimony at a deposition taken by defense attorney, Mr. Norgard on December 27, 1990. At the deposition, he told Mr. Norgard the wrecker he had seen looked a lot like a

homemade wrecker that he had seen at Robert Barker's place.

Testimony of James Troup from Transcript Of Proceedings Volume I, pages 123-128, transcript of evidentiary hearing on May 8, 2006.

The defense called Mr. James Troup as a witness. Mr. Troup testified at Mr. Pittman's trial. Mr. Troup was asked about his testimony in the case and to describe for the court today what he had observed about a vehicle on Prairie Mine Road back in a morning in 1990. Mr. Troup answered: "Okay. I was on my way to work and there was a car sitting on the side of the road kind of at an angle slanted down toward the ditch, and I noticed a glow in the back window. It looked like a little import station wagon is what I remember it looking like. And the glow was shining through the back window, and so I pulled over to see if I could - if there was anyone inside or if I could help or whatever was there." See pages 125-126, transcript of evidentiary hearing Volume I on May 8, 2006. Mr. Troup testified that he did not see any smoke coming out of the vehicle, or anybody around the vehicle, or running away from the vehicle. Mr. Troup testified that when he looked inside the vehicle he could see the car was filling up with smoke. He shouted to see if anybody was in there and got no response. He thought he might be able to put out the fire, but he was not able to. Mr. Troup testified that he did not see a wrecker in the neighborhood. Mr. Troup said he called his office and told them to call the fire department. He did not see anybody in danger and left to go to work. On cross-examination, Mr. Troup agreed with the State that his testimony today was pretty much the same testimony he had given at trial.

Testimony of Tillie Amos Woody from Transcript Of Proceedings Volume I, pages 128—140, transcript of evidentiary hearing on May 8, 2006.

The defense called Ms. Tillie Amos Woody, a retired teacher and employee of the Polk County School Board, as a witness. She testified that she remembered having David Pittman as a student for sixth, seventh, and eighth grade at the Mulberry Middle School. She testified that the students in her classroom were classified as educable mentally handicapped (EMH). She testified that David Pittman was on the low elementary level of being in the

EMH class. She testified that his behavior in the classroom was average, and he was not impulsive. He did not pick on other kids, and he did not really cause problems for her. Ms. Woody was asked if anybody came and talked to her about David Pittman in 1990. She testified that somebody talked to her. She did not know who that person was, and she was not asked to come to testify for David Pittman. Ms. Woody said she would have come to testify on David's behalf in 1990 or 1991, if she had been asked to do so.

Testimony of Robert Barker from Transcript Of Proceedings Volume II, pages 147—154, transcript of evidentiary hearing on May 9, 2006.

The defense called Robert Wayne Barker as a witness. Mr. Barker testified that he now lives in North Fort Myers, and he left Polk County in about 1989 or 1990. Mr. Barker testified that when David Pittman was a kid, he stayed at a junkyard Mr. Barker owned more than he did anywhere else. He testified that he first met Mr. Pittman when Mr. Pittman was around 14 years old, and that he ultimately became one of his employees. He was asked if David ever used any intoxicants when he was working with him, and he said that Mr. Pittman huffed a lot of gas and drank some gas with milk. He testified that he taught Mr. Pittman things about fixing cars. He testified that David still came around the junkyard when he got in his 20s. He was asked if Mr. Pittman was using drugs in the few months preceding his being charged with the crimes, and he testified that he saw him using some crack cocaine.

Testimony of Dr. Joseph C. Wu, M. D., from Transcript Of Proceedings Volume II, pages 154-222 transcript of evidentiary hearing on May 9, 2006.

The defense called Dr. Joseph C. Wu, M.D., as a witness. He testified that his area of specialty is in the area of PET scan imaging of the brain in neuropsychiatric disorders. He currently practices at the University of California Irvine College of Medicine Brain Imaging Center, where he is the clinical director for the UCI Brain Imaging Center.

Dr. Wu testified that a PET scan is a corroborative medical test that can help provide evidence to strengthen a physician's clinical impression that someone has organic brain damage and is a piece of the puzzle in

terms of providing testing results that could either confirm or be inconsistent with brain damage.

Dr. Wu was asked about the PET scan of David Pittman. He testified that it took place at Advanced Nuclear Imaging in Orlando, Florida, and he was present to oversee the testing. Defense Exhibit 23 was marked for identification. Dr. Wu testified that these were the type of images produced during Mr. Pittman's scan and consisted of sagittal, cornoal, and transaxial images of Mr. Pittman. Defense Exhibit 23 was admitted by the Court into evidence without objection from the State. The defense asked Dr. Wu if he formed any opinions after looking at Mr. Pittman's images regarding whether he has any brain abnormalities. Dr. Wu answered: "Yes. In my opinion, Mr. Pittman's PET scans show abnormalities in the pattern of distribution of glucose. Specifically, there are abnormalities in a pattern of distribution in the front versus the back of the head." See page 184, transcript of evidentiary hearing.

Dr. Wu testified that the difference in terms of quantitative value between the front and the back was approximately 25 percent higher in the back, which he described as a significant difference. Dr. Wu testified that Mr. Pittman's PET scan was consistent with someone who had a history of traumatic brain injury. Dr. Wu notes that the PET scan abnormalities he saw are consistent with brain damage and the correlation found by Dr. Dee between a clinical history of brain injury and neuropsychological testing deficits. Dr. Wu also testified that Dr. Dee noted that the verbal IQ was lower than performance IQ, which is consistent with left hemisphere damage. The PET scan shows that the left part of the brain is asymmetrically lower that the right. Dr. Wu testified that PET scanning does not tell you the cause of brain damage, but the PET scan abnormality was consistent with head trauma, consistent with neuropsychological testing, and consistent with Mr. Pittman's family history of mental illness.

Dr. Wu was asked about Defense Exhibit 23 which was a PET Scan taken of Mr. Pittman on August 22, 2002, and he agreed with the State that there was no PET scan of Mr. Pittman at the time the offenses occurred in May of 1990. Dr. Wu testified that there was literature indicating that there is a decrease in frontal lobe activity as people age, but it was typically not to this degree in someone of Mr. Pittman's age. Dr. Wu said he

did not give Mr. Pittman any psychological tests, or an MRI, or take his medical history. Dr. Wu said that the frontal lobe could affect a person's ability to regulate their impulses or their judgment and long-term goal planning. Dr. Wu agreed that there is no way to say that Mr. Pittman committed the murders because he had frontal lobe damage.

Dr. Wu answered affirmatively when the Court asked him if the frontal lobe damage that he detected was consistent with trauma and with other non-traumatic factors. Dr. Wu said that Mr. Pittman might have shown abnormalities simply from the genetic predisposition from the father and the brother being paranoid schizophrenics without any head trauma. The Court asked Dr. Wu if the frontal lobe damage detected in the PET scan was consistent with the clinical history taken by Dr. Dee and what Dr. Dee testified to at trial. Dr Wu testified: "In my opinion, the PET scan would be very consistent with Dr. Dee's neuropsychological testing, findings, as well as his clinical history, and so I would agree that the PET scan would be very consistent with those findings." See page 221, transcript of evidentiary hearing on May 9, 2006.

Testimony of Ms. Jean Wesley from Transcript Of Proceedings Volume II, pages 223—230, transcript of evidentiary hearing on May 9, 2006.

The defense called Ms. Jean Wesley, a teacher, as a witness. In 1974, Ms. Wesley worked as a teacher's aide with a class of six students including David Pittman. It was a mixed class of emotionally handicapped students and autistic students. She testified that she thinks David Pittman was eleven or twelve years of age when he was one of her students, and he was not working on grade level for his age. She testified that she remembered one incident when he got really frustrated with himself and started pulling his hair out, and he seemed to withdraw. She testified that he got along fine with the other students, the teacher, and her. She testified that nobody approached her back in the early 1990's asking about Mr. Pittman and what she knew about him. She testified that she would have testified on his behalf if someone had approached her at that time about doing so.

Testimony of Mr. Michael Eugene Pittman from Transcript Of Proceedings Volume II, pages 230—261, transcript of evidentiary hearing on May 9, 2006.

The defense called Michael Eugene Pittman, David Pittman's half brother as a witness. Michael Pittman testified that he was born in September 1963, and David Pittman was born in December 1961. He testified that he and David have the same mother. Mr. Pittman said that between the ages of five and ten years old his family moved many times because his Dad didn't have a real secure job. He testified that he had five siblings and that sometimes he and his siblings were split up and sent off to live with aunts and uncles. He described his grandmother on his mother's side as being abusive. He said that David was in special classes and had trouble academically at school. He testified that his Dad worked a lot, and he would only see him coming and going from work. Mr. Pittman testified that his mother did most of the discipline and whippings happened several times a week. He testified that one of their baby sitters, Donna Fay Haney, was probably having sex with David Pittman when David was about 10 years old. He testified that he thought some kids they played with, the Haney kids, made David do sexual things to them.

He testified that David was smoking pot in his later teens and later on appeared to be taking speed or amphetamines. He said that David liked to drink beer and on occasion had a good liquor drunk. He testified that David was working at a gas station and huffing gasoline in his early teens. David also huffed model glue as well. Mr. Pittman testified that he was stationed in Korea at the time of the crimes. Before leaving for Korea, he fathered a child named Robin whose mother was David's wife, Marie Pittman. He testified that he had a relationship with her when she was married to David. He testified that he was not contacted by anyone in 1990 or early 1991 about helping David in his case. He testified that he would have made an effort to testify for David if contacted, and the military would have excused him for that purpose. On cross-examination, Mr. Pittman agreed with the State that his brother David was in trouble with the law quite a bit, and this was one of the reasons he would get whipped or beat.

Testimony of Ms. Tammie Lynn Davis from Transcript Of Proceedings Volume II, pages 261—270, transcript of evidentiary hearing on May 9, 2006.

The defense called Tammie Lynn Davis as a witness. She testified that she knew David because his mother practically raised her. She said David was 5-7 years older than her, and he was a teenager when she met him. She testified that she was there when the mother beat the kids. She said she talked with Bonnie Knowles on the telephone shortly before she was murdered. Bonnie told her that Marie and Allen had come over and wanted money from Mr. and Mrs. Knowles for medicine for one of the children. She said that Marie's parents did not what to give her money because she and Allen were doing drugs. She said there was a big blowout over this. She testified at trial, but she said that she did not remember if David Pittman's trial lawyers ever asked her about her knowledge of David Pittman while he was growing up or her contact with his family. She testified that had trial counsel asked her about the information she testified to at the evidentiary hearing, she would have testified for him in the penalty phase. On cross-examination, Ms. Davis agreed that she testified at trial after being called as a witness by Mr. Pittman's attorneys. The State asked Ms. Allen to confirm that she was talked to a number of times prior to getting on the witness stand, and she said she was talked to twice, once at her job and once when she came to testify.

Testimony of William Pittman from Transcript Of Proceedings Volume III, pages 275—283, transcript of evidentiary hearing on May 9, 2006.

William Pittman was called by the defense as a witness. He is David Pittman's half brother and is three years younger than David. He testified that prior to the time of the murders his brother was using methamphetamine. He described the effect on David as making him moody and aggressive. He and David both worked at the Chevron station in Mulberry at one time. He testified that Reed Oil Company owned the gas station, but it was run by Cliff Gassett. He testified that Mr. Gassett who was in his 50's at that time molested him orally when he worked at the station. He also testified that Mr. Gassett told him that he also had been molesting his brother David orally on a regular basis. Mr. Pittman testified at David Pittman's penalty phase. At the

evidentiary hearing, he said that he was not asked about his knowledge about sexual abuse that might have happened to David Pittman or drug use his brother was involved in. He said that he would have testified about them for his brother if he had been asked. On cross-examination, Mr. Pittman testified that he did not tell David Pittman's lawyers about his brother's methamphetamine problem because they did not ask.

Testimony of Dr. Henry L. Dee from Transcript Of Proceedings Volume III, pages 283—317, transcript of evidentiary hearing on May 9, 2006.

The defense called Dr. Henry L. Dee, as a witness. Dr. Dee testified that he was a clinical psychologist and clinical neuropsychologist. He testified that he evaluated David Pittman at the request of the defense in his murder trial in 1990, and he testified at his trial on behalf of the defense. Dr. Dee was asked if he recalled what diagnosis he had for Mr. Pittman at the time of the trial. He testified that there were two, amnestic disorder and orgainic personality disorder. He testified that Mr. Pittman had a history of head trauma in childhood and a history of using drugs and huffing gasoline. It was difficult to ferret out which was the most important contributor to the brain damage. He testified that he did not have knowledge at the time of the trial that David and two of his brothers suffered homosexual sexual abuse in childhood on numerous occasions. He did not have information about the sexual abuse that occurred at the service station to David, but prior to trial he did have information that one of the brothers was abused by a neighbor. Dr. Dee also testified that prior to trial David Pittman had told him that he had been sexually abused in his past, but he did not have any corroboration of that at the time.

He testified that he gave a variety of tests to David Pittman at the time of the trial. One of the tests he gave David Pittman showed that he had an addiction problem. However, he didn't have any independent evidence of it. Defense Exhibit 25 was marked for identification. Dr. Dee identified that exhibit as being a report from Tri-County Addictions about David Pittman's drug abuse, alcohol abuse, and dependence. The report names alcohol, amphetamines, marijuana, cocaine and tea. Dr. Dee testified that he did not have the document at the time of trial, and that it corroborates the result he found in testing Mr. Pittman. Dr. Dee said the

neuropsychological tests including Wechsler, the Denham Neuropsychology Memory scale and other tests that he gives are commonly used in evaluating someone to determine if they have brain damage. It was common practice in 1990 to give this sort of testing. He testified these non-invasive testing techniques were the most accurate technique in use at the time for measuring brain damage, and Mr. Pittman's testing showed he had brain damage. He testified that at the time he saw Mr. Pittman he didn't believe Mr. Pittman had a progressive disease, and he would have had trouble justifying the kind of expense involved in a getting a PET scan had it been available. Dr. Dee was also asked what other type of information about David Pittman he had learned recently. Dr. Dee testified that an additional possible source of brain damage for Mr. Pittman that he had learned about recently was that David would drink a mixture of gasoline and milk each morning, which is very poisonous. Dr. Dee said he also thinks he underestimated how dysfunctional David Pittman's family was.

On cross-examination Dr. Dee agreed with the State that he had quite a bit of experience in testifying in penalty phases of a death penalty case, and he had quite a bit of experience before testifying in Mr. Pittman's case. He testified that there was nothing he would now change about the opinions he gave during the course of the trial, but there was now a little additional information in terms of corroboration. Dr. Dee agreed that he testified at the trial about Mr. Pittman's addiction. He testified that the addiction was alcohol and/or drugs, but Mr. Pittman denied being addicted when he talked to him. Dr. Dee agreed that he may not have talked to the people that were aware of Mr. Pittman's drug addiction. Dr. Dee agreed that he remembered testifying at trial that Mr. Pittman had been sexually molested three or four times at age eight or nine. He testified that he thinks he got this information from Mr. Pittman. Dr. Dee testified that in 1990 and 1991 PET scans were not widely used and were typically done only in the context of research in university centers. Dr. Dee agreed that he did not tell the defense lawyers, Mr. Norgard or Mr. Trogolo, that they needed to go out and get a PET scan, and he testified that he was satisfied that he did not need a PET scan to corroborate his findings. On redirect examination, Dr. Dee testified that he did not speak to Mr. Pittman's brothers back in 1990. Dr. Dee agreed that other evidence he has become aware of has validated his opinions, and he agreed that

there has been sort of another layer of nonstatutory mitigation added. Dr. Dee testified he had no idea at the time of trial about Mr. Pittman drinking gasoline or the severity of his gasoline huffing problem.

Testimony of Hardy Pickard from Transcript Of Proceedings Volume III, pages 317—337, transcript of evidentiary hearing on May 9, 2006.

The defense called Hardy Pickard as a witness. Mr. Pickard is an Assistant State Attorney in the Tenth Judicial Circuit, and he was employed in that capacity when he had his initial involvement with the David Pittman case in 1990. Mr. Pickard testified that he did not subpoena people in order to gather evidence to file an information. Mr. Pickard testified that people were subpoenaed for interviews to help him prepare the case for trial to see what the witness knows or is going to testify to. Defense Exhibit 2 was marked for identification. Mr. Pickard identified most of the documents in Defense Exhibit 26 as being State Attorney Subpoenas. He acknowledged that some of the other documents appear to be notes regarding efforts to serve the subpoena. Mr. Pickard testified that some of the subpoenas were to witnesses involved in Mr. Pittman's case. Defense counsel had Mr. Pickard identify another one of the documents as a subpoena directed to Barbara Cecere in connection with the David Pittman case. The subpoena showed John Doe as the name of the defendant. Mr. Pickard agreed that this was the standard way they would issue the subpoena. Mr. Pickard identified subpoenas directed to Barbara Joann Pittman, Barbara Marie Pittman and Eugene Pittman. Mr. Pickard testified that he did not know if this was all of the subpoenas that were issued, and he testified that he did not have every witness come to the office pursuant to a State Attorney subpoena. Mr. Pickard testified that he took notes during the interview while the people were talking, but he would not call them statements.

Testimony of Hardy Pickard (continued) from Transcript Of Proceedings Volume IV, pages 367—476, transcript of evidentiary hearing on May 10, 2006.

