IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC08-656

THOMAS WYATT

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Thomas A. Wyatt ("Wyatt"), Defendant below, will be referred to as "Wyatt" and Appellee, State of Florida, will be referred to as "State". Reference to the appellate record will be by "R", to the postconviction record will be "PCR", to the record in Wyatt's direct appeal of the Domino's murders "Wyatt I R" and supplemental materials will be designated by the symbol "S" preceding the type of record referenced, Wyatt's initial brief will be notated as "IB" followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE AND FACTS

On May 10, 1989, Wyatt, was indicted[1] for the first-degree murder murders of William Edwards, "FE" and Matthew Bornoosh (Counts I, II and III) (R 3960-66). The indictment also charged Wyatt and Michael Lovette with sexual battery, kidnapping, robbery with a firearm, grand theft, arson and possession of a firearm by a convicted felon involving the Domino's victims (R 3960-66). There was also one count charging the first-degree

[1] Presently, Wyatt has four cases pending before this Court arising from his May 10, 1989 indictment. Postconviction appeal SC08-655 and habeas petition SC09-556 for triple homicide ("Wyatt I" or "Wyatt-Dominos") and postconviction appeal SC08-656 and habeas petition SC10-632 for murder of Cathy Nydegger ("Wyatt II" or "Wyatt-Nydegger") The evidentiary hearing for these cases were held together, however, separate records were prepared.

murder of Cathy Nydegger (Count IV), which was later severed, and is the subject of this litigation.

Wyatt was tried separately for Nydegger's murder (R 4172) and after a jury trial, was found guilty as charged on Count IV. The jury recommended a sentence of death, by a vote of 11 to 1. The judge followed the recommendation, sentencing Wyatt to death on December 20, 1991, for the first-degree murder of Cathy Nydegger (R 2477-2484) finding the following aggravators: (1) Wyatt was under a sentence of imprisonment at the time of the murder; (2) Wyatt had prior violent felonies; (3) the murder was committed during the course of a felony, to-wit, a robbery; (4) the murder was committed for the purpose of avoiding arrest; (5) the murder was committed for pecuniary gain; and (6) the murder was CCP. The court merged factors three and five, weighing them together. Also, the court found no statutory mitigators and one nonstatutory mitigator–that in Wyatt's his early youth, he had lived in a broken and unstable home provided by his stepfather while his mentally ill mother was in and out of mental hospitals.

The judge found the following aggravators: (1) Wyatt was under a sentence of imprisonment at the time of the murders; (2) Wyatt had prior violent felonies; (3) the murders were committed during the course of felonies to-wit, robbery and sexual battery; (4) the murders were committed for the purpose of

avoiding arrest; (5) the murders were committed for pecuniary gain; (6) the murders were CCP and (7) the murders were HAC. The court found no mitigators.

On direct appeal, Wyatt presented 16 issues.[2] In affirming Wyatt's convictions and sentences on appeal, this Court found the following facts:

> Wyatt and Michael Lovette escaped from a North Carolina road gang on May 13, 1988. The pair then set out on a crime spree throughout Florida. [FN1] On May 19, 1988, Cathy Nydegger was at a bar near Tampa where she was seen talking to and playing the "skill crane" with Wyatt. They left together carrying several stuffed animals they had won. Wyatt returned to the bar ten or fifteen minutes later and left again with Michael Lovette. Nydegger's body was found the next day in a ditch in a deserted area in Indian River County. She had been shot once in the head.
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> FN1. According to evidence presented at the guilt and penalty phases of the trial, Wyatt and Lovette: kidnapped and robbed someone on their way to Florida; stole a car in Jacksonville and later burned it in Indian River County; robbed a Taco Bell in Daytona Beach; and killed three Domino's Pizza employees with Wyatt committing sexual battery on one of them. Also, Wyatt stole a car in Madeira Beach.
>
> The day Nydegger's body was found, Wyatt checked into a motel in Clearwater using an assumed name. He

[2] Of import here were issues: (5) the Trial Court Erred by Admitting a Photograph of the Victim; (11) the Trial Court Incorrectly Found the Existence of the Aggravators; (12) the Trial Court Failed to Consider All the Mitigators; (13) the Jury Was Not Properly Instructed During the Penalty Phase; (14) Admission of Prior Violent Felonies Violated the Confrontation Clause; (15) the Prosecutor's Penalty Phase Argument Was Impermissible; (16) Florida's Death Penalty Statute Is Unconstitutional.