Mr. Pickard was shown Defense Exhibit 12. These are notes taken by Detective Cosper concerning an interview of Eugene Pittman on May 30 that indicate Mr. Pickard was present. Mr. Pickard was shown a State Attorney

investigative subpoena for Eugene Pittman for Wednesday, May 30th, which was from Defense Exhibit 26, and he agreed that it correlated with the handwritten note of Detective Cosper. Mr. Pickard testified that he did not think the notes taken by Mr. Cosper would qualify as statements that are discoverable. Mr. Pickard testified there was no policy regarding which interviews conducted pursuant to a State Attorney subpoena would be tape recorded. Mr. Pickard testified that he did not record any statements taken pursuant to a State Attorney subpoena in this case. Mr. Pickard testified that he took his own notes on the interview on May 30, and he was not relying on notes taken by Detective Cosper. He testified that he did not receive or ask for any of the notes taken by Detective Cosper. Mr. Pickard testified that neither his notes or the notes from Detective Cosper from the May 30 interview were disclosed to the defense. Mr. Pickard testified that he had no independent recollection of what Mr. Pittman said at the interview.

Mr. Pickard was shown Defense Exhibit 13, some notes that Detective Cosper testified he made regarding an interview of Barbara Marie Pittman on May 31, 1990. Mr. Pickard was also shown a State Attorney Investigative subpoena for Barbara Marie Pittman from Defense Exhibit 26, which he agrees was for May 31, 1990. He agreed that it correlated with the notes taken by Detective Cosper. Mr. Pickard testified that he did not have an independent recollection of taking a statement of Barbara Marie Pittman at that time. He testified that Detective Cosper's notes of the interview would not have been provided to him or the defense. He testified that he did not provide his own notes regarding the interview to the defense. He testified that he did not think at that point there was favorable information that came out at the interview for the defense. Mr. Pickard testified that he never looked to see if what Mrs. Pittman said at the interview came out at the deposition or at trial. He did not consider his notes or Mr. Cosper's notes to be statements, but simply impressions by whoever was writing the notes.

Mr. Pickard read the following from Defense Exhibit 13: "David and my parents had pretty good relationship." See page 385 transcript of evidentiary hearing Volume IV on May 10, 2006. He testified he did not remember that being said. He testified that he did not think that was information that would have been useful to the defense. Mr. Pickard was shown a line from Defense Exhibit 13,

which seemed to be talking about Mr. Pittman and money for crank. Mr. Pickard testified that he did not recall Mrs. Pittman making a statement regarding Mr. Pittman's crank money, and he did not recall either disclosing or not disclosing the information to the defense. Mr. Pickard testified he could not recall if he specifically told the defense that there was evidence that the Defendant was doing crank. He would probably have assumed they already knew that based on interviews the defense did of the Defendant, his parents, relatives and friends. Mr. Pickard was shown Defense Exhibit 13 again and read a line indicating Bonnie Pittman [sic] would make up physical ailments. Mr. Pickard testified that he did not remember the statement. Mr. Pickard testified that it did come out at the deposition that Bonnie had mental problems. Mr. Pickard testified that it did come out at trial that there had been an allegation of a rape by Bonnie Pittman against David Pittman. Mr. Pickard was asked if it would have been favorable to the defense to have some evidence that Bonnie made things up on occasion. Mr. Pickard said he did not think so because the issue was not whether it was made up or not, just whether the allegation had been made. Mr. Pickard said he could not specifically say the State told the Defense that we have information that Bonnie sometimes makes things up.

Mr. Pickard was shown a Defense Exhibit 14 which was note taken by Detective Cosper indicating an interview of Carl Hughes was taken on June 26, 1990. Mr. Pickard said he did not know if he had been involved in the decision making process to interview Carl Hughes. The notes by Detective Cosper indicate Mr. Hughes was interviewed on June 26, 1990 and returned to the same jail cell with Mr. Pittman. Mr. Pickard denied that he would be put back in the cell to get additional information. Mr. Pickard testified that at some point Mr. Hughes, who had State charges pending, was told that Mr. Bergdoll, the assigned prosecutor for the State Attorney's office, would tell the Court that Mr. Hughes cooperated. He thought FDLE Agent Randy Dey told Mr. Hughes that he would make the Federal Courts aware of the cooperation. Mr. Pickard did not remember if he knew that Mr. Hughes's wife had been polygraphed by Mr. Bergdoll. Mr. Pickard did not recall any information being given to him that there were potentional [sic] criminal charges against Mrs. Hughes. Mr. Pickard testified that he did not remember Mr. Hughes mentioning that he was concerned about protecting his wife, but it was possible that he did. Mr. Pickard was

shown Defense Exhibit 15 which were notes taken by Detective Cosper indicating another interview was done of Carl Hughes on July 6, 1990. Mr. Pickard testified that he does not recall knowing of an interview of Carl Hughes being done on that date, and he has no idea if the defense was advised that an interview of Carl Hughes took place on that date. Mr. Pickard testified that had he known about the interview, it was not something he would disclose to the defense because they had no obligation to tell the defense every time that they go out to interview a witness.

Mr. Pickard was shown Defense Exhibit 17, a report by Detective Cosper dated April 30, 1991, that seemed to reflect that Mr. Cosper was attempting to ascertain a location of the inmates in the jail pod with Mr. Pittman in May 1990. Attached to the report were some jail records with names of inmates and numbers of cell location. Next to the names of David Pittman, David Pounds, and Raymond Reyone the number J227 is listed. Mr. Pickard noted that he did not see Mr. Hughes name on the list when he was shown the pages in the report containing the names beginning with Hs. He did not know if the information was disclosed to the defense or if he had a copy in his possession. He also testified that jail records are pretty much public records, and he thought the defense could have gotten the information. Mr. Pickard testified he did not remember when the trial ended in relationship to the date of the report, but if the trial was over he thought there was a good chance it was not given to the defense. Mr. Pickard was shown Defense Exhibit 5. Mr. Pickard was shown some names of other people listed at being in pod 227 with David Pittman, specifically Elton Ard and Raymond Reyone. Carl Hughes name was not listed. Mr. Pickard was shown Defense Exhibit 9, which was a cover letter from him to Mr. Cosper dated October 11, 1990 with a handwritten letter attached. Mr. Pickard agreed that it was possible the handwritten letter was showing a reluctance on the part of Mr. Hughes to testify, and his cover letter to Mr. Cosper was telling Mr. Cosper to go contact Mr. Hughes in the prison system and find out why he did not want to testify. The defense asked Mr. Pickard what he told Mr. Cosper and Mr. Pickard answered: "In case he asks, we will do nothing more to help. 'Well, let me start back.' Hughes claims he will refuse to testify unless we assist him in getting him out of prison. Please locate Hughes in the prison system and talk to him again and find out what his problem is. In case he asks,

we will do nothing more to help or assist him. If he will not testify, we will ask that he be held in contempt. If that prospect, which would be added to his present sentence and delay his release, does not concern him and he still refuses to testify, we will simply try the case without him." See page 416 of transcript of Evidentiary hearing Volume IV. Mr. Pickard testified that he assumes Detective Cosper did what the cover letter asked him to do, and he did not recall if his cover letter to Detective Cosper was disclosed to the defense. He testified that in the normal course of things he would not have considered a letter like that discoverable.

Mr. Pickard was shown Defense Exhibit 10, a collection of letters containing instructions Mr. Pickard sent to Detective Cosper in connection with preparing for trial. The top letter had a date of July 2, 1990, and Mr. Pickard was asked what the second paragraph was requesting Detective Cosper to do. Mr. Pickard responded: "Mr. Smith said he thought he recognized the defendant as the same person he saw two to three weeks prior at Charles Layton's Used Car Lot on Highway 60 and 37 in Mulberry trying to sell a Pontiac to Layton. Please contact Layton and see if he knows defendant and can verify that incident." See pages 418—419, transcript of evidentiary hearing. Mr. Pickard testified that Mr. Smith was a witness at the trial who indicated that he had seen Mr. Pittman on the morning of May 15th. Mr. Pickard agreed that the defense was probably not advised that Mr. Smith had said he thought he recognized the defendant as the same person he had seen. Mr. Pickard said he did not think they had to tell the defense about every investigative lead they followed up on unless it came to something. Mr. Pickard agreed that Mr. Cosper was asked to follow up with Mr. Smith, but he did not think it was because of information that could be used to hurt his case by the defense.

Defense Exhibit 27 was marked for identification and given to Mr. Pickard who identified it as a presentence investigation report of David Powell. Mr. Pickard agreed that this was another name for David Alan Pounds. Mr. Pickard agreed that the report should have been available to him if he needed it in connection with Mr. Pound's potential testimony in the Pittman case, but he doubted that he looked at it. Defense counsel drew Mr. Pickard's attention to page 2A which had a psychological history. Mr. Pickard was asked if the defense had access to the

report, and he said that he assumed that they could have obtained a copy of it through the court file if they wanted to. The defense pointed out a part of the report that indicated that while Mr. Pounds was incarcerated in 1988 he was suffering from visual and auditory hallucinations. Mr. Pickard was asked if he would have felt obligated to disclose this information to the defense if he had known of this section and seen it. Mr. Pickard testified that if he believed the defense already knew this information chances are that he would not have disclosed the document. The defense also noted that the document indicated that Mr. Pounds was taking Thorazine, and the defense asked Mr. Pickard if he ascertained whether or not Mr. Pounds was on medication in May and June 1990. Mr. Pickard testified that he did not check into that sort of information, but it might have been brought up in the depositions or a taped interview. The defense had Mr. Pickard read from the last page of the document. Mr. Pickard agreed that the document indicated that Mr. Pounds' mother knew of his emotional problems and that he needs counseling. Mr. Pickard testified that he never had the document or made any effort to get the document, so it would not have been disclosed to the defense. Mr. Pickard testified that he did not know if the Public Defender would have had to get a Court Order to get their own copy of the document.

Mr. Pickard testified that he remembered a letter from an individual on death row named George Hodges in the middle of Mr. Pittman's trial, and Judge Strickland recessed the trial several days so that Mr. Norgard and Mr. Trogolo could look into the letter. Defense Exhibit 32 was marked for identification. Mr. Pickard identified the document as a list of names in his handwriting that presumably were going to be subpoenaed in connection with George Hedges' letter. Mr. Pickard agreed that in the letter George Hodges was reporting that his nephew had confessed to him that he had committed the murder along with someone else. Mr. Pickard testified that he did not recall if the nephew was Aaron Gibbons. Mr. Pickard was shown that on Defense Exhibit 32 there was a notation that the subpoena address on Gibbons was different from the discovery address for Gibbons that was given to the defense. Mr. Pickard testified that this was probably because Mr. Gibbons had moved. The State was not trying to keep the defense from knowing where he was located. Mr. Pickard testified that he had no knowledge of Mr. Gibbons taking off or disappearing. He testified that both Mr. Gibbons and Mr. Watson showed up in Court for an

evidentiary hearing on the Hodges matter during the trial. Defense Exhibit 33 was marked for identification. Mr. Pickard identified the exhibit as a message from his secretary at the time, Dee Dee Wright, referring to the fact that Aaron Gibbons had not taken off, and it indicated an address where he was located. Mr. Pickard agreed the address listed was the same address he had listed for the subpoena.

On cross-examination Mr. Pickard testified that Detective Cosper came in contact with Mr. Hughes after being contacted by Randy Dey. Mr. Dey had been contacted by Kathy Hughes who told him that her husband had information about the case. Mr. Dey went to the jail and talked to Mr. Hughes. Mr. Dey contacted Mr. Cosper after finding out Mr. Cosper was the investigator on the Pittman case. He testified that Mr. Dey and Mr. Cosper went to the jail to talk to Mr. Hughes about the Pittman case and later that night Mr. Hughes was attacked. Mr. Pickard was asked about Defense Exhibit 13 regarding notes taken by Detective Cosper of an interview of Barbara Marie Pittman. Mr. Pickard was asked about a notation on page 3 of the notes that indicated that David Pittman and Barbara's parents had a pretty good relationship. Mr. Pickard agreed that you could not tell from the notes if the reference to David and Barbara's parents having a pretty good relationship referred to their relationship just prior to the time of the murders or years earlier.

Mr. Pickard testified that the testimony of Dennis Waters with regard to the certainty of his identification of a homemade wrecker was not consistent throughout the proceedings. Mr. Pickard agreed that the defense deposed Mr. Waters, and they knew his level of certainty at the time of the deposition and the time of trial. On redirect examination, Mr. Pickard's attention was directed to Defense Exhibit 9, the cover letter from Mr. Pickard to Detective Cosper containing instructions about what he needed to convey to Carl. Hughes. Mr. Pickard testified that the cover letter, which indicated that additional time could be tacked on to his sentence, was probably not provided to the defense. Mr. Pickard testified that Mr. Cosper' s handwritten notes and his own handwritten notes of the interviews were not handed over to the defense, but they may very well have had most if not all of the information that was in the notes. Mr. Pickard did not recall going back through his notes for sort of a Brady review to see if there was information

that would be favorable to the defense that they had not received in some other fashion. Mr. Pickard testified that if he already knows the defense has some information, he doesn't see the necessity of him providing it to them again. He testified that he did not know if they had the jail records, but he knew they could go to get the jail records. Mr. Pickard testified that he did not think he had gotten the jail records until after the trial was over. He admitted that he may have gotten an oral statement from Detective Cosper about them.

Mr. Pickard testified that he would not have looked at the jail records as being records that have favorable information for the defense. Mr. Pickard testified that he did not believe his handwritten summary notes of what a witness tells him to be a statement that is subject to disclosure under the discovery rules. Mr. Pickard was shown Defense Exhibit 18, a letter that Mr. Hughes wrote with a factual summary of his involvement with Mr. Pittman. Mr. Pickard testified that the letter indicates that Mr. Hughes contacted his wife and read her his notes about Mr. Pittman and asked her to contact Randy Dey to verify the validity of Mr. Pittman's statements. Mr. Pickard testified that he did not recall that Mr. Hughes had been told that his wife faced criminal charges or that she had been polygraphed by Mr. Bergdoll. Mr. Pickard testified that even if he had known it, he was not sure he would have thought of it as information that had to be disclosed to the defense.

Mr. Pickard testified that he had not gone through his notes to determine whether there's any favorable information to disclose to Mr. Pittman in the postconviction proceedings. Mr. Pickard testified that the first time he heard that the child Cindy may have witnessed the murder was in connection with the postconviction proceedings, and Barbara Pittman never made the statement to him. Mr. Pickard agreed that the defense was trying to show at trial that Mr. Pittman's wife, or ex-wife and her new husband could have committed the murder. Mr. Pickard agreed that Cindy having witnessed a murder was potentially consistent with being present with her mother and Mr. Pridgen at the time of the murder. Mr. Pickard agreed that the presence of Cindy at the crime scene would be inconsistent with the State's theory of prosecution. On recross-examination Mr. Pickard was asked if there was any testimony at the depositions or at the time of trial with regard to where

the children were on the night of the murder. Mr. Pickard testified that Marie Pittman testified that Mr. Pittman's sister Bobbie Joe came over and woke them up and told them the other house was on fire. She testified that she got the kids up and dressed them and went over to where the fire was. Mr. Pickard agreed that this information indicated where Cindy was at 5:00 a.m. It did not indicate where she was at the time of the murder and fire which was sometime between 3:00 a.m and 4:00 a.m. Mr. Pickard agreed that if Marie and/or her husband committed the murder, it was conceivable that they could have had Cindy with them.

Testimony of Raymond Reyome from Transcript Of Proceedings Volume V, pages 481-491, transcript of evidential)' hearing on May 10, 2006.

The defense called Raymond Reyome as a witness. Mr. Reyome testified that he was an inmate in jail pod 227 with Mr. Pittman. Mr. Reyome agreed that it would have been around May 1990 that he was in the pod. He testified that Mr. Pittman was quiet and stuck to himself. He testified that the whole time he was in the cell with Mr. Pittman he never saw Mr. Pittman talk to anyone about his case.

Testimony of David Pounds from Transcript Of Proceedings Volume V, pages 491—543, transcript of evidentiary hearing on May 10, 2006.

The defense called David Pounds as a witness. Mr. Pounds agreed that he was also known as David Powell, and Pounds was his real name. He testified that at the period of time he was in the pod with Mr. Pittman he had received a diagnosis of being bipolar with psychotic features and paranoid schizophrenia. He said he was being partially medicated at the time. He said he was not on the correct medication, and it was causing him problems at the time. He testified that at that time he was delusional having auditory and visual hallucinations. He agreed that May 1990 was probably the period of time he was in the jail pod with Mr. Pittman. He testified that he has no recollection now about talking with David Pittman. He is aware that he testified at Mr. Pittman's trial after going through the transcripts. He did not have any recollection of why he may have said in his testimony that David Pittman had made statements to him indicating that he had committed the murder. He

testified that he may have been destabilized and believed in his mind that this is what David Pittman said. He does not know if he was saying things or whether he was picking up things from the TV and getting it confused with reality. He testified he was not given any breaks or deals for his testimony. Mr. Pounds was asked if he remembered his involvement in the case began with a letter he wrote to his mother. He said he had been shown the letter but did not remember writing it. State Exhibit 1 was marked for identification. It was a copy of a letter that Mr. Pounds wrote his mother. Mr. Pounds testified that he did not recall what he said to his mother in the letter. Mr. Pounds read the letter at the hearing, and it indicated that David Pittman had told him that he had committed the murders. He was asking his mother for advice about whether he should help law enforcement and possibly do something about his life sentence.

He testified that he did not recall writing the letter, and he did not recall meeting with his mother and getting advice from her regarding what he should do. Mr. Pounds was shown Defense Exhibit 31, a transcript of a deposition he gave dated June 4th 1990. The State asked him about language in the transcript when he was talking with Detective Cosper that indicated that David Pittman appeared to slip and say, "the people that I killed." See page 512 transcript of evidentiary hearing. Mr. Pounds testified that he did not recall his conversation with Mr. Cosper.

The State referred to the transcript of Mr. Pittman's trial beginning at the bottom of page 1896, and counsel for the State said the following:

The question was asked of you: After the first several days, did he ever tell you that he did it? Your answer: Yes, sir, he did make that statement to me one time. Question: How did that come about? Your answer: We were watching a newscast, and it was on the Mulberry homicides, and I was sitting on the bunk beside him. I elbowed him and I said, come on, man, you know you did it. He said, yeah, I did it, but there's no way they can pin it on me. My alibi is too good because of the time frames involved.

See page 522 transcript of evidentiary hearing. Mr. Pounds testified that he did not remember making that statement. Mr. Pounds testified that to the best of his

memory he cannot recall ever talking to David Pittman. Mr. Pounds was asked if investigators from the State Attorney's office, who had interviewed him about a week before the evidentiary hearing, had told him he was in danger if something changed in his testimony. He testified that nothing like that happened. He was just worried he could get in trouble because he did not remember what he had said at the trials or in the depositions.

Testimony of John Thomas Schneider, Jr., from Transcript Of Proceedings Volume V, pages 544-572, transcript of evidentiary hearing on May 10, 2006.

The defense called Mr. John Thomas Schneider, Jr., as a witness. Mr. Schneider testified that he recalled being in the jail cell 227 with Mr. Pittman in 1990 possibly in June. He testified that he never heard Mr. Pittman talking about his case, but that Carl Hughes asked about Mr. Pittman's case on several occasions. He testified that David Pittman kept his legal work under the bed that Carl Hughes slept on, and Mr. Hughes was going through Mr. Pittman's materials and writing stuff down. He testified that Mr. Hughes told him that Mr. Pittman had given him permission to do this. He testified that on one night at about two o'clock in the morning he saw Mr. Hughes going through David Pittman's stuff while David was sleeping. Mr. Hughes told him it was none of his business when he asked Mr. Hughes what he was doing. He testified that he walked around the cell for about 20—30 minutes and woke David up. He testified that he got in a confrontation with Mr. Hughes. He said Mr. Hughes was calling him a liar because he claimed that he had never told Mr. Schneider that David had given him permission to go through his stuff. Mr. Schneider testified that Mr. Hughes was removed from the pod after he got in a fight with him. He testified that he had not gotten any information before the fight that Mr. Hughes had been meeting with somebody from law enforcement earlier in the day. Mr. Scheider testified that he was not contacted by anyone representing Mr. Pittman in 1990, 1991, or 1992.

Testimony of Robert Norgard, Esq., from Transcript Of Proceedings Volume VI, pages 578-756, transcript of evidentiary hearing on May, 11, 2006.

The defense called Robert Norgard, an attorney

engaged primarily in criminal defense, as a witness. He testified that he was employed by the Public Defender's office in 1990, and he was lead counsel in Mr. Pittman's capital case. He testified that he has been an attorney since June of 1981, and he has been doing criminal law in one capacity of another since that time.

He testified that he had capital experience, and the case was assigned to him in anticipation that it might be a capital case. From the beginning he was looking to prepare for both phases of the trial. Defense Exhibit 36 was marked for identification. Mr. Norgard identified the exhibit as a composite of documents. He identified a response to the notice of discovery which would include witness and exhibit lists, and a number of supplemental witness and exhibit disclosures. Mr. Norgard testified that they presented a straight-up innocence defense. He testified that he thought that they had a chance of winning, and it was a circumstantial evidence case. Mr. Norgard said he did not believe there was any physical evidence tying Mr. Pittman to the scene of the homicide. He said that there were witnesses tying Mr. Pittman to a particular wrecker and witnesses testifying he was in the area where the car was burned. He testified it would be extremely important to him in terms of the defense and for impeachment purposes to know Mr. Waters said his identification of the wrecker was 50/50. Mr. Norgard agreed that they tried to show that there were other homemade wreckers in the area. Mr. Norgard was shown what had been marked as Defense Exhibit 10. These were letters from Mr. Pickard to a police officer asking for work to be done and mentioned that Mr. Smith had indicated that he recognized the Defendant as the same person he had seen two or three weeks previously at a used car lot.

Mr. Norgard said that to the best of his recollection he was not provided with letters of this nature. Mr. Norgard testified that if he had been aware that Mr. Smith claimed he thought he had seen the person at a used car lot two weeks before, he would have investigated that and established that Mr. Pittman had never been at the used car lot. He would have used that to attack the certainty of Mr. Smith's identification of Mr. Pittman. Mr. Norgard was shown Defense Exhibit 3, some handwritten notes of interviews of witnesses. Mr. Norgard testified that he did not recall ever receiving any handwritten notes.

Mr. Norgard was shown Defense Exhibit 11, some handwritten notes regarding an interview with David Pound, and Mr. Norgard testified that he did not recall seeing a note like that. Defense Exhibit 37 was marked for identification. Mr. Norgard identified it as a Public Defender's request for investigation form. Mr. Norgard said his initial request was for as much information as possible from jail records about anyone who had been in Mr. Pittman's cell, and the request was dated January 3, 1991. There was response from the investigator indicating that the jail roster files had been purged. Mr. Norgard agreed that the response indicated that the best information he had was that the records were not available to him. Mr. Norgard identified the attachments to Defense Exhibit 17 as being jail logs. Mr. Norgard was asked if those were the kinds of documents he was requesting in Defense Exhibit 37. He said that he was requesting the information contained in the document referred to as inmate location roster. Mr. Norgard looked at the inmate Roster and said that it showed David Pittman's name, his booking number, and the number J227. He was asked to look for the name Carl Hughes. Mr. Norgard testified that he did not see the name Carl Hughes listed, and there was someone with the name Seaborn Hughes listed as being in 228.

Mr. Norgard was asked about Mr. Pound's statement making reference to Carl Hughes, and he agreed that the jail log would have given him information he did not otherwise have to investigate what Mr. Pounds was saying. Mr. Norgard was shown Defense exhibit 27 which he identified as a presentence investigation of David Pounds, and it showed the presentence investigation was requested on 4/13/90. Mr. Norgard testified that presentence investigations are confidential, and he did not know if he had received this document in discovery or not. His attention was drawn to page 2A which was referred to a psychological history, and he agreed it referred to mental problems and hallucinations. He did not recall if this was information that he had. Mr. Norgard testified that if he had this document, he would have explored it through discovery deposition to determine what relevance it had to potential impeachment at trial. Mr. Norgard was shown Defense Exhibits 34 and 35, and he said that these were the kind of documents regarding Mr. Pounds mental health that he would have been seeking. He identified Defense Exhibit 34 as being excerpts of pages out of a medical history from the Department of Corrections Central Florida Reception

Center. He testified that the documents indicated they were from June 1990. Mr. Norgard agreed that Defense Exhibits 34 and 35 reflected medication that was being administered to Mr. Pounds. This was information that he would have pursued if it had been given to him.

Mr. Norgard agreed that neither the deposition of Mr. Dey nor the deposition of Mr. Cosper gave any indication that an interview was done of Carl Hughes on July 6, 1990. Mr. Norgard testified that based on the documents it appears he was not aware of the other statement by Mr. Hughes. He said that he would have expected it to be disclosed to him as part of what's required by Florida Rule of Criminal Procedure 3.220 and other constitutional grounds were also implicated. Mr. Norgard testified that it would have been important for him to know every version of what Mr. Hughes claimed to know over a period of time and build that into cross-examination. Mr. Norgard's attention was drawn to the handwritten notes of July 6, 1990 and a notation that said "real off on time of occurrence." Mr. Norgard testified that it would have been significant for him to know about that notation because it was indicating that Mr. Hughes was telling Mr. Cosper information about the case that Detective Cosper realized was off in terms of time and not accurate in terms of other evidence in the case. Mr. Norgard agreed that he relied on the prosecutor's compliance with Rule 3.220 and *Brady* and would have looked deeper into the possibility of things existing that were not disclosed if he had been aware that something like this interview with Mr. Hughes was not disclosed. Mr. Norgard testified that he had no independent recollection of being told that Mr. Hughes had been advised that his wife might be charged. Mr. Norgard testified that if he had known there were threats of prosecution to Mr. Hughes wife by law enforcement or the State Attorney's office, it would have been an area for impeachment that he would have gone into. Mr. Norgard testified that there would be Fifth or Sixth Amendment implications with respect to Mr. Hughes being an agent of law enforcement, if law enforcement had gone to him and requested that he get information on somebody at the jail.

Defense Exhibit 41 was marked for identification. Mr. Norgard agreed that he had been interested in speaking with Mr. Schneider. Mr. Norgard identified Defense Exhibit 41 as a memo from Ms. McInnis in reference to John Schneider. Mr. Norgard said her report

is dated October 8, 1990, and it would correspond with his request of September 24 asking her to try to get him this information by October 10. Mr. Norgard read the following from the report: "Spoke with Gerald Johnson, the attorney for John Schneider, this date. He said that he had spoken with Schneider, and that Schneider doesn't want to talk with us. Said that he is afraid and if he talks said that he feels he will be killed." See page 657 transcript of evidentiary hearing. Mr. Norgard said he would have accepted what Mr. Johnson said, and he would not have any way of knowing if in fact Mr. Johnson did check with Mr. Schneider. Mr. Norgard testified that he would have seen this as a dead end.

Mr. Norgard was shown Defense Exhibit 12, and Mr. Norgard agreed that it appeared to be an interview of Eugene Pittman. Mr. Norgard testified that he did not remember getting any handwritten notes from law enforcement officers or an Assistant State Attorney in the Pittman case. Mr. Norgard testified from glancing at the seven pages of notes in Defense Exhibit 12 that it should have been disclosed under 3.220 and that he didn't know not having read the whole thing if it contained anything that constitutes or another basis for disclosure. Mr. Norgard was shown Defense Exhibit 13. He agreed that they appeared to be handwritten notes of an interview of Barbara Marie Pittman on May 31, 1990, eight pages in length. Mr. Norgard testified that he would not have had these notes of the interview of Barbara Pittman. Mr. Norgard's attention was drawn to a line that said "David and my parents had pretty good relationship." See page 663 transcript of evidentiary hearing. Mr. Norgard testified that he did not have an independent recall of how evidence came out at trial about the relationship between David Pittman and his former inlaws, but it would be important to have information that somebody who was essentially a hostile witness thought they had a good relationship.

Mr. Norgard was shown Defense Exhibit 13 again and looked at the second page. Mr. Norgard testified that it appeared that Marie was implying that Mr. Pittman never wanted to do anything for the children, and there was an indication that this would take away from his crank money. Mr. Norgard agreed that it would be significant to have this information. Mr. Norgard said it was certainly something he would look at as possible penalty phase evidence, and that it could be significant to a mental health expert. Mr. Norgard was asked if the

exhibit made reference to Bonnie making up physical ailments, and he agreed that it did. Mr. Norgard testified that if he had known Marie Pittman was saying her sister was making up ailments, he would certainly have asked Marie about that in a deposition. Mr. Norgard agreed that had he had the information from Defense Exhibit 13, he would have questioned Marie Pittman about matters mentioned in the exhibit and followed up on other aspects that came from the statements in the exhibit. Mr. Norgard testified that he would have expected a statement such as the comments in the notes in Defense Exhibit 13 to have been provided to him based on Rule 3.220.

Mr. Norgard was handed Defense Exhibit 26 a collection of State Attorney subpoenas. Mr. Norgard testified that he did not remember getting any feedback from his investigators regarding John Doe subpoenas in Mr. Pittman's file, and he did not recall any John Doe subpoenas being provided to him. Mr. Norgard noted that one of the subpoenas was for Barbara Marie Pittman with a date of May 31, 1990 that corresponded with Defense Exhibit 13 and the interview done of her on May 31, 1990. Mr. Norgard testified that pursuant to Rule 3.220, he would expect a statement made pursuant to those subpoenas to be made available to him. The Court asked Defense Counsel and Mr. Norgard to define what they are talking about with regard to using the term "statement". The Court asked defense counsel if he recalled that the word "statement" was defined in Rule 3.220, and he acknowledged that he did. Defense counsel read from Rule 3.220 in a 2004 Rule book: "The term statement as used herein includes a written statement made by the person and signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner made by the person in written or recorded or summarized in any writing or recording. The term statement is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case, but shall not include the notes from which those reports are compiled." See transcript of evidentiary hearing page 673.

Mr. Norgard was asked how he went about preparing for the penalty phase, and he answered in terms of Mr. Pittman's case. He testified that Robert Trogolo another attorney at the PD's office worked on the case with him and that at that time they shared responsibilities in both phases of the trial. He testified that it appears

Ms. McGinnis was doing a lot of the investigative work on the guilt phase investigation, and he would have relied on investigator Toni Maloney to do penalty phase investigation. Mr. Norgard agreed that the purpose of the investigation would be to develop mitigation for the penalty phase proceeding and to come up with evidence to rebut any of the aggravating circumstances that the State might be relying on. Mr. Norgard recalled that Dr. Dee was the defense's mental health expert and testified at the penalty phase. Mr. Norgard testified that he recalled that Dr. Dee testified to organic brain damage. Mr. Norgard testified that he did not have independent recall of what statutory and/or non statutory mitigation Dr. Dee found. Mr. Norgard was shown the findings of fact entered by Judge Strickland when he imposed the sentence of death, and he was asked if the judge found there was insufficient corroboration of Dr. Dee's conclusions. Mr. Norgard said: "As to the finding of brain damage, yes. Essentially stated in the order, sentencing order, other that this opinion, there exists no corroborating evidence to suggest the presence of this damage or its degree, nor its actual relationship to the murders." See page 684 transcript of evidentiary hearing. Mr. Norgard testified that he conferred with Dr. Dee in preparing for the penalty phase, and Dr. Dee made a number of findings related to finding organic brain damage. Mr. Norgard did not recall whether school records were introduced into evidence. He testified it was part of their practice to provide them to mental health experts.

Mr. Norgard testified that in 1990 to 1992 neuropsychological testing was and often is the best way of identifying brain damage, and he did not know of any corroborating evidence that could be developed. Mr. Norgard's attention was drawn to Defense Exhibit No. 44, school records of Mr. Pittman and a page called psychological report. Mr. Norgard was shown a reference that Mr. Pittman's previous IQ was 70 and mentioned that he saw a mention on another page of a full scale IQ of 76. He was asked if this information regarding problematic mental functions back in 1972 could have provided some level of corroboration for Dr. Dee's conclusion, and he agreed that it could. Mr. Norgard testified that he did not recall making a decision with regard to the school records. He testified that they would have been provided to Dr. Dee, and he did not recall to what extent the information from the school records was developed through Dr. Dee's testimony.

Defense counsel said that at the penalty phase Bill Pittman did not testify regarding any sexual abuse of David Pittman, and he asked Mr. Norgard if they knew about the sexual abuse or made a strategic decision not to present it. Mr. Norgard said it was likely they did not know Bill Pittman had any information about sexual abuse. He testified that the defense did know about sexual abuse from Dr. Dee and other sources. He did not recall any strategic decision why Michael Pittman, David Pittman's brother was not contacted.

Mr. Norgard was asked about the letter from George Hodges that caused the trial to stop for a brief investigation. The letter identified some other individuals as potentially being the killers. Mr. Norgard testified that he did not know if the Public Defender's office represented one of the individuals or recall whether they considered it a conflict of interest. Mr. Norgard testified that he remembered some discussion concerning conflict with respect to Mr. Hodges after his letter arrived in the middle of trial. The Public Defender's office of the Tenth Circuit was representing Mr. Hodges on his direct appeal. Mr. Norgard also agreed that the subject was discussed on the record with Judge Strickland. Mr. Norgard agreed that when the trial began a defense was going to be raised that the crimes were committed by Marie and her boyfriend/husband Allen Pridgen. Mr. Norgard testified that the information in the Hodges' letter indicating that two other people may have committed the crimes came out of the blue. Mr. Norgard agreed that ultimately Judge Strickland ruled that none of the Hodges' material would come into evidence. The State noted that Bill Pittman did not talk about drug addiction or David Pittman being molested as a child when he testified in the penalty phase. Mr. Norgard testified that he did not know if Bill Pittman ever told them about the Defendant's methamphetamine problem or sexual abuse, or if they did not ask the right questions. He said that they certainly would have developed the information through him at the penalty phase if they knew that information. Mr. Norgard agreed that testimony regarding sexual abuse in the past did come out during the penalty phase in Dr. Dee's testimony, and Judge Strickland commented on it in his sentencing order. Mr. Norgard was asked about Mr. Cosper's notes of his interview with Marie Pittman from Defense Exhibit 13 referring to Mr. Pittman and Crank. Mr. Norgard testified that they knew about Mr. Pittman's drug problems. Mr. Norgard said the information coming from

Marie Pittman had some importance not because it was new information but because it was coming from a hostile witness and would have had value with respect to her credibility.

Mr. Norgard was asked about Defense Exhibit 27, which contained a PSI of Mr. Pounds. Mr. Norgard testified that if this is not in the Public Defender file, they probably did not get it. He testified that if it contained relevant material it should have been given to them as discoverable Brady Material, information required under Rule 3.220. Mr. Norgard testified that the State Attorney's office had an affirmative obligation to obtain this information about Mr. Pounds to determine if it had Brady material and then provide it to the defense. Mr. Norgard said this was particularly true because the PSI related to what Mr. Pounds was under sentence for at the time he testified. Mr. Norgard testified that he could have tried to get the PSI by making a motion and request to the Court. Mr. Norgard testified that he relied on the State to provide him with such material if it was favorable to the Defendant. Mr. Norgard testified that if the State has the information in their care, custody and control then they have the obligation to check out the backgrounds of their witnesses for information that should be disclosed to the defense. Mr. Norgard agreed that they did make an effort to get Mr. Pittman's PSI from a case in which he was represented by Mr. Collier. Mr. Norgard testified that they had Mr. Pittman sign a release form to get the information. Mr. Norgard testified that Mr. Pounds had an attorney named Bob Doyel. He testified that he did not believe Mr. Doyel would have agreed to have his client sign a release so he could get a copy of his PSI.