> arrived at the motel in Nydegger's car, which he abandoned a few days later. While at the motel, Wyatt met Freddie Fox and gave him some bullets matching the fatal bullet. Fox also took a gun from Wyatt with rifling characteristics similar to those of the gun used to kill Nydegger. Wyatt was later arrested in South Carolina on an unrelated charge. While in jail, he told Patrick McCoombs, another inmate, that he had killed Nydegger. At trial, Wyatt denied killing Nydegger and blamed the murder on Lovette. He admitted to twenty-one prior felony convictions.

Wyatt v. State, 641 So.2d 355, 357 (Fla. 1994). On March 20, 1995, Wyatt's certiorari petition was denied. Wyatt v. Florida, 514 U.S. 1023 (1995).

On or about March 14, 1997, Wyatt's initial motion for post-conviction relief was filed.[3] After several years of public records litigation and amendments dated November 29, 1999, December 23, 2003 and March 30, 2004, Wyatt filed his final amendment on March 24, 2006. Following these submissions, responses from the State, and the Case Management Conference/hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1983), an evidentiary hearing was granted the claims addressed to ineffectiveness of counsel, newly discovered evidence related the use of comparative bullet lead analysis testing ("CBLA") evidence and the alleged recantation of Patrick McCoombs. The hearing was held on August 6th through 9th, 2007, in conjunction with the postconviction hearing on the Domino's

[3] By leave of this Court, on July 22, 1996, Wyatt was given until August 21, 1996 to be designated counsel and until July 21, 1997 to file his postconviction relief motion.

murders, and during which Wyatt presented, former prosecutors, The Honorable Lawrence Mirman and the Honorable David Morgan, Patrick McCoombs, The Honorable Diamond Litty (Wyatt's penalty phase counsel, previously practicing as Diamond Horne), Dr. Faye Sultan, William Tobin, and Dr. Ernest Bordini.

On February 12, 2008, just prior to the trial court's scheduled ruling on the postconviction matters, Wyatt filed a Supplement to Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend. This was treated as a successive motion, and the matter was stayed. On February 29, 2008, the court denied all claims. His motion for rehearing was denied and he appealed.

Initially, this Court denied Wyatt's request to relinquish jurisdiction, however, following the disclosure of the October, 2008 FBI letter, Wyatt's renewed motion to relinquish was granted. On remand, Wyatt was allowed to amend his postconviction motion and a hearing was held the CBLA and McCoombs issues. Postconviction relief was denied, and the case returned to this court.

SUMMARY OF THE ARGUMENT

Issue I - The trial court's denial of postconviction relief on Wyatt's claims that he should be granted a new trial under newly discovered evidence, Giglio, Brady, and Strickland given the FBI's recent rejection of CBLA testing and the alleged false testimony provided by McCoombs was proper. The factual findings are supported by substantial competent evidence and the law was applied properly.

Issue II – Wyatt's penalty phase counsel provided constitutionally effective assistance of counsel under Strickland and his mental health evaluation comported with Ake.

Issue III – Summary denial of Wyatt's claims of ineffective assistance arising from the introduction of allegedly gruesome photographs and permitting Wyatt to be shackled was proper as either they were pled in legally insufficient terms, procedurally barred, refuted from the record, or without merit.

Issue IV – Florida Rule of Criminal Procedure 3.852 addressed to public records requests for capital defendants is constitutional.

Issue V – Wyatt's challenge to the penalty phase instructions is procedurally barred and not preserved, however, the instructions were constitutional.

Issue VI – Florida's capital sentencing statute and lethal injection protocols are constitutional.

ARGUMENT

ISSUE I

WYATT'S CLAIMS OF NEWLY DISCOVERED EVIDENCE,[4] BRADY[5] AND GIGLIO[6] VIOLATIONS AND INEFFECITVE ASSISTANCE OF COUNSEL[7] ARISING FROM THE USE OF COMPARATIVE BULLET LEAD ANALYSIS TESTIMONY AND PRESENTATION OF PATRICK MCCOOMBS WERE DENIED PROPERLY (restated)

Wyatt challenges his murder convictions claiming newly discovered evidence of the FBI's decision regarding Comparative Bullet Lead Analysis ("CBLA") and of allegations Patrick McCoomb's ("McCoombs") testimony was false with respect to his federal sentence, the assistance he expected from the

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[4] Denial of a request for new trial based on newly discovered evidence is reviewed for abuse of discretion. See Aguirre-Jarquin v. State, 9 So.3d 593, 603 (Fla. 2009); Consalvo v. State, 937 So.2d 555, 562 (Fla. 2006).