Mr. Norgard was shown part of the trial transcript and read a portion where Mr. Hughes was talking about his being threatened that he could be given 6 months for contempt. Mr. Norgard testified that they had the information that Mr. Hughes was going back and forth on whether or not to testify and that people were telling him that he could be held in contempt if he did not testify. Mr. Norgard was shown Defense Exhibit 9. Mr. Norgard was asked about the cover letter from Mr. Pickard to Mr. Cosper asking him to talk with Mr. Hughes about what his problem was and to tell him that he could be held in contempt if he didn't testify. Mr. Norgard indicated that the letter had some added significance because it contained a nuance that the State might be

indicating to Mr. Hughes that a sentence for contempt might run consecutive to his sentence. Mr. Norgard said the letter to Detective Cosper from Mr. Pickard would have been important to know about in terms of impeaching Mr. Hughes because of the amount of pressure it showed from authorities. The Court asked Mr. Norgard if he thought the memo from Mr. Pickard to Detective Cosper was discoverable. Mr. Norgard said he would not necessarily say the memo was discoverable, but if Detective Cosper went and talked to Mr. Hughes as directed in the memo that would be discoverable.

The Court asked Mr. Norgard in what form the State was supposed to give him that information through discovery. Mr. Norgard testified that if Detective Cosper went to Mr. Hughes, told him what they intended to do if he didn't testify and that generated a police report, it would be discoverable. The Court asked what the situation would be if a police report was not generated. Mr. Norgard said that the State should have put it in a discovery cover sheet. He indicated a synopsis of the communication and the reaction of the witness would be appropriate. If a prosecutor or police officer tell a witness what they are going to do to him if they don't testify and it is not disclosed to the defense, that would be a *Brady* violation. The Court asked Mr. Norgard if he was precluded from asking Mr. Hughes if anybody had threatened him during the deposition. Mr. Norgard testified that he would have to look at when the deposition was taken in relationship to the letter. He could not say he asked Mr. Hughes every question that he should have that would trigger what was needed. All of the Defense Exhibits 1-48 were admitted into evidence without objection by the State. State Exhibit No. 1, the letter from Mr. Pounds to his mother, was admitted into evidence without objection by the defense.

Testimony of Martin Hodges from Transcript Of Proceeding Volume VI, pages 758—765, transcript of evidentiary hearing on May, 11, 2006.

The State called Martin Hodges, an investigator for the State Attorney's office as a witness. Mr. Hodges testified that he had been with the State for approximately 21 years. Mr. Hodges testified that last Wednesday he went with investigator Dan Butler to interview Mr. Pounds to determine if he was going to change his testimony at the evidentiary hearing. He said

Mr. Pounds told him that at one point he thought he was going to change his testimony, but he was not going to do it now. He testified that Mr. Pounds said the reason he thought he might change his testimony was because he did not agree with the death penalty and felt sorry for Mr. Pittman. However, he changed his mind because if he changed his testimony he would be lying, and he didn't want it to come back on him. Mr. Hodges testified that Mr. Pounds told him that his trial testimony was true.

Testimony of Hardy Pickard, Esq., from Transcript Of Proceedings, pages 14—55 transcript of evidentiary hearing on February 15, 2007.

The defense called Hardy Pickard as a witness. Defense Exhibit 49 some handwritten notes taken by Mr. Pickard was admitted into evidence. Mr. Pickard identified the handwritten notes as being notes he had taken of an interview of Barbara Marie Pridgen. Mr. Pickard was shown a transcript of some testimony he gave at an evidentiary hearing in May 2006, and he said it indicated that he had issued a subpoena for her to appear on May 31, 1990. Mr. Pickard testified that he had no reason to believe the notes were not from the May 31, 1990 interview. Mr. Pickard testified that notes written on the left margin of pages might have been added months later for trial preparation and were not necessarily contemporaneous with the time of the interview. Mr. Pickard also said the note could be something that occurred to him and not necessarily something the witness said at the time of interview. Mr. Pickard testified that crossed out lines might indicate that he had changed his mind about what he thought the witness was saying. He said that it could also indicate that it was something that he did not want to go into at the trial even though it accurately reflected what the witness said at the interview.

Mr. Pickard was asked about a line that said the Defendant got along well with W's parents. He agreed that it certainly seemed to be saying Mr. Pittman got along well with her parents. However, he said he was not sure what words she actually used or what period of time she was talking about. Mr. Pickard was asked about the fact that some notes from Detective Cosper said the same thing almost word for word, and he said he did not have any independent recollection of whether Mr. Cosper was present for the interview. Mr. Pickard was asked about a line that said "Bonnie lived at home all life," and a

line that said "she would make up physical ailments", and he agreed that this was similar to something that appeared in Detective Cosper's notes. See page 28, transcript of evidentiary hearing on February 15, 2007. Mr. Pickard said that Mr. Cosper may very well have been present for the interview. Defense Counsel read some lines from page 12 of the notes that said; "Mom hit Witness once with telephone receiver while witness holding Cindy." and there is also a question mark followed by, "know how defendant felt about seeing Allen Pridgen." See page 34, transcript of evidentiary hearing on February 15, 2007. Mr. Pickard testified that this was not written down during the interview.

Mr. Pickard testified that he did not recall if it was ever disclosed to the defense that Barbara Marie's mother had hit her with a telephone receiver once while she was holding Cindy. Mr. Pickard testified that the handwritten notes that made up Defense Exhibit 49 were never disclosed to the defense. Mr. Pickard testified that at Ms. Pridgen's deposition he was reviewing his notes, and he advised the defense about five or six areas that the State was going to go into that the defense hadn't covered in the deposition. On cross-examination, Mr. Pickard testified that the notes were not verbatim statements of the witness, and they were never shown to the witness or adopted by the witness. He testified that he considered the notes to be work product. Mr. Pickard testified that even after reviewing his notes he did not have any reason to believe that he did not disclose *Brady* material to the defense.

On redirect examination Mr. Pickard testified that he did not consider the line that mentioned the mom hitting Barbara Marie with the telephone receiver while she was holding Cindy to be Brady material. Mr. Pickard testified that he did not consider the line in the notes indicating that Bonnie would make up physical ailments to be favorable to the defense. Mr. Pickard was asked about a line from page 3 of the notes that said:

"Money that would take away from the defendant's drugs." See page 52 of transcript of evidentiary hearing on February 15, 2007. Mr. Pickard testified that the defense already knew about the defendant's drug usage, and he would not have disclosed this statement. Mr. Pickard testified that he did not consider having a statement from Marie confirming the drug usage to be something that should be disclosed to the defense because

they already knew about the drug usage. A deposition of Barbara Marie Pridgen taken on January 24, 1991 was marked for identification as Defense Exhibit 50 and received into evidence without objection.

Testimony of Robert Norgard, Esq., from Transcript Of Proceedings, pages 55—83 transcript of evidentiary hearing on February 15, 2007.

The defense called Robert Norgard, Esq., as a witness. Mr. Norgard testified that he was never provided with the notes that made up Defense Exhibit 49 prior to reviewing them in preparation for the evidentiary hearing. Mr. Norgard was asked about a line in the notes that said; "money that would take away from the defendant's drugs." He testified that it was significant to him as a defense attorney that Marie Pridgen was indicating that there was drug usage usage by Mr. Pittman because she was a hostile witness, her family members were victims, and it would have been important for her to offer evidence that would be favorable to a penalty phase mitigator. See pages 60-61, transcript of evidentiary hearing on February 15, 2007.

Mr. Norgard's attention was drawn to page 4 of the notes that made up Defense Exhibit 49 and the line that indicated that Bonnie would make up physical ailments. He testified that he would have viewed this information as being favorable to the defense. He agreed that it would go towards the credibility of claims that she made against Mr. Pittman of criminal conduct, and it would be of more importance coming from Barbara Pridgen a hostile witness. Mr. Norgard was asked about some lines on page 5 of the notes that said, "Bonnie told witness she going to file charges on defendant, dash, rape. She said because defendant kept wanting Cindy in the divorce. She didn't want him to have custody of Cindy." See page 65 of transcript of evidentiary hearing on February 15, 2007. Mr. Norgard testified that this would be significant information because it would be evidence of motive as to why Bonnie would fabricate the rape charges to have a favorable edge in divorce proceedings. Mr. Norgard testified that he did not have any independent recall of getting any information from the State that Bonnie would make up physical ailments or was interested in filing the rape charges in connection with the custody case. Mr. Norgard testified that if he had information that Barbara Pridgen had said that Bonnie would make up physical ailments he would have pursued that at the

deposition to see what relevance that had to the allegation of sexual assault.

Mr. Norgard was asked about the line on page 12 of the notes that said the mom had hit Barbara Pridgen with the phone while she was holding Cindy. He testified that this would have been important information to him because one of the theories at trial was that Barbara and her husband may have been involved in the murder. Mr. Norgard was asked about a line from Page 4 of the notes that indicated that the Defendant got along well with Barbara's parents. He testified that this would have been significant to him because Mr. Pittman was being accused of their murder and the State's theory was that he didn't like these people and had problems with these people. On cross-examination Mr. Norgard testified that it was the State's theory that the rape allegation made by Bonnie, whether true or false, was why Mr. Pittman wanted to kill her. Mr. Norgard testified that he did not recall any efforts by the State to try to argue whether the allegation was true or not. He said that that he thought that it was significant that the jury heard that the Defendant may have raped Bonnie, because evidence of other crimes, wrongs, or acts can have an impact above and beyond its potential relevance. On redirect examination, Mr. Norgard testified that it is a serious concern if the State successfully gets in evidence of other crimes, wrongs, or other acts. He said this was particularly significant in a death penalty case when the jury is making a decision of recommending life or death. Mr. Norgard testified that information related to the rape allegation was significant to the defense both as to the guilt phase and penalty phase.

Testimony of Chastity Eagan from Transcript Of Proceedings, pages 2—30, transcript of evidentiary hearing on July 27, 2007.

The defense called Chastity Thomas Eagan as a witness. Ms. Eagan testified that she was born in 1977, and in 1990 she would have been about 13 years old. She testified that she knew Marie Pridgen at that point in time because her mother Sondra Thomas and her mother's ex-boyfriend John lived with Marie in the same house. Ms. Eagan testified that she did not live in the house, but she would spend weekends and other times there. She testified that Allen Pridgen, Marie Pridgen, John Van Shuman, Sondra Thomas, and Marie Pridgen's children all lived in the house. She testified that she thought her

mother lived with Marie for over one year.

Ms. Eagan testified that Marie did not act upset over the fact that her mother, father, and sister were dead. She said that Marie showed no remorse about it. Ms. Eagan was asked if Marie made any specific statements and Chastity said: "Because of the fact that what was going on then I guess HRS was trying to take their kids, and she said that she was glad her parents were dead." See page 10, transcript of evidentiary hearing on July 27, 2007. Defense Counsel, Mr. McClain asked her if it was her understanding that the HRS was working with Marie's parents to take Marie's children, and she answered affirmatively. Chastity Eagan also indicated that Marie had gotten some money after the deaths because she went on a spending spree, which Ms. Eagan described as buying a lot of stuff.

Ms Eagan testified that Allen Pridgen who lived in the house had a brother named David. She said she was dating David Pridgen in about 1992 when she was 15 years of age. He said that he had killed three people. She also said he didn't like black people. Ms Eagan also testified that she observed a lot of drug usage at the house where Marie Pridgen was living, and she observed Marie using methamphetamine. She testified that she observed her using it every time she went to the house.

On cross-examination, Ms. Eagan testified that she had no knowledge who was involved in committing the offenses, and she didn't know the names of the people that were killed. She just knew the name Knowles. The police never talked to her about it. Ms. Eagan indicated that she was aware that Marie had gotten some life insurance proceeds from her parent's death, and Allen Pridgen had gotten some sort of settlement from a motorcycle accident. She said she did not know whether that was the money she saw them spending. She testified that her relationship with David Pridgen probably didn't last even a month. She testified that at some point she got pregnant but she did not accuse David of being the father because the child was black. She testified that her mother, John Van Shuman, and some other people were in the room at a Halloween party when David made his statement about killing people. She said this was after he got back from Iraq.

Ms. Eagan testified that she did not know if David Pridgen was in the military and away from Mulberry and

Polk County at the time of the murders in May 1990. Ms. Eagan testified that he made his statement about killing three people after he found out that she was pregnant by a black guy. She testified that if you look at his police records, David Pridgen had shot at a black guy before. She did not know if he was indicating that he had killed black people. She testified that David Pridgen made this statement when everyone was drinking, and she did not put much stock in it. She said that she never heard David Pridgen talking about fire fights and possibly killing some people in Iraq. Ms. Eagan testified that she remembered talking to investigator Rosa in the Alachua County Jail in August 2006. She testified that she was in Alachua County in May 2006, and she did not know that the police were looking for her at that point in time.

Testimony of Rosa Greenbaum from Transcript Of Proceedings, pages 31—37, transcript of evidentiary hearing held on July 27, 2007.

The defense called Rosa Greenbaum, a criminal defense investigator, as a witness. Ms. Greenbaum had been working with the defense since August or September of 2005 on the Pittman case. Ms. Greenbaum testified that she had been doing capital post-conviction work for about eight years. Ms. Greenbaum testified that two other attorneys, Linda McDermott and John Abatecola, were involved in the Pittman case, along with another investigator, Daniel Ashton. Prior to the May 2006 evidentiary hearing, she was given the name of Chastity Eagan as a person she was assigned to locate as a potential witness. She tried to locate Ms. Eagan by a computer search, an IRB search and this did not produce anything. She said she was aware Ms. Eagan was on probation, but when she contacted Ms. Eagan's probation officer, he said that he did not know where she was. After the May evidentiary hearing, the probation officer contacted her and said that Ms. Eagan was in the Hillsborough County Jail. He didn't know how long she would be there because she had charges in Alachua County. She interviewed her a couple of months later at the Alachua County Jail in August 2006, and she learned what Ms. Eagan had to say about Marie Pridgen and David Pridgen.

Testimony of David Wayne Pridgen from Transcript Of Proceedings, pages 38—51 transcript of evidentiary hearing held on July 27, 2007.

The State called David Wayne Pridgen as a witness. Mr. Pridgen testified that he was not sure if he slept with Chastity Eagan or not. He testified that he was drinking a lot after he got out of the Army. He testified that he was at Ft. Bragg, North Carolina on May 15, 1990 at the time the murders took place. He testified that he found out about the three people that were killed because his mother sent him an article. He said he deployed to Iraq sometime after May 1990 and came back near the end of 1991. He testified that he did not remember specifically saying that he had killed three people. He said he was involved in fire fights in Iraq where people were killed, but he did not know whether he personally killed anybody in Iraq. He testified that he had nothing to do with the murders on May 15, 1990.

On cross-examination, Mr. Pridgen testified that he did not have any records to corroborate his recollection that he was in Fort Bragg recovering from a broken foot on May 15, 1990. He testified that the State asked him to get some records if he could. He testified that he called but he had not gotten back anything yet. He did not know if the State made any effort to subpoena the records. He testified that he was not given time off from the Army after he broke his foot. He was put on light duty in Charge of Quarters desk, logging everyone in and out. He testified that he called the VA about getting medical military records about his broken foot, but he had not gotten any records. He testified that he was on the third wave that went to Iraq and this was about a week after the war started in January 1991. Mr. Pridgen said he did not recall making any statements to Chastity about his feelings towards black Americans, and he testified that he had no strong feelings about blacks. He testified that he met with Mr. Pickard at the State Attorney's office and provided him with what he could regarding his military service, but he had no records showing what was happening in April and May of 1990.

Testimony of John Van Shuman from Transcript Of Proceedings, pages 51—66, transcript of evidentiary hearing held on July 27, 2007.

The State called Mr. John Van Shuman as a witness.

> He was incarcerated at the Polk County on pending charges unrelated to the Pittman case. Mr. Shuman testified that he knew Chastity, and he had a relationship with her mother starting in 1986 that lasted about 12 years. He testified that David Pridgen was a friend of his. He testified that he did not recall hearing David Pridgen make any statement in his presence about having killed three people. On cross-examination, Mr. Van Shuman testified that Marie, Allen Pridgen and Marie's children lived with them on and off. He testified that they lived with them for a few months time, and then would leave for awhile and come back. He testified that he did not recall Marie doing methamphetamines. He testified that he remembered Marie coming into some money. He recalled that they sold her parents' property, and she had some stocks and bonds that her dad had. He said that she inherited the money. He testified that Chastity came to where they were living on and off, and she was not doing methamphetamines. He testified that he had no reason to doubt her recollection of that time period. He testified that he was using methamphetamines at that time. He testified that he had memory problems, and there were gaps in his memory. He testified that his memory gaps would include the year 1990. Mr. Van Shuman testified that Marie was not living with them at the time of the murders. Defense counsel asked Mr. Van Shuman if he knew where David Pridgen was in May 1990, and he said that he was at his mom's house. He testified that when Marie and Allen lived with them money was tight, and they did not charge them rent. He testified that he did not know for a fact that the HRS was trying to take Marie's children away.
>
> (PCR V34/5324-5378).

The trial court's comprehensive legal analysis (PCR V34/5378-5405; 5409-5412) will be addressed within the argument section of the instant brief.

SUMMARY OF THE ARGUMENT

Pittman's alleged Brady[2], Giglio, Strickland/IAC, and Jones/newly discovered evidence claims raised in this post-conviction appeal were litigated at the evidentiary hearings below. In denying Pittman's post-conviction claims, the trial court set forth detailed factual findings which are supported by competent, substantial evidence. Inasmuch as no procedural or substantive errors have been shown with regard to the factual findings or the trial court's application of the relevant legal principles, no relief is warranted and this Court must affirm the trial court's order denying post-conviction relief.

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2 The defendant's right to the disclosure of favorable evidence under Brady does not "create a broad, constitutionally required right of discovery." United States v. Bagley, 473 U.S. 667, 675 n.7, (1985). Brady does not include the right to either search through the government's files, Pennsylvania v. Ritchie, 480 U.S. 39, 59, 107 S. Ct. 989 (1987), or require the prosecution to deliver its entire file to the defense. See, United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976). Rather, Brady obligates the prosecution to disclose only favorable [exculpatory/impeachment] evidence that is "*material*." And, the "*touchstone of materiality is a 'reasonable probability' of a different result*." Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566 (1995). A defendant alledging a Brady violation bears the burden to show prejudice, i.e., to show a reasonable probability that the undisclosed evidence would have produced a different verdict. Hannon v. State, 941 So. 2d 1109, 1124 (Fla. 2006), citing Strickler v. Greene, 527 U.S. 263, 281 n.20, 119 S. Ct. 1936 (1999).

ARGUMENT

ISSUE I

THE GUILT PHASE CLAIMS: (1) BRADY, (2) GIGLIO, (3) STRICKLAND/IAC, and (4) JONES/NEWLY DISCOVERED EVIDENCE.

In Issue I, Pittman asserts convoluted and entangled allegations of guilt phase error under Brady, Giglio, Strickland, and Jones.[3] After several days of evidentiary hearings, the trial court meticulously unraveled Pittman's complaints and denied all relief. The trial court's factual findings are supported by competent, substantial evidence and reviewed with deference; the legal conclusions are considered *de novo*. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999).

The Applicable Legal Standards

In Jones v. State, 998 So. 2d 573, 580 (Fla. 2008), this Court emphasized the following standards under Brady and Giglio:

> Under Brady, the State must disclose to the defense knowledge of material exculpatory or impeachment evidence. Brady, 373 U.S. at 87; see also Kyles v. Whitley, 514 U.S. 419, 433, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). To demonstrate a Brady violation the defendant must prove that (1) the evidence is favorable to him, either because it is exculpatory or because it is impeaching; (2) the State willfully or inadvertently suppressed it; and (3) that the suppression resulted in prejudice. Evidence is prejudicial or material under Brady if there is a reasonable probability that had the evidence been disclosed, the result of the trial would have been different. United States v. Bagley, 473 U.S. 667, 678, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). Thus, the critical question is whether "the favorable

3 Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, (1963); Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, (1972); Jones v. State, 998 So. 2d 573 (Fla. 2008).

> evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Strickler v. Greene, 527 U.S. 263, 290, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (quoting Kyles, 514 U.S. at 435).
>
> To establish a claim under Giglio, the defendant must demonstrate that (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the evidence was material. Guzman v. State, 941 So. 2d 1045, 1050 (Fla. 2006). Once the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. Id. Under this standard, the State has the burden to prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt. Id.; see also Mordenti v. State, 894 So. 2d 161, 175 (Fla. 2004).

Jones, 998 So. 2d at 580 (e.s.)

In evaluating IAC claims under Strickland[4], there is a strong presumption that trial counsel performed effectively. In Hartley v. State, 990 So. 2d 1008 (Fla. 2008), this Court highlighted the standards applied to IAC claims:

> We review claims of ineffective assistance of counsel under the two-pronged standard established in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, a defendant must point to specific acts or omissions of counsel that are "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. In addition, the defendant must establish prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." Id. Claims of ineffective assistance of counsel present mixed questions of law and fact subject to plenary review. Occhicone v. State, 768 So. 2d 1037, 1045 (Fla. 2000).

4 Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

> This Court independently reviews the trial court's legal conclusions and defers to the trial court on questions of fact and credibility.
>
> Hartley, 990 So. 2d at 1013

Most recently, this Court, in Taylor v. State, 2009 Fla. LEXIS 132, 10-11 (Fla. Jan. 29, 2009), reiterated the Jones/newly discovered evidence criteria:

> . . . first, the evidence must be newly discovered and not have been known by the party or counsel at the time of trial, and the defendant or defense counsel could not have known of it by the use of diligence; second, the newly discovered evidence must be of such quality and nature that it would probably produce an acquittal on retrial. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (citing Jones v. State, 591 So. 2d 911, 915 (Fla. 1991)). In determining whether the evidence compels a new trial, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." Jones, 591 So. 2d at 916. This determination includes
>
> > whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether the evidence is cumulative to other evidence in the case.
> >
> > The trial court should further consider the materiality and relevancy of the evidence and any inconsistencies in the newly discovered evidence. Jones, 709 So. 2d at 521 (citations omitted). As noted above, the second prong of Jones requires a showing of the probability of an acquittal on retrial.
>
> Taylor, 2009 Fla. LEXIS 132, 10-11

Pittman's post-conviction claims, alleged under Brady, Giglio, Strickland and/or Jones, were extensively litigated during the multiple evidentiary hearings below. This Court now independently

reviews the trial court's legal conclusions, while deferring to the trial court's factual findings which are supported by competent, substantial evidence. See, Jones v. State, 998 So. 2d 573, 582 (Fla. 2008). For the following reasons, the trial court's comprehensive order denying post-conviction relief should be affirmed.

The Brady Claims

Pittman's first Brady claim focuses, primarily, on State witness Carl Hughes, the disgraced director of operations for the Lakeland Housing Authority who was convicted in federal court and in state court on multiple criminal charges, including bribery and grand theft. (Initial Brief at 62-75). Hughes did not testify in post-conviction; his trial testimony was neither changed nor recanted. On direct examination at trial, Hughes testified that he was incarcerated in a federal penitentiary in New York for falsifying a firearms application and bribery. Hughes had been charged in Polk County with 17 counts of bribery and grand theft. (DA-R 2246). Hughes had an 18-month federal sentence and 4.5 years state time, concurrent. (DA-R 2247). Hughes met Pittman in the Polk County Jail and their conversations occurred around June 20-27, from midnight to 5 a.m. (DA-R 2248; 2250). On cross-examination, defense counsel, Mr. Norgard emphasized the following:

Prior to his current convictions, Hughes had been convicted of 6 prior felonies. (DA-R 2272)

Hughes was going to be prosecuted as a career criminal. (DA-R 2274)

Hughes faced the possibility of 85 years in prison. ASA Bergdoll repeatedly made it clear that he was seeking an enhanced penalty. (DA-R 2278; 2283)

Hughes had his attorney seek a plea agreement on Hughes' behalf, but the prosecutor said "no deals." (DA-R 2284)

Hughes wrote two or three letters to ASA David Bergdoll, head of the career criminal division, offering to help out the State in exchange for a deal. During his 16 months in jail, Hughes saw plea bargain after plea bargain, but the State refused to plea bargain in his case. (DA-R 2285-2286)

Hughes never believed that there really would be an 85-year sentence. On March 6, 1990, Hughes wrote to the judge complaining that the State wouldn't give him a deal and the State was being excessive. (DA-R 2284-2285). In his letter to the judge, Hughes also offered to turn State's evidence on about 20 people related to HUD cases. (DA-R 2286)

According to Hughes, his attorney, Roger Alcott, thought he could get a 10-year cap with a guilty plea. (DA-R 2287)

No one ever promised Hughes anything whatsoever. ASA Bergdoll stood very firm on the fact that the statute prohibited him from making any kind of deals whatsoever. (DA-R 2299)

Hughes wrote several letters, against his counsel's wishes, to ASA David Bergdoll and to the sentencing judge. (DA-R 2299)

On April 25, 1990, Hughes pled "straight up" to the charges, with the maximum penalty of 85 years. According to Hughes, his attorney assured Hughes that if he acted in good faith, he could get a 10-year cap for Hughes; if not, it wouldn't exceed 20 years. (DA-R 2295-2296)

Hughes thought the guidelines called for 7 - 9 years; Hughes was unaware of ASA Bergdoll's continuing recommendation in Hughes' PSI for 85 years. Three days after his plea, Hughes wrote to the trial judge offering to be debriefed by the State on the HUD charges and to do anything to correct his mistakes. (DA-R 2297)

Both before and after his plea, Hughes made offers to testify against other people. Hughes stated he "had been asked to do that all through the course of [his] confinement." Hughes wanted a specific plea agreement, stating a specific amount of time. (DA-R 2298)

Between the time of Hughes' plea and sentencing, Hughes had conversations with FDLE case agent Randy Dey and negotiated giving information about the HUD charges. (DA-R 2300)

The only thing FDLE agent Randy Dey and FBI agent Brad Brekke promised Hughes was that they would come forward and make the judge aware of Hughes' cooperation. Randy Dey never indicated that he could persuade the trial judge and ASA Bergdoll was firm in wanting to ask for the maximum penalty; therefore, the whole question at the time was what the sentencing judge would do. (DA-R 2301; 2306)

Hughes wrote several letters to the trial judge. Hughes' letter of May 16th complained about being in isolation for almost five months; Hughes wanted to get past the county jail stage and start doing his time. Hughes' attorney told Hughes that FDLE was upset with Hughes, Hughes' probation report wasn't going well and the PSI investigator felt Hughes had lied to him. (DA-R 2302-2303)

Hughes had a plea agreement with the federal government and the federal prosecutor agreed to dismiss some of the charges. (DA-R 2305). Also, HUD did not want any more disclosures to the state and Hughes felt that he was caught in the cross-fire between the state and the federal government. (DA-R 2303-2304). Hughes entered his plea in federal court on May 23, 1990. (DA-R 2305-6)

On June 26, 1990, Hughes gave information about David Pittman to law enforcement. That meeting [with Detective Cosper and FDLE Agent Dey] lasted about an hour. (DA-R 2306)

Hughes asked to take a polygraph to confirm his credibility. Hughes initially refused to give a taped statement since law enforcement would not give him a polygraph. When Hughes asked if they would make his cooperation known to the sentencing judge, Detective Cosper informed Hughes, "Carl, I can't promise you anything as much as a phone call." (DA-R 2307-2308)

Hughes later gave a taped statement. Page two of Hughes taped statement to Detective Cosper included: "QUESTION: You understand that I can't promise you anything. However, you have been made aware that the court would be advised of your cooperation in this matter, and that's the only thing I could do for you? ANSWER: I understand that." (DA-R 2308)

Hughes felt that he still had a lot to lose, including his life and "ten years probation following this." (DA-R 2310)

On June 27, 1990, Hughes was on his bunk when he was attacked by Pittman and Schneider. (DA-R 2311)

Hughes was not a very popular inmate with the jail administration and Hughes thought that was why he spent 5 months in isolation. (DA-R 2315-2316)

After being attacked in his jail cell, Hughes wrote Schneider a threatening letter. (DA-R 2317)

At Hughes' federal sentencing hearing (August 3, 1990), both FDLE agent Randy Dey and FBI agent Brad Brekke informed the federal judge that Hughes had been cooperating. (DA-R 2321)

On September 7, 1990, Hughes wrote a letter to the state judge regarding cooperation that Hughes gave, or attempted to give, to the FBI, to FDLE in the HUD cases, and to the state in the Pittman case. (DA-R 2322)

Hughes gave a taped statement to Detective Cosper, but he was unsure of the date [September 11, 1990]. (DA-R 2323)

Hughes was sentenced in state court September 26, 1990. (DA-R 2323)

At Hughes' sentencing hearing in state court, ASA Bergdoll advised the court of Hughes' cooperation with the HUD investigation and the homicide case. ASA Bergdoll re-evaluated the State's original intent to pursue career criminal status/sentencing, relied on the statute's exception for cooperation, and "looking at the cooperation" and "full magnitude of the case," ASA Bergdoll recommended a total of 6 years." (DA-R 2324; 2325-26)

On October 6, 1990, Hughes wrote a letter to ASA Bergdoll, thanking him "for giving [Hughes] another chance in life." (DA-R 2324; 2327-2329). Hughes' letter to ASA Bergdoll also stated, "I respect you for standing firmly on your decision not to plea bargain with me. Because of your persistence I was forced to offer assistance." (DA-R 2331)

The guidelines called for probation, and the PSI recommended 7-9 years, but that included charges that were not allowed. Another PSI was never done, but another score sheet was. (DA-R 2332-33)

Hughes spent 16 months in the county jail before sentencing. By the time of Hughes' anticipated release date (March 13, 1992), Hughes would have served 33 months on a four and a half year sentence; about three times as much as anybody else. Hughes would serve 17 months of his 18-month federal sentence. (DA-R 2334)

Hughes did not know if Pittman's statements were true. Therefore, Hughes had his ex-wife [Kathie] contact law enforcement to confirm whether the information from Pittman was true or not. Kathie

contacted FDLE agent Randy Dey, who confirmed, "Yes, in fact that murder did occur. We will be very interested in talking to Carl about it." (DA-R 2338-2339)

On November 1, 1990, Hughes wrote another letter to ASA Bergdoll, and thanked him for dropping some other charges (because Hughes faced 85 years on a straight-up plea and it served no prosecutorial purpose to continue with the prosecution). According to Hughes, those charges included the "absurdity" of a wiretapping charge for openly tape recording the public housing staff meetings and an alleged aggravated assault involving plastic toy laser guns. (DA-R 2341; 2343)

Hughes wrote quite a few letters to ASA Bergdoll and to the trial judge, clearly asking for help, especially after articles appeared in the local newspaper. In January of 1990, Hughes wrote to ASA Bergdoll to "try to get four or five months off" his sentence because there was a discrepancy for the time credited to him. (DA-R 2346)

Hughes also wrote letters to ASA Pickard. In one letter, Hughes complained that he was sitting in state prison in violation of the trial court's order, that he should be in federal custody, and that "everybody is aware of my involvement in the Pittman case. Get me out of her before I get killed." (DA-R 2349)

Hughes did not want to come back to Polk County to testify, but knew that he would be returned anyway. ASA Pickard gave Hughes the options to either testify or face contempt, and six months. Hughes did not want to finish his federal prison sentence and be stuck for six months in Polk County jail again. (DA-R 2358-2359).

Hughes thought he gave three different statements: one written, one off tape, and one taped. (DA-R 2374)

Hughes' written statement to Detective Cosper detailed Pittman's statements to Hughes, but Hughes did not know if Pittman said that he set the car on fire right before Pittman went to his father's house. (DA-R 2380-2382).

As evidenced by the foregoing, Hughes was subjected to extensive cross-examination at trial. Hughes' criminal history, unsuccessful efforts to obtain a "plea bargain," repeated offers of assistance, initiation of contact with law enforcement via his ex-

wife, Kathie, and description of Pittman's various admissions to Hughes were explored in detail. Pittman now argues that the State violated Brady in allegedly failing to disclose the following witnesses/information regarding Carl Hughes: (1) Hughes' ex-wife, Kathleen [Kathie] Anders; (2) the prosecutor's letter of 10/11/90 to Detective Cosper; (3) Cosper's handwritten notes regarding an interview with Hughes on 7/6/90; and (4) Hughes' confidential PSI.

In denying Pittman's Brady claim regarding Carl Hughes, the trial court emphasized that any purported "deal" was thoroughly addressed at trial, that Pittman failed to show that the privileged, hearsay statements to Hughes' then-wife, Kathleen Anders, would have been admissible at trial, and even if her hearsay testimony was arguably admissible as alleged impeachment, Pittman failed to show any reasonable probability that this information weakened the case against Pittman "so as to give rise to a reasonable doubt as to his culpability or might have led to a different jury verdict." (PCR V34/5386). The trial court concluded:

> A review of the direct and cross-examination of Mr. Hughes at trial shows that any purported deal Mr. Pittman thinks Mr. Hughes received was addressed on direct examination and cross-examination at trial. On cross-examination it was brought out that Mr. Hughes had written a letter to the sentencing judge prior to his sentencing letting him know of his cooperation with FBI, and FDLE on HUD cases and in the David Pittman case. It was also brought out that Assistant State Attorney Bergdoll told the Court at sentencing that looking at the cooperation and full magnitude of his case they had arrived at a recommendation of 6 years rather than 85 years. Additionally, the defendant has not shown that

> Mr. Hughes's hearsay statements to Ms. Anders were admissible at trial. Even assuming the undisclosed evidence regarding Ms. Anders had some impeachment value, the Court finds that the Defendant has not shown any reasonable probability that this information weakens the case against the Defendant so as to give rise to a reasonable doubt as to his culpability or might have led to a different jury verdict.
>
> (PCR V34/5386) (e.s.)

For the following reasons, the trial court correctly denied Pittman's Brady claim. First of all, the defense knew, at the time of trial, that Hughes initiated contact with FDLE Agent Randy Dey *via* Hughes' [then] wife, Kathie. At trial, both Randy Dey and Hughes addressed the initial contact by Hughes' wife. (DA-R 2338-2339; 2408). A Brady claim cannot stand if the defense knew of the witness or evidence at the time of trial. See e.g., Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000). Second, Pittman did not establish that the State was ever aware of the arguments or conversations between Hughes and his [then] wife. The Brady rule only applies to "the discovery, after trial, of information which had been *known to the prosecution* but unknown to the defense." United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392 (1976). Third, the trial record confirms that any purported "deal" to Hughes was addressed, at length, on direct and cross-examination at trial. Fourth, Pittman has not shown that any confidential hearsay statements Hughes allegedly made to his wife were not privileged, and, therefore, even admissible. See, Section 90.504, Florida Statutes; Bolin v. State, 793 So. 2d 894, 896 (Fla. 2001). Fifth,

according to Ms. Anders, approximately sixteen years earlier, Hughes called her and asked her to give some money to a friend, Hughes became very angry when she said that she didn't have it; Hughes then claimed that he was trying to keep her from being arrested along with him and had been asked by FDLE to obtain information regarding the case that had been in the newspapers [Pittman]. Ms. Anders simultaneously denied any wrongdoing and admitted that she was administered a polygraph. See, Wood v. Bartholomew, 516 U.S. 1, 8 (1995) (reversing federal appellate court's speculation and misapplication of Brady principles and concluding that it was not "reasonably likely" that disclosure of inadmissible information – witness' polygraph results - would have resulted in a different outcome). At most, Hughes' exaggerated attempt to make his wife feel indebted to him, assuming it occurred, is scarcely more than Hughes' self-serving bluster when juxtaposed against her steadfast denial of any wrongdoing. To satisfy Brady's prejudice prong, a defendant must show that the suppressed evidence was material. Kyles v. Whitley, 514 U.S. 419, 435, 115 S. Ct. 1555 (1995). A new trial is only warranted 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." Rhodes v. State, 986 So. 2d 501, 508 (Fla. 2008), citing Strickler, 527 U.S. at 290. Given the significant amount of evidence impeaching Hughes' credibility at trial, even assuming the

admissibility of Anders' hearsay and some added impeachment value from Hughes' self-serving tirade to her, there was no reasonable probability that it would have led the jury to doubt the incriminating portions of Hughes' testimony. See, Ponticelli v. State, 941 So. 2d 1073, 1085-1086 (Fla. 2006) (given the significant amount of evidence impeaching the witness' credibility, defendant failed to establish any prejudice under Brady; and even assuming evidence had some additional impeachment value, there was no reasonable probability that it would have led the jury to doubt the incriminating portions of the witness' testimony); Marshall v. State, 854 So. 2d 1235, 1251 (Fla. 2003) (no prejudice under Brady where defense counsel thoroughly cross-examined witness and elicited testimony concerning subject of the State's alleged promise to witness).