[5] The standard of review for Brady v. Maryland, 373 U.S. 83 (1963) claims is "*de novo* for the legal question of prejudice while giving deference to the postconviction court's factual findings." Pace v. State, 854 So.2d 167, 178 (Fla. 2003) (citing Rogers v. State, 782 So.2d 373, 377 (Fla. 2001)).

[6] When reviewing Giglio v. Unitied States, 405 U.S. 150 (1972) claims this Court defers to the trial court's "factual findings supported by competent, substantial evidence, but reviews *de novo* the application of the law to the facts." Ferrell v. State, 29 So.3d 959, 977 (Fla. 2010) (citing Green v. State, 975 So.2d 1090, 1106 (Fla. 2008)).

[7] The standard of review for Strickland v. Washington, 466 U.S. 668 (1984) claims of ineffectiveness of counsel following an evidentiary hearing is *de novo*, with deference given the trial court's factual findings. "For ineffective assistance of counsel claims raised in postconviction proceedings, the appellate court affords deference to findings of fact based on competent, substantial evidence, and independently reviews deficiency and prejudice as mixed questions of law and fact." Freeman v. State, 858 So.2d 319, 323 (Fla. 2003).

prosecutor, and his allegedly recanted testimony. The State disagrees and submits that the trial court's decisions rejecting these claims are supported by substantial competent evidence and the law. The denial of relief should be affirmed.

Newly Discovered Evidence - As explained in Wright v. State, 857 So.2d 861 (Fla. 2003), newly discovered evidence is evidence that existed at the time of the trial, but was unknown by the court, party or counsel at that time, and neither the defendant nor his counsel could have known of the evidence through due diligence. In order to prevail, the defendant must show the "newly discovery evidence "is of such nature that it would probably produce an acquittal on retrial. [c.o] To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial…." Jones v. State, 709 So.2d 512, 521-22 (Fla. 1998).

"Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial" Marquard v. State, 850 So.2d 417, 424 (Fla. 2002) (citing Brown v. State, 381 So.2d 690 (Fla. 1980); Bell v. State, 90 So.2d 704 (Fla. 1956)). According to this Court, in determining whether a new trial is required because of a recantation:

a trial judge is to examine all the circumstances of

> the case, including the testimony of the witnesses submitted on the motion for the new trial. [c.o.] "Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury." [c.o.] Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted.

Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994). See Consalvo v State, 937 So.2d 555, 561-62 (Fla. 2006); Stano v. State, 708 So.2d 271, 275 (Fla. 1998). Only where it is determined that the recantation testimony is true must there be an assessment as to whether the new testimony would result in a different verdict on re-trial. See Johnson v. State, 769 So.2d 990, 998 (Fla. 2000). "Because [the assessment] entails a determination as to the credibility of the witness, this Court 'will not substitute its judgment for that of the trial court on issues of credibility' so long as the decision is supported by competent, substantial evidence." Marquard, 850 So.2d at 424 (quoting Johnson v. State, 769 So.2d 990, 1000 (Fla. 2000)).

Giglio Claim - This Court has opined:

> To establish a *Giglio* violation, it must be shown that (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. ... "[T]he false evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " *Id*. at 506 ... "The State, as the beneficiary of the *Giglio* violation, bears the burden to prove that the presentation of false testimony at trial was

harmless beyond a reasonable doubt." *Id.*

Ferrell v. State, 29 So.3d 959, 976-77 (Fla. 2010) (citations omitted); Mordenti v. State, 894 So.2d 161, 175 (Fla. 2004). Initially, the defendant bears the burden of proving the evidence was false and the prosecution knew this, only then does the burden shift to the State as the alleged beneficiary of the false testimony to prove the admission was harmless. Ferrell, 29 So.2d at 977.

Brady Claim - In analyzing Brady v. Maryland, 373 U.S. 83 (1962) claims, the reviewing Court defers to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but reviews de novo the application of those facts to the law. See Pace v. State, 854 So.2d 167, 178 (Fla. 2003). This Court has stated:

> To establish a *Brady* violation, the defendant must show the following: (1) that the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the suppression resulted in prejudice. *Rogers v. State*, 782 So.2d 373, 378 (Fla. 2001) (citing *Strickler v. Greene*, 527 U.S. 263, 280-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)).