Next, Pittman alleges a Brady claim based on the prosecutor's letter to Detective Cosper on October 11, 1990. (Initial Brief at 69-71). This letter instructed Detective Cosper to locate Hughes in the prison system, tell Hughes that if he refuses to testify "*we will ask that he be held in contempt*" and "*[i]f that prospect, which would be added to his present sentence and delay his release, does not concern him and he still refuses to testify, we will simply try the case without him.*" (PCR-Evid. V5/839). The trial court found that the prosecutor's letter did not constitute Brady

material;[5] this matter was specifically addressed at trial - Hughes admitted that he knew he could be incarcerated for more time for contempt if he refused to testify. (PCR V34/5386-5387). At trial, Hughes acknowledged that he could receive six months for contempt and Hughes agreed that he not want to "finish this federal prison sentence, [and] be stuck for six months in Polk County Jail again." (DA-R 2358-2359). There is no Brady claim where the same information (contempt and six months) was known to the defense and specifically addressed at trial.

Next, Pittman argues that the failure to disclose defense exhibit 15, which consists of Detective Cosper's 1 1/2 pages of handwritten notes[6] from an interview with Hughes on July 6, 1990, constituted a Brady violation. (Initial Brief at 71-75). The trial court found that Detective Cosper's handwritten notes[7] did not

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[5] As further addressed, *infra*, there is no legitimate Brady claim based on the prosecutor's handwritten notes. See, Williamson v. State, 961 So. 2d 229, 232-233 (Fla. 2007), citing Williamson v. Moore, 221 F.3d 1177, 1182-83 (11th Cir. 2000) (prosecutor did not violate Brady in failing to turn over written notations of the prosecutor's mental impressions of the case and nonverbatim, nonadopted witness statements.)

[6] At the bottom of the first page, Detective Cosper wrote:

-- Behind father's house -- \ Burned in Bucket
F/S across ST \ 9-1.1
Washed his SELF + / Real off on time of
Bobbi Jo & Barker / occurrence –

[7] See also, Green v. State, 975 So. 2d 1090, 1102-1103 (Fla. 2008), concluding that notes from which a police or investigative report were compiled are not subject to disclosure under Florida Rule of Criminal Procedure 3.220(b)(1)(B).

constitute material information under Brady; and the trial court did "not find that the evidence could have any reasonable probability of producing a different outcome at the trial." (PCR V34/5387). On October 3, 1990, Detective Cosper was deposed by the defense and Detective Cosper addressed, at length, his police reports, witness interviews, including taped interviews, his interview with Hughes on June 26, 1990, and Hughes' taped statement on 9/11/90, all of which were provided to the defense at the time of trial. (Def. Ex. 6, 19 & 20). During Detective Cosper's pre-trial deposition, defense counsel confirmed his understanding that taped interviews were normally conducted after oral interviews; and Detective Cosper noted that, absent oversight, his written reports would also address any significant off-tape statements. Detective Cosper also met with Hughes on July 6, 1990, and Cosper's handwritten notes included cryptic remarks such as "*F/S across ST*," "*burned in bucket*" and "*real off on time of occurrence*." On cross-examination at trial, defense counsel repeatedly questioned Hughes on whether Pittman allegedly told Hughes that Pittman had set the car on fire right before Pittman when to his father's house [three hours before the burning car was discovered, i.e., "real off on time of occurrence"]. (DA-R 2381-2382). Pittman failed to show that Detective Cosper's handwritten notes of a contact with Hughes on 7/6/90 constituted any material information under Brady; and the cryptic remark "real off on time of occurrence" arguably refers to

the same subject - the timing of the car fire - addressed on cross-examination at trial. (DA-R 2381-2382). See, Walton v. State, 847 So. 2d 438, 453 (Fla. 2003) (citing trial court's finding that police officer's notes were not exculpatory, nor did they have any impeachment value, and affirming denial of Brady claim because there is no reasonable probability of a different outcome had the handwritten police notes been used by the defense at trial).

Pittman next asserts a perfunctory claim, presumably under Brady, based on Hughes' PSI. (Initial Brief at 75). Trial counsel, Mr. Norgard, admitted that he could have filed a motion requesting Hughes' PSI. The trial court found "the defense has not shown that defense counsel could not have obtained the PSI through the exercise of reasonable diligence," and found no Brady violation. (PCR V34/5387). As to Pittman's corollary IAC claim, the trial court found no deficiency of counsel and no resulting prejudice. (PCR V34/5388). Notably, during the cross-examination of Hughes at trial, both defense counsel, Mr. Norgard, and Hughes referred to information contained in Hughes' PSI. (DA-R 2297; 2332-2333). Thus, defense counsel apparently was familiar with the contents of Hughes' PSI at the time of Pittman's trial. (DA-R 2297). Because the information was not only equally accessible, but also was known to the defense, any Brady claim must fail. See, Riechmann v. State, 966 So. 2d 298, 308 (Fla. 2007).

The David Pounds Sub-Claim

At pages 75-78 of his initial brief, Pittman argues that the prosecutor allegedly violated Brady by failing to (1) obtain David Pounds' confidential PSI, which included Pounds' psychological history, (2) obtain DOC's confidential medical file on Pounds, and (3) provide the sealed PSI and DOC's confidential medical file to Pittman's defense team at the time of trial. For the following reasons, the trial court correctly denied this alleged Brady claim.

At trial, David Pounds testified that he was incarcerated at Union Correctional Institution, serving a life sentence for armed robbery. Pounds had been convicted of six felonies. (DA-R 1892). Pounds previously was convicted of 11 misdemeanors that involved either dishonesty or making false statements. (DA-R 1893). On several occasions when Pounds and Pittman were in the cell together, the defendant said "the people that I killed" and then he changed it to "the people they say I killed". (DA-R 1895). One time, Pittman made the statement to Pounds that he had done it. (DA-R 1897). They were watching the news on the Mulberry homicides and Pounds ribbed Pittman and said "Come on, man, you know you did it" and Pittman replied, "Yeah, I did it, but there's no way they can pin it on me. My alibi is too good because of the time frames involved." Pittman's alibi was that he was home in bed approximately 10 minutes after the murders were supposedly committed and Pittman's father would give him an alibi. (DA-R 1898). Pittman told Pounds that there was no way they could lift

fingerprints off the car because it had been burned and the fire department used water to put out the fire and that would have washed away the fingerprints. Pittman said his in-laws' attitude toward him wasn't good because they were supportive of their daughter in the divorce. Pittman said he had a wrecker that had the boom removed and a circle on the hood which hadn't been painted. Pittman also said that someone had seen a black wrecker in the area, but his wrecker was blue and there was only one spot on the hood where he had run out of paint. (DA-R 1899). Pounds and Pittman only had this one discussion at any great length and it was around the time of the 11:00 news. There were six other inmates in the cell, but they weren't participating in the conversation. (DA-R 1900). There was a lapse of a few days from the time Pittman told Pounds these things until Pounds contacted the State Attorney's Office. Pounds had already been convicted on his case and sentenced. (DA-R 1901). At first, Pounds thought he might help the State and that might help in mitigation on his sentence. Detective Cosper took a statement from Pounds, but Pounds did not divulge all the information he had. (DA-R 1902). Pounds did not tell Detective Cosper that Pittman had given him a direct confession. Pounds wanted to contact his parents first, to get their opinion on whether he should become involved with the case. (DA-R 1903). After Pounds spoke with his mother, Detective Cosper went to Central Florida Reception Center and took a second statement from

Pounds. This time, Pounds told Detective Cosper that Pittman actually had committed the murders. (DA-R 1904). At that point, Detective Cosper made it perfectly clear to Pounds that if Pounds became a witness, there was nothing they could do to help him with his sentence, as did the State Attorney's office. No one told Pounds that he would get his sentence reduced if he testified. Pounds wanted to testify because he was thinking about the victims' families. (DA-R 1905). On cross-examination, defense counsel stressed:

Pounds was sentenced on May 9, 1990 and Pittman was placed in Pounds' cell on May 15, 1990. (DA-R 1905)

Pounds was not aware that there were still 60 days from the conclusion of Pittman's trial for Pounds' attorney to file a 3.800 motion. (DA-R 1909)

Pounds also did not tell Detective Cosper everything in the first statement because, according to Pittman's defense counsel, Pounds wanted to get paid for it. The only person Pounds could recall being around when Pittman made his statements was Raymond Kayoni (phonetic) [Reyome]. (DA-R 1914)

Pounds didn't know if the others who were watching TV heard Pittman's comments or not. It was pretty loud. Besides having committed the crime himself, Pittman may have learned the information from his attorney. (DA-R 1915)

Pounds was not sure how badly his memory had been affected by his extensive alcohol use. During 1979–1986, Pounds was severely alcoholic and having blackouts. While Pounds was on psychotropic medications, he was maintaining a 3.5 GPA in college. During his deposition of December 28, 1990, Pounds informed defense counsel that he was currently on psychotropic medication for mental disorders, which also affect his memory. (DA-R 1920-22)

According to defense counsel, Pounds basically lied to Detective Cosper the first time he talked to him when he said that he didn't have any additional information. (DA-R 1924)

Pounds didn't consider it lying. Pounds didn't consider

withholding information that he wasn't obligated to tell anybody to be a lie. (DA-R 1925)

Pounds admitted that he initially withheld information from Detective Cosper, which defense counsel emphasized as lying. (DA-R 1931-33)

On redirect examination at trial, Pounds read the letter he wrote to his mother. (DA-R 1936-1937). Pounds' letter to his mother stated, in pertinent part:

> *The problem is that I know David Pittman did it. He told me he did. I didn't tell the detective that he actually told me he did it but he did. He said there was no way that he could get convicted of it though.*
>
> *Now, if I help the State Attorney prosecute David Pittman I can get this life sentence off of me. But, you know, I have to snitch, and that's what I would be doing. I would never tell on a friend if they told me something like that, but I don't even know David Pittman. Killing three people is a serious crime.*
>
> *The detective gave me his name and number and he wants me to give a statement under oath and take a polygraph test. Then I would have to testify in court against him. Would you do it or not? I don't know what I should do. It is awful tempting to get this life sentence off of me. Give me some advice on this.*
>
> (DA-R 1936-1937).

SAO Investigator Martin Hodges interviewed Pounds the week before the post-conviction hearing. Pounds was going to change his testimony to help Pittman, but Pounds decided against lying and confirmed that his trial testimony was true.

ASA Pickard never looked into Pounds' mental health issues and didn't know any more than the defense knew. Attorney Norgard did not ask the trial court to provide the sealed PSI to the defense.

Although the prosecutor arguably may have had "access" to Pounds' PSI, this access, alone, did not authorize the State to release otherwise confidential records. Furthermore, Brady does not require the prosecutor to obtain and disclose evidence which is available to the defense from other sources. Pittman did not show that defense counsel could not have obtained the otherwise confidential records through the exercise of reasonable diligence; therefore, the trial court found no Brady violation. (PCR V34/5388). There is no Brady violation where the defense either had the information or could have obtained it through the exercise of reasonable diligence. Stewart v. State, 801 So. 2d 59, 70 (Fla. 2001). Moreover, in this case, Pounds dubious mental health was addressed both at Pounds' deposition and again at trial. (DA-R 1920-22).

Pittman next argues that the jail records would have been *useful* in impeaching Pounds by allegedly demonstrating that Hughes was *never* in the pod with Pounds. (Initial Brief at 78-80) The trial court found that "the jail log would not have shown that Mr. Pittman and Hughes were never together, or that Mr. Pounds and Mr. Hughes were never together. Mr. Reyome's testimony at the evidentiary hearing indicated that inmates in Pod 227 could see and talk to inmates in Pod 228." (PCR V34/5388-89). The trial court's fact-specific determination is unassailable. Furthermore, the "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." Boyd v. State, 910 So. 2d 167, 179-180 (Fla. 2005), quoting United States v. Agurs, 427 U.S. 97, 109-10, 96 S. Ct. 2392 (1976).

Addressing Detective Cosper's alleged "interview" with Pounds on June 18, 1990, the trial court found that Detective Cosper's handwritten notes of June 18, 1990 (PCR-Evid. V5/729). "*are very abbreviated and appear to do nothing more that confirm contact information and coincide with Detective Cosper's arrangement to interview Pounds at the DOC reception Center.*" (PCR V34/5389). Pittman does not dispute this dispositive assessment supporting the trial court's conclusion that the handwritten notes were not Brady material. The trial court did not find anything "that could reasonably be taken to put the case in such a different light that it undermines confidence in the verdict." (PCR V34/5390). Pittman has not shown any materiality from Detective Cosper's travel directions and arrangement to interview Pounds at the DOC reception center.

The ASA's handwritten notes & Detective's handwritten notes

At pages 82-84 of his initial brief, Pittman argues that the State allegedly violated Brady by not disclosing the prosecutor's handwritten notes and Detective Cosper's handwritten notes of an interview with Marie on May 31, 1990. These notes were not subject

to disclosure under Brady.[8] In fact, "non-verbatim, non-adopted witness statements are not admissible at trial as impeachment evidence." Williamson v. Moore, 221 F.3d 1177, 1183 (11th Cir. 2000); See also, Williamson v. State, 961 So. 2d 229, 239 (Fla. 2007) (affirming that prosecutor's trial preparation notes, which include nonverbatim and nonadopted notes of witness interviews, impressions of witness remarks, and discussions of trial strategy, are not admissible and are not properly part of an analysis of the cumulative effect of all admissible evidence). The handwritten notes did not become Brady material simply because they were made while talking to a witness rather than obtaining the information from the witness by any other method.

Pittman highlights the remarks that Pittman and Marie's parents "had [a] pretty good relationship" [at some unspecified

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8 Pittman's citations to Young v. State, 739 So. 2d 553 (Fla. 1999) are unavailing. In Young, this Court determined that the trial court erred in limiting the scope of a post-conviction evidentiary hearing so as to exclude review of exculpatory evidence that should have been disclosed; and, because the substance of the Brady information was undisputed, this Court remanded for a new sentencing hearing.

Likewise, Pittman's reliance on Banks v. Dretke, 540 U.S. 668, 124 S. Ct. 1256 (2004) is misplaced. As the Eleventh Circuit noted in Jennings v. McDonough, 490 F.3d 1230, 1239, n.8 (11th Cir. 2007), "[a]lthough the Court in Banks did warn that a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process," id. at 696, 124 S. Ct. at 1275, that statement was made in response to the State's contention that the "prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence." Id.; see also id. at 694, 124 S. Ct. at 1274 (noting that the prosecution continually allowed "untruthful testimony to stand uncorrected" on the matter underlying the Brady claim)."

time] and that Bonnie would "make up physical ailments." And, as to Pittman's "crank" use and remark that Pittman (at some undisclosed time) had a good relationship with Marie's parents, the trial court found that the "defense was well aware of the Defendant's difficulties with drugs, and the statement regarding Mr. Pittman's relationship with his wife's parents does not indicate what period of time is being discussed." (PCR V34/5398). The trial court did "not find that the notes qualify as a statement that should have been disclosed to the defense, pursuant to Rule 3.220, Fla. R. Crim. P, and they are not Brady material. Although the notes might contain some information that might be considered favorable to the defense, there is no reasonable probability that the jury verdict would have been different had the suppressed information been used at trial." (PCR V34/5398).

The handwritten notes do not contain any information which is material under Brady. The unremarkable disclosure that Pittman had, at some unspecified point in time, a "pretty good relationship" with Marie's parents would not diminish the strength of the State's case, nor bolster Pittman's "someone else did it" defense. Marie was not the only witness who testified to Pittman's fractured relationship with her parents, and Marie was not the only witness to testify about the threats Pittman made against Marie and her family. Witness Johnny Taylor testified that he met Pittman at the Bartow Correctional Center and Pittman's attitude toward the

wife's parents was one of hatred. Pittman said he would kill them but did not give any reasons. Pittman said he was going to kill them. (DA-R 2454). Deborah Caves, an acquaintance, recalled Pittman making a statement to his wife, Marie, that he would kill her and her family if she got a divorce from him. (DA-R 2497). Correctional Officer William Hunter testified that, in late 1989 and early 1990, Pittman told him of the family problems he had. Pittman felt that his in-laws were responsible and instrumental in keeping Pittman and his wife apart and Pittman was adamant that he would resort to violence if necessary to resolve the problem. (DA-R 2792). Pittman stated that if necessary he would kill them; Pittman could do it in a heartbeat. (DA-R 2793). Pittman had a lot of knowledge about stealing cars and said he would burn them if he was in a rush and that torching took care of any evidence. (DA-R 2794, 95). Furthermore, any suggestion by Marie that Bonnie made up physical ailments does not materially undermine the State's prosecution, nor credibly bolster Pittman's defense. The issue was not whether Bonnie's belated rape allegation was true; rather, it was that the allegation had been made. Moreover, at the conclusion of Marie's deposition, the prosecutor specifically alerted defense counsel to additional areas of inquiry. See also, Walton v. State, 847 So. 2d 438, 454 (Fla. 2003) (noting that Walton was fully aware of the nature of his own relationship with State witness; therefore, under Occhicone, Walton's Brady claim "cannot stand.")

Moreover, even if the State arguably withheld any of the foregoing, Pittman cannot demonstrate that he was prejudiced by the alleged nondisclosure. A defendant must demonstrate "a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial." Smith v. State, 931 So. 2d 790, 796 (Fla. 2006) (citing Strickler v. Greene, 527 U.S. at 289). In other words, the favorable evidence must place "the whole case in such a different light as to undermine confidence in the verdict." Id. quoting Strickler, 527 U.S. at 290. The evidence would have been merely cumulative impeachment. Marie testified at length and was subjected to extensive cross-examination. (DA-R 2524-2631; 2893-2912). Among other things, Marie was Pittman's alternate suspect, Marie testified that her mother physically abused her as a child, the older she became, the worse the abuse, her father refused to believe Marie, and Marie ran away from home when she was 16 or 17 years old. (DA-R2894-98). Here, as in Jones v. State, 998 So. 2d 573, 581-582 (Fla. 2008), her alleged motive and capacity for truthfulness was already significantly impeached. See also, Guzman v. State, 868 So. 2d 498, 508 (Fla. 2003) (in light of the significant impeachment evidence presented at trial, the additional evidence would have merely been cumulative).

Next, Pittman summarily concludes that Detective Cosper's handwritten notes of the May 30, 1990 interview with the defendant's father, Eugene Pittman, might have been useful to

"refresh Eugene Pittman's recall" or "impeach Eugene to the extent that he deviated" from an earlier statement. (Initial Brief at 84-85). Again, as underscored in Williamson, these "non-verbatim, non-adopted witness statements are not admissible at trial as impeachment evidence." Furthermore, Pittman now has Detective Cosper's handwritten notes and he's still failed to specifically identify anything, at all, that remotely supports a legitimate Brady claim. Moreover, Eugene Pittman also testified as a defense witness and Pittman was not denied access to Eugene, his father. A Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it. Occhicone v. State, 768 So. 2d 1037 (Fla. 2000).

At page 85 of his initial brief, Pittman concludes that the whereabouts of Aaron Gibbons was undisclosed. In denying this post-conviction claim, the trial court reiterated that ASA Pickard testified that both Mr. Gibbons and Mr. Watson showed up in Court for a hearing that was held mid-trial with regard to the George Hodges' letter. (PCR V34/5400). Pittman does not dispute this conclusive determination; this claim is baseless.

The Dennis Waters Sub-Claim

During Dennis Waters' pre-trial deposition, taken by Mr Norgard on 12/27/90, Waters thought the wrecker was similar; and, at trial, Waters identified it as the same wrecker (noting the distinctive "Bondo" on the hood). (DA-R 1650). In post-conviction,

Waters thought that the wrecker was similar, which was the same thing that he said in his pre-trial deposition. In denying Pittman's Brady claim regarding Waters' vacillating levels of certainty, the trial court found that the "equivocal nature of Mr. Water's deposition had already put the defense on notice that he had vacillating levels of certainty on the matter." (PCR V34/5391). Pittman does not dispute this dispositive finding; and, once again, his alleged Brady claim is without merit. (PCR V34/5391).

The William Smith Sub-Claim

William Smith, who lived near the Majik Market on Highway 60, testified that between 6:30 and 6:45 a.m. on May 15th, he saw a homemade wrecker come to a stop behind the store. (DA-R 1793). It was dark blue or black with booms, and orange primer coat on the right front fender of the hood. A white male got out of the vehicle and picked up a five gallon gas can, shook it on the ground and set it back in the truck. (DA-R 1795). Later on the 6:00 television news, Mr. Smith saw the guy who had been arrested and he told his wife that it was the same person that he had seen earlier that day. (DA-R 1801). Smith also viewed photographs of the wrecker and the gas can.[9] The State did not advise the defense of

9 On direct appeal, this Court noted, "another witness [Smith] testified that he saw a homemade wrecker stop near his house in the early morning hours on the day of the murders; that the driver, whom he later identified as Pittman, got out of the wrecker, shook out the contents of a gas can, returned to the wrecker and then drove off. This witness [Smith] first identified the wrecker several weeks after the murders from a photo-pack that included photographs of Pittman's wrecker only. . . . The first and second

the ASA's instructions to Detective Cosper. As this Court noted in Carroll v. State, 815 So. 2d 601, 620 (Fla. 2002), the prosecution is not required to provide the defendant all information regarding its investigatory work on a particular case regardless of its relevancy or materiality. At pages 86-88 of his initial brief, Pittman claims that the State's case was circumstantial, except for Hughes and Pounds. In other words, the State presented direct evidence at trial. The State also presented three additional witnesses [Caves, Taylor, and Hunter] who testified regarding Pittman's threats of harm to his in-laws. As in Jones v. State, 998 So. 2d 573, 581-582 (Fla. 2008), there was more than one witness to testify about Pittman's incriminating admissions and confessions. Pittman failed to show a reasonable probability that had the alleged additional impeachment been disclosed, the result of the proceeding would have been different; the trial court further evaluated Pittman's intertwined claims cumulatively and correctly denied relief. (PCR V34/5394; 5400).

The Misleading Conduct Claim

Next, at page 90 of his initial brief, Pittman asserts a purported Giglio claim based on a shotgun barrage of perfunctory allegations. Giglio involves a prosecutor's knowing presentation, at trial, of false testimony against the defendant. Giglio, 405

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witnesses [Waters and Smith] had a sufficient opportunity to view the wrecker and had given fairly accurate descriptions before the in-person identification." Pittman v. State, 646 So. 2d 167, 171 (Fla. 1994)

U.S. at 154-55. Pittman summarily alleges that the following was allegedly false: Hughes' trial testimony that he "was given no favors" (DA-R 2337); that Hughes allegedly gave no interviews between June 26 and September 11 [although Hughes stated at trial that "I gave, I think, three different statements: one written, one off tape, and one taped." (DA-R 2374)]; FDLE Agent Randy Dey's deposition and Detective Cosper's deposition - that Hughes' taped statement on September 11th was Hughes' second one; the State's argument that Pittman and his ex-wife's parents had "bad blood" between them; Dennis Waters' positive identification of the homemade wrecker he saw on the morning of May 15th; and information the State provided to the defense as to Aaron Gibbons' address and availability.

Pittman's conclusory allegations of alleged falsity are insufficient to fairly preserve any claim for review; and the State strongly disputes Pittman's mischaracterizations of the foregoing as allegedly false testimony. Pittman was afforded more than a week of evidentiary hearings and he failed to prove any of his alleged Giglio violations. Moreover, the foregoing individual allegations were addressed within Pittman's prior claims and rejected as meritless. And, in denying post-conviction claim II, the trial court again explained:

> In his Motion, the defense alleges that State witness, Carl Hughes's testimony was less than truthful regarding his relationship with the State. The Defendant alleges that Mr. Hughes made statements that he was going to attempt to get statements from Mr. Pittman and that

> doing so was part of the a deal with the State that existed prior to his placement with Mr. Pittman. The Defendant alleges that Mr. Hughes decided not to go through with his testimony but was coerced into doing so when the State threatened to prosecute him and a family member unless he went through with the deal. The defense alleges that an interview Mr. Hughes had with Detective Cosper on July 6, 1990 was never disclosed to the defense. This matter is fully discussed by the Court under Claim I. The Defendant also alleges that the State violated Mr. Pittman's due process rights by allowing Mr. Hughes to testify that he had been advised by other inmates that Mr. Pittman talked about this case nonstop and indicated to some inmates that he may have done it. The Defendant claims that the State knew that this wasn't the case; and they failed to disclose that they knew that another inmate, Elton Ard, had indicated that Mr. Pittman had never given an indication that he had killed anyone. The Court does not find that this allegation has any merit, and it was not supported by the defense at the evidentiary hearing.
>
> The Defendant alleges that to the extent the new evidence regarding Mr. Hughes was not disclosed by the State, due process was violated. In addition, the Defendant alleges that to the extent trial counsel failed to discover the information with regard to Mr. Hughes, Mr. Pittman received ineffective assistance of counsel. The Court does not find that the new information concerning Mr. Hughes supports a conclusion that confidence in the verdict has been weakened or undermined. In addition, the Court does not find that the Defendant has supported a conclusion that trial counsel's performance fell below an objective standard of reasonableness.
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> (PCR V34/5395-5396).

The IAC Sub-Claim

At pages 92-94 of his initial brief, Pittman concludes that his experienced trial attorneys, Mr. Norgard and Mr. Trogolo, were ineffective in failing to obtain Pounds' PSI, contact inmate John Schneider in person, elicit from James Troup that, even though

there was smoke inside the Toyota, it was not yet coming out of the car, and dispute Waters level of certainty in identifying the homemade wrecker.

At trial, Mr. Troup testified that he saw a car on fire on Prairie Mine Road at around 6:30 a.m. (DA-R 1283). In denying the IAC sub-claim (based on the failure to elicit testimony from Troup that he did not see smoke coming from the vehicle to allegedly impeach the observations of Barbara Davis[10]), the trial court found no deficiency; and, even assuming any deficiency, there was "no reasonable basis to assume that but for such deficient performance, the result of the proceeding would have been different." (PCR V34/5403). In short, the jury already knew that Troup did not see anyone around the burning car. (DA-R 1290-91).

With regard to the failure to contact inmate John Schneider in

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10 Barbara Davis identified Pittman as the man next to the passenger side of the burning car and who came up the embankment at a "jog-like" pace. Ms. Davis lived in an apartment on Prairie Mine Road next to where the Toyota was abandoned and burned. (DA-R 1699—1700). At approximately 6:40 a.m. on the morning of the fire, Ms. Davis was outside picking roses when she saw a ball of smoke. (DA-R 1702-03). When Ms. Davis subsequently approached the location of the fire, she saw a man coming up the embankment from beside the car. (DA-R 1704-05). The man was right next to the passenger side of the car - an inch or two away from it. (DA-R 1704) The man went across the parking lot, taking "big steps at record speed." (DA-R 1705) Ms. Davis saw the right side of the man's face; she described him as a white male with acne or indents in his face, a long and pointed nose, and dirty blonde hair hanging down on his head. (DA-R 1705; 1711-1712; 1714). Later that day, the police took her to Bartow where she identified Pittman's photo from two separate photo-packs; the first group of photos were front view only and the second group were right side profile photographs. (DA-R 1714-16; 1720). Ms. Davis also identified Pittman in court. (DA-R1 719).

person, trial counsel, Mr. Norgard, testified that Schneider[11] was not contacted (in person) at the time of trial because Schneider's attorney informed the Public Defender's investigator that Schneider was afraid and Schneider didn't want to talk to them. Strickland mandates an evaluation of the conduct from counsel's perspective at the time. 466 U.S. at 689. Further, "[t]here is no reasonable basis to assume that but for such deficient performance, the result of the proceeding would have been different." (PCR V34/5403).

None of Pittman's IAC allegations satisfy Strickland. Pittman was represented by experienced capital defense attorneys who were zealous advocates on Pittman's behalf. The trial court correctly found that Pittman failed to establish any deficiency of counsel; and, even assuming deficient performance, there was no reasonable probability that the result of the proceedings would have been different. (PCR V34/5405).

The "Alleged Newly Discovered" Evidence Claim

Pittman alleged below that his daughter, Cindy (when she was 4 years old), was a witness to the Knowles' homicides and that the murders were committed by Harry Earl Wilson [victim Barbara Knowles' brother-in-law] or someone other than David Pittman. The trial court ruled that the alleged Brady and newly discovered evidence claims relating to Harry Earl Wilson were unsupported at

11 At the post-conviction hearing, Schneider testified that he saw Hughes going through Pittman's papers on two occasions, and that inmates in the jail had access to newspapers.

the post-conviction hearing and deemed abandoned. (PCR V34/5383). And, Marie's hearsay statement to Carlos Battles in 1998, eight years after the murders, that Cindy needed counseling for sexual abuse and Cindy "witnessed her grandmother being killed by her brother-in-law"[12], did not constitute any basis for relief under Jones. As the trial court explained:

> This claim of newly discovered evidence involves hearsay statements from Marie Pridgen given to a Mr. Battles in 1998. Cindy Pittman was four years old when her grandparents were murdered in 1990, and the statement Marie made to DCF investigators was eight years after the murders. Mr. Battles testified that he never questioned Cindy about the allegation, and he had no idea if the child actually saw a murder. Detective Cosper testified at the evidentiary hearing that Marie Pittman never told him that Cindy had witnessed the murders. The Court finds no credible basis that this information meets the Jones requirements as newly discovered evidence. In particular, the Court does not find that this evidence is of such a nature that it would probably produce an acquittal on retrial.
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> (PCR V34/5384).

At page 96 of his initial brief, Pittman relies on his belated discovery of an allegedly "newly discovered" hearsay witness, Chasity Eagan. The trial court emphasized its "concerns regarding the timeliness of the Defendant's Second Amendment, and it is the

12 Pittman admits that Battles' notation of Marie's hearsay statements eight years after the murders - that Cindy (when she was 4 years old) purportedly witnessed "*her grandmother* being killed by *her brother-in-law*" - is unclear. (Initial Brief at 95, fn. 110). Victim Barbara Knowles' brother-in-law was Harry Wilson - the same man that Pittman's post-conviction motion suggested as the killer. Battles own conclusory reference to "her" uncle could mean either Marie's uncle [Harry Wilson] or Cindy's uncle [either her Pittman uncle[s] or Pridgen uncle].

Court's opinion that it is untimely and procedurally barred based on the defense's admission that it did have knowledge of Ms. Eagan prior to the May 2006 evidentiary hearing." (PCR V34/5393). The trial court allowed Pittman's belated amendment, conducted an additional evidentiary hearing on the alleged "newly discovered" hearsay witness, Chastity Eagan (PCR V34/5392-5393), and concluded:

> even if the testimony of Ms. Eagan could not have been discovered earlier by counsel through the exercise of due diligence, the Court finds that the evidence provided by Ms. Eagan does not meet the newly discovered evidence standard, because it is not of such a character as to probably produce an acquittal on retrial. Ms. Eagan's testimony involves hearsay statements that would likely have not been admissible at trial, except possibly for impeachment purposes. Ms. Eagan was 13 years old at the time she allegedly heard the statement by Marie Pridgen, and this was approximately 17 years ago. The statement Ms. Eagan heard from Marie Pridgen does not constitute an admission, confession, or statement of any material nature. The statement Ms. Eagan allegedly heard David Pridgen make while he had been drinking at a Halloween party approximately 15 years ago seems likely to have had something to do with his experiences in the Gulf War, and nothing whatsoever to do with the murders of the Knowles.
>
> * * *
>
> . . . The Court does not find any reasonable probability that the new evidence argued by the Defendant in this Claim when considered cumulatively along with information detailed in Claims II and III would have made a difference in the outcome of the verdict. Claim I of Defendant's Motion is denied.
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> (PCR V34/5382-5394). (e.s.)

The trial court correctly denied Pittman's claim of alleged "newly discovered" evidence. First, the defense failed to establish "due diligence" with regard to this belated hearsay

witness. Second, Chastity Eagan's hearsay testimony would be inadmissible as substantive evidence. Third, David Pridgen directly contradicted any innuendo of an alleged confession. David Pridgen had nothing to do with the Knowles' family murders on May 15, 1990. Eagan's inadmissible hearsay would not produce an acquittal under Jones.

Pittman was in jail from November 1988 (DA-R 3804) and released in January of 1990 (DA-R 3876); the three members of the Knowles family were murdered in May of 1990. In addition to Pittman's separate confessions to Hughes and Pounds, May 14th was the first night in years that Pittman had visited his father's house. (DA-R 3885). The bedrooms had doors that opened to the outside. (DA-R 2106). Debra Caves confirmed Pittman's threat to kill Marie and her family. (DA-R 2497). Both Johnny Taylor and Officer William Hunter also testified regarding Pittman's threats to kill his in-laws. (DA-R 2454; 2793). Pittman claimed that torching took care of any evidence (DA-R 2794, 95), and Pittman set fire to the car and house with use of an accelerant, which confirmed his prior threats to harm his in-laws and avoid apprehension. None of Pittman's current allegations, individually or cumulatively, warrant any relief.

ISSUE II

THE PENALTY PHASE CLAIMS UNDER BRADY, STRICKLAND and JONES.

Issue II of Pittman's initial brief, which totals three pages (Initial Brief at 97–100), summarily alleges penalty phase claims under Brady, Strickland/IAC, and Jones/newly discovered evidence. For the following reasons, the trial court's fact-specific order denying Pittman's penalty phase claims (PCR V34/5408-5412; 5420-5421; 5335; 5341) should be affirmed.