Johnson v. State, 921 So.2d 490, 507 (Fla. 2005). See Pagan v. State, 29 So.3d 938, 952 (Fla. 2009); Lightbourne v. State, 841 So.2d 431, 437-38 (Fla. 2003); Rogers v. State, 782 So.2d 373 (Fla. 2001); Way v. State, 760 So.2d 903 (Fla. 2000); Strickler

v. Greene, 527 U.S. 263, 280-82 (1999).[8]

"The Brady rule requires that the prosecution not suppress evidence favorable to an accused where that 'evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' Brady, 373 U.S. at 87." Boyd v. State, 910 So.2d 167, 179 (Fla. 2005). "[F]avorable evidence is material and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 435 (1995). However, "'[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.'" Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988) (quoting United States v.

[8] In Pagan v. State, 29 So.3d 938, 952 (Fla. 2009), this Court reaffirmed that although the "due diligence" prong of Brady was absent from Strickler, "it continues to follow that a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant." (quoting Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000)). See Way v. State, 760 So. 2d 903 (Fla. 2000); High v. Head, 209 F.3d 1257 (11th Cir. 2000). Evidence has not been suppressed, and "'[t]here is no Brady violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence.'" Freeman v. State, 761 So.2d 1055, 1061-62 (Fla. 2000) (quoting Provenzano v, State, 616 So.2d 428, 430 (Fla. 1993).

Agurs, 427 U.S. 97, 109-10 (1976)). "Reasonable probability" is "a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985) (plurality); Kyles, 514 U.S. at 435.

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

CBLA[9] - It is Wyatt's claim that the FBI's new position on CBLA, and on this case in particular, is "newly discovered evidence" and establishes violations under Giglio and Brady. Also, Wyatt asserts he received ineffective assistance of counsel in violation of Strickland where counsel failed to challenge FBI Agent Riley's testimony under the state of the science in 1991 and could have discovered that "junk science" was being used against Wyatt. The trial court conducted an evidentiary hearing on these issues in August 2007 and again on remand in August 2009.

[9] This Court granted the Innocence Project of Florida leave to submit an Amicus Curiae brief. Such was addressed to the use of CBLA testimony. Based on the following analysis, while the FBI has discontinued the use of CBLA testing and has sent a letter noting the testimony offered in against Wyatt is not longer supported by the science, such does not undermine confidence in Wyatt's conviction or the death sentence he received.

The orders issued after each evidentiary hearing determined that no relief was required. Following the 2007 evidentiary hearing on Claim 26, the trial court found:

> Wyatt claims that the September 1, 2005, press release issued by the Federal Bureau of Investigation (FBI) is newly discovered evidence that the trial testimony concerning comparative bullet lead analysis (CBLA) was false and misleading. CBLA was issued in Wyatt's 1991 trial to match the bullets recovered from the victim to the bullets in Wyatt's possession. At trial, FBI Special Agent John Riley testified that the bullet removed from the victim came from the same box of ammunition as Wyatt's bullets, or from a box of ammunition that was manufactured at the same place around the same date as Wyatt's bullets. (Wyatt II R Vol IX 1443-47). In the 2005 press release the FBI announced that it was discontinuing CBLA in part because "neither scientists nor bullet manufacturers are able to definitively attest to the significance of an association made between bullets in the course of bullet lead examination." (See press release incorporated in Wyatt's third amended motion page 150).
>
> After conducting the evidentiary hearing, it is now clear that the press release was merely the announcement that the FBI had discontinued examination of bullet lead based in significant part on results of the National Research Council (NRC) evaluation of CBLA reported in "Weighing Bullet Lead Evidence" issued on February 10, 2004. (See Defendant's third amended motion page 151). In 2002, the FBI commissioned NRC to independently evaluate the scientific basis of CBLA as practiced by the FBI including: the scientific method, the data analysis, and the interpretation of results. In 2004, after conducting the extensive research, NRC concluded that any opinion that certain lead originated from the same box or the same batch of ammunition in not accepted in the scientific community. In 2005, the FBI discontinued CBLA.
>
> In his third amended motion, Wyatt relied upon NRC findings to support his claim of newly discovered evidence undermining CBLA. (See Defendant's third

amended motion pages 148-52, 155-59, & 163) And like the NRC evaluation, the FBI's CBLA practices were the feature of Wyatt's metallurgy expert's testimony at the evidentiary hearing. (PCR-T Vol. 823-954; Vol VIII 960-1047). As a result, the court now finds that the substance of the newly discovered evidence is actually the NRC report and underlying CBLA research, and not the one-page FBI press release announcing the discontinuation of CBLA.

Consequently, Claim 34 (including all sub-claims) is procedurally barred. Wyatt first raised Claim 34 in his third amended motion filed on March 28, 2006 more than one year after the NRC report was issued on February 10, 2004;[FN12] and more than one year after Wyatt's judgment and sentence