A. The Brady Claim

At pages 97–98 of his initial brief, Pittman declares his sweeping reliance on some unspecified Brady "information" that is "set forth in the preceding sections" of his Initial Brief. Pittman's attempt to incorporate additional "information" set forth *somewhere* in the preceding 96 pages of his 100-page Initial Brief is inadequate to preserve any penalty phase claim for review. Any unspecified Brady/penalty phase claims are waived. See, Kearse v. State, 969 So. 2d 976, 990 (Fla. 2007) (claims raised in conclusory fashion on post-conviction appeal were waived); Smith v. State, 931 So. 2d 790, 800 (Fla. 2006) (defendant's unspecified claim -- that the trial court allegedly precluded Smith from presenting "some evidence" on some of his Brady and Giglio claims - was vague and conclusory); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990)

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

At page 98 of his initial brief, Pittman does identify, with specificity, one alleged Brady/penalty phase claim. That single claim is based on Pittman's post-conviction exhibit 13 -- Detective Cosper's handwritten notes[13] which correspond to the prosecutor's interview of Pittman's ex-wife, Marie, on May 31, 1990. Detective Cosper wrote: *She found it funny that David would be concerned – stated he was putting on an act – He never wanted to do anything for the children – It would take away from his drug "crank" money.* (PCR-Evid. V6/857). Relying on this notation, Pittman concludes that Marie likely informed ASA Pickard that Pittman had a "crank" problem.[14]

As the trial court noted, Pittman's trial counsel, Mr. Norgard, confirmed that, at the time of trial, the defense already

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13 Mr. Cosper referred to his notes as a memory jogger; they were not verbatim. (PCR V34/5329). Likewise, ASA Pickard's handwritten notes were not verbatim statements of the witness and were never shown to the witness or adopted by the witness. (PCR V34/5370).

14 The trial court noted that ASA Pickard "was shown a line from Defense Exhibit 13, which seemed to be talking about Mr. Pittman and money for crank. Mr. Pickard testified that he did not recall Mrs. Pittman making a statement regarding Mr. Pittman's crank money, and he did not recall either disclosing or not disclosing the information to the defense. *Mr. Pickard testified he could not recall if he specifically told the defense that there was evidence that the Defendant was doing crank. He would probably have assumed they already knew that based on interviews the defense did of the Defendant, his parents, relatives and friends.*" (PCR V34/5344, e.s.).

knew about Pittman's drug use. (PCR V34/5365). However, because Marie was considered a hostile witness, the trial court concluded, at most, that additional testimony of Pittman's drug use "might be considered favorable for use in penalty phase mitigation." (PCR V34/5420). The trial court did not believe that the State willfully tried to keep information from the defense and further found that Mr. Pickard made an effort at Marie's deposition to "tell the defense about things he was going to go into that hadn't been covered in the deposition."[15] (PCR V34/5421). The trial court ultimately concluded that "none of the information from the notes comes close to being of such a material nature, and the Court does not find that the State's failure to disclose the notes or the information contained in the notes constitutes a Brady violation." (PCR V34/5421).

Pittman argues that additional testimony from Marie on Pittman's voluntary use of "crank" would have been "particularly helpful." [16] (Initial Brief at 98). However, a Brady violation is not established by the defense suggestion that additional evidence may be "particularly helpful." Rather, the ultimate test under Brady is "whether the disclosed information is of such a nature and

15 ASA Pickard reviewed his notes during Marie's deposition [January 24, 1991], and advised the defense about five or six areas that the State was going to go into that the defense hadn't covered in Marie's deposition. (PCR V34/5369-5370; Excerpt, Marie's deposition at PCR-Evid. V9/1352-1354).

16 In relying on Detective Cosper's notes, Pittman simultaneously ignores the preceding notation which concluded that Pittman's

weight that "confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different." Jennings v. State, 782 So. 2d 853, 856 (Fla. 2001). As previously noted, Pittman's trial counsel, Mr. Norgard, confirmed that the defense already knew of Pittman's drug use at the time of trial. Furthermore, Pittman testified on his own behalf at trial and Pittman does not allege any limitation on the defense examination of any of the witnesses, including Marie, regarding Pittman's own drug use. "There 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." Peede v. State, 955 So. 2d 480, 497 (Fla. 2007), citing Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993).

B. The IAC/Penalty Phase Claim

Next, Pittman argues that defense counsel was ineffective during the penalty phase in (1) failing to present four additional witnesses - Robert Barker, Michael Pittman, Jean Wesley and Tilly Woody - to testify about Pittman's substance abuse and "life-long" afflictions, and (2) failing to elicit additional information from three witnesses-Tammy Davis, William Pittman, and Dr. Dee-who previously testified during penalty phase. (Initial Brief at 99).

"concern" for the children was merely an act.

When evaluating claims that counsel was ineffective for failing to present mitigating evidence, the defendant has the burden of showing that counsel's ineffectiveness "deprived the defendant of a reliable penalty phase proceeding." Mungin v. State, 932 So. 2d 986, 1002 (Fla. 2006), citing Asay v. State, 769 So. 2d 974, 985 (Fla. 2000). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693. Instead, under Strickland, when a criminal defendant challenges a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695.

On direct appeal, this Court reiterated that, during the penalty phase,

> . . . the State established that Pittman was convicted of aggravated assault in 1985. In mitigation, Pittman presented the testimony of his mother that he was a difficult child to deal with and that she had disciplined him severely. A clinical psychologist testified that Pittman's father was a paranoid schizophrenic; that as a child Pittman suffered from a severe attention deficit disorder with hyperactivity; and that Pittman has organic personality syndrome, which causes paranoia and an unstable mood. After hearing this testimony, the jury recommended the death penalty for each murder conviction by a vote of 9 to 3. In his sentencing order, the judge found two aggravating circumstances for each murder: (1) previous conviction of another capital or violent felony, and (2) the murders were heinous, atrocious, or cruel. [n1] The judge then expressly rejected the mitigating factors of Pittman's being under the influence of extreme mental and emotional disturbance and concluded that the aggravating factors

outweighed the proven mitigating factors. [n2] The judge imposed the death penalty for each murder. . . .

Pittman, 646 So. 2d at 169-170 (e.s.) (footnotes omitted)

On direct appeal, this Court also set forth the trial court's sentencing order, which stated, in pertinent part:

I. AGGRAVATING CIRCUMSTANCES

1. As an aggravating circumstance, the Defendant, David Joseph Pittman, was proven beyond and to the exclusion of every reasonable doubt to have a previous conviction of a felony involving the use or threat of violence; to wit: Aggravated Assault. (Case No. CF85-3584A1 - Sentenced on March 12, 1986.)

2. As an aggravating circumstance, the Defendant, David Joseph Pittman, was proven beyond and to the exclusion of every reasonable doubt to have committed two previous capital felonies as to each of the three murders for which he has been found guilty; to wit: the murders of Bonnie Knowles and Barbara Knowles as to the murder of Clarence Knowles; the murders of Barbara Knowles and Clarence Knowles as to the murder of Bonnie Knowles; the murders of Clarence Knowles and Bonnie Knowles as to the murder of Barbara Knowles.

3. As an aggravating circumstance, the commission of the First Degree Murder of Bonnie Knowles was especially heinous, atrocious or cruel.

By testimony and evidence in the record the court finds that the State proved beyond and to the exclusion of all reasonable doubt that Bonnie Knowles experienced conscious pain and suffering before death as a result of the Defendant cutting and stabbing Bonnie Knowles numerous times with a knife or similar object.

4. As an aggravating circumstance, the commission of the First Degree Murder of Barbara Knowles was especially heinous, atrocious or cruel.

By the testimony and evidence in the record the Court finds that the State proved beyond and to the exclusion of every reasonable doubt that Barbara Knowles [a] experienced pre-death apprehension of physical pain; [b] experienced conscious pain and suffering before death as

a result of the Defendant stabbing Barbara Knowles numerous times with a knife or similar object; and [c] that she experienced apprehension of impending death even absent physical pain.

5. As an aggravating circumstance, the commission of First Degree Murder of Clarence Knowles was especially heinous, atrocious or cruel.

By testimony and evidence in the record the Court finds that the State proved beyond and to the exclusion of every reasonable doubt that Clarence Knowles [a] experienced pre-death apprehension of physical pain; [b] experienced apprehension of death even absent physical pain; and [c] experienced conscious pain and suffering before death as a result of the Defendant stabbing Clarence Knowles numerous times with a knife or similar object.

THE COURT concludes from these facts that David Joseph Pittman's actions in murdering each of the three individuals was especially heinous, meaning extremely wicked or shockingly evil; was especially atrocious, meaning outrageously wicked or vile; and was especially cruel, meaning designed to inflict a high degree of pain with utter indifference to, or even with enjoyment of, the suffering of others.

II. MITIGATING CIRCUMSTANCES

As to mitigating circumstances, the Court finds the following:

1. That the three First Degree Murders for which the Defendant is to be sentenced were not committed while the Defendant was under the influence of extreme mental or emotional disturbances, nor were they mitigated by the use of alcohol as suggested. To the contrary, the Court finds the Defendant [a] arranged the visit to his father's house on the eve of the murders, the first time in months that he had been to his father's house; [b] that he left the house by an outside door from a locked room; [c] walked the short distance in the early morning hours to the victim's home; and [d] there cut the telephone lines to the outside of the house.

The Defendant upon entering the victim's home, systematically killed all the occupants of the house using a weapon that assured the least possibility of

drawing the attention of witnesses. He then proceeded in a knowledgeable way to pour gasoline about the house and out into the yard. Testimony at the trial revealed that he understood the use of fire to destroy evidence. Before setting the fire, however, he secured the keys to Bonnie Knowles car for the purpose of his getaway.

The Defendant's actions and all other evidentiary circumstances considered show a direct conscious plan to kill and avoid apprehension. These actions do not indicate a person functioning under the influence of extreme mental or emotional disturbances. In regard to the influence of alcohol, other than the expert's opinion, the record does not reflect it to have been a factor in the commission of the murders.

2. Except for the solicited opinions of the Defendant's expert that the Defendant's capacity to conform his conduct to the requirements of the law was substantially impaired, this mitigating circumstance is unsupported by any other evidence in the record.

To the contrary, these facts reveal that all the actions by the Defendant leading up to the killings, the nature of the killings themselves, the methodical steps taken to destroy evidence, to effectuate a getaway, and to establish an alibi were the product of deliberate thought. These actions clearly show that the Defendant knew what he was doing and that it was unlawful. Again the presence of alcohol as a mitigating factor is unsupported by the record except for the expert's opinion.

THE COURT finds there is nothing in the record to demonstrate that the Defendant could not conform his conduct to the requirements of law.

3. The expert has offered an opinion as a mitigating circumstance that the Defendant suffers brain damage. Other than this opinion there exists no corroborating evidence to suggest the presence of this damage or its degree, nor its actual relationship to the murders.

4. Additional mitigating circumstances offered in evidence are that the Defendant was and may still be a hyperactive personality, and that he may have suffered physical and sexual abuse as a child. Also the expert testified that the Defendant was an impulsive person with

memory problems and impaired social judgment.

Taking all these mitigating circumstances in a light most favorable to the Defendant, the Court finds they have little if any connection to the murders. The record speaks clearly of an individual who went about the killings and the destruction of evidence in a deliberate, methodical and efficient manner to such an extent that detection was nearly avoided. But for a lady picking roses early one morning who happened to see the Defendant running from Bonnie Knowles' burning car, the case might not have been successfully prosecuted.

While addressing meaningful facts, the record reflects another that enlightens upon the issues of the Defendant's intentions and his capacity to understand what he was doing was unlawful. That fact was the Defendant's cutting of the telephone lines. This was admitted by the Defendant to witness Hughes as being done before the Defendant entered the home of the victims.

THE COURT, therefore, finds the aggravating circumstances established by the proper burden of proof to substantially outweigh all mitigating circumstances reflected in the record.

Pittman, 646 So. 2d at 170, fn. 1 & 2 (e.s.)

In imposing the death sentence, the trial court rejected Pittman's claim that his conduct - the careful preparation and execution of this triple homicide - was mitigated by any mental health theory. The facts and circumstances of the murders - including Pittman's use of gasoline and fire to destroy evidence - refuted the theory presented by the defense-retained mental health expert in an effort to reduce Pittman's culpability. Indeed, the truth of the matter is closer to the testimony presented by Pittman's mother as "a child most women would not want to have to

raise" (DA-R 4357-58) and responsible for most of his fights (DA-R 4364). At the time of trial, it was established that Pittman's I.Q. is a lot higher than many people Dr. Dee dealt with, Pittman was capable of making the decision whether to kill or not (DA-R 4476; 4487), and the night of May 14 was the first night in months that Pittman had visited his father's house - a fact confirmed by Pittman's own testimony. (DA-R 3885).

In this case, each victim was stabbed numerous times and bled to death. In addition, Bonnie Knowles' throat was cut. Pittman, 646 So. 2d at 173. Pittman had made threats about his in-laws over a prolonged period of time, waited for the first opportunity to confront them in the early morning hours at their home, cut the telephone wires, stabbed them and burned the house to remove evidence. The trial court addressed the defense mitigation claims of brain damage, hyperactivity, physical and sexual abuse as a child, his impulsivity with memory problems in paragraphs (3) and (4) of the mitigating circumstances section of his sentencing order (DA-R 5180). The alleged mental and emotional problems urged by the defense were discounted by comparison to the "deliberate, methodical, and efficient manner to such an extent that detection was nearly avoided." (DA-R 5181). On direct appeal, this Court agreed that the trial judge could reasonably reject the expert's testimony concerning Pittman's mental and emotional condition, and the trial judge did consider the non-statutory mitigation but found

it to have little weight as a mitigating factor. Pittman, 646 So. 2d at 173. On direct appeal, this Court examined the sentencing order and held:

> The order also provides a reasoned judgment for its rejection of alcohol use and brain damage as mitigating factors in this case, and for its acceptance of the mitigating circumstances that Pittman was a hyperactive personality, that he may have suffered physical and sexual abuse as a child, and that he was an impulsive person with memory problems and impaired social judgment. Finally, the order states with particularity the reasons that this mitigation did not outweigh the aggravating circumstances. We have examined the sentencing order and find no error.
>
> Pittman, 646 So. 2d at 172 (e.s.)

After conducting several days of post-conviction evidentiary hearings, the trial court concluded that the defense failed to establish any deficiency of counsel with regard to additional mitigation evidence. And, as the trial court emphasized, Dr. Dee testified during the penalty phase regarding Pittman's mental health issues, drug problems, and sexual abuse. (PCR V34/5409-5412). In sum, Pittman failed to establish any deficiency of counsel and resulting prejudice under Strickland, and Pittman's post-conviction witnesses either presented no genuinely compelling mitigation or essentially addressed cumulative evidence. See, Cole v. State, 841 So. 2d 409, 425 (Fla. 2003); Jones v. State, 998 So. 2d 573 (Fla. 2008).

Pittman repeatedly stabbed the three victims, set the victims' home ablaze, and made his "getaway" by stealing Bonnie Knowles'

car. In setting the Knowles' house on fire, with the victims still inside, and setting Bonnie's car on fire, Pittman evidenced both his plan to kill and to avoid apprehension. Pittman not only slaughtered three members of the Knowles' family, but he previously had been convicted of aggravated assault in 1985. As this Court emphasized on direct appeal, "Pittman stabbed his in-laws to death in the middle of the night after taking the precaution of cutting the phone lines. Clearly, these murders justify the sentences imposed in this case." Pittman, 646 So. 2d at 173.

C. The "Newly Discovered Evidence" Claim (PET Scan)

Lastly, Pittman's alleged "newly discovered" evidence consists of the results of the PET scan[17] administered to Pittman in 2002 by Dr. Wu. There was nothing in Dr. Dee's trial testimony that Dr. Wu disagreed with - the PET scan results were consistent with Dr.

17 Presumably, Pittman argues this claim under the guise of "newly discovered" evidence rather than a component of ineffective assistance because PET scans were not routinely available in the early 1990's. See, Brown v. State, 755 So. 2d 616, 633, n.13 (Fla. 2000) (noting that defense expert testified that a PET scan was not recommended because, at the time of Brown's trial in 1987, the test was not available in Hillsborough County, no research data existed at the time as to how to interpret the test, and the PET scan was not widely accepted until recently and still is not approved by the Food and Drug Administration as a medical diagnostic tool); See also, Ferrell v. State, 918 So. 2d 163, 175, n.11 (Fla. 2006), stating "In fact, a capital cases defense manual prepared by the Florida Public Defender's Association and distributed in 1992 did not mention either PET or SPECT scans in a list of medical tests used to confirm brain damage. Furthermore, the manual cautioned that even the listed medical tests could be unreliable and did not always indicate organic brain damage. Instead, the manual stated that neuropsychological testing was actually more reliable in showing such deficits."

Dee's trial testimony.

In Miller v. State, 926 So. 2d 1243, 1259 (Fla. 2006), another death row inmate also claimed that the PET scan offered new information entitling him to post-conviction relief. At trial, Miller's expert witness, Dr. Krop, testified that Miller suffered from a frontal-lobe deficiency. Dr. Krop testified in post-conviction that the information revealed from the PET scan supported his initial conclusion of a frontal lobe deficiency. On post-conviction appeal, this Court held that "although the results from the PET scan were not known at the time of the trial, this additional evidence is not the type of evidence that is "of such nature that it would probably produce an acquittal on retrial." Scott v. State/Dugger, 604 So. 2d 465, 468 (Fla. 1992) (alteration in original) (quoting Jones v. State, 591 So. 2d 911, 915 (Fla. 1991)). Because the PET scan results would have only corroborated Dr. Krop's trial testimony, this Court denied Miller's post-conviction claim. Miller, 926 So. 2d at 1259. Here, as in Ferrell, Pittman has not demonstrated that a PET scan would have been available to counsel or even admissible at trial; and as in Miller, 926 So. 2d at 1259, because the PET scan would have only corroborated Dr. Dee's prior testimony, Pittman is not entitled to any relief under Jones.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court denying post-conviction relief should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Martin J. McClain, Esq., McClain & McDermott, P.A., 141 N.E. 30th Street, Wilton Manors, Florida 33334-1064 this 26th day of March, 2009.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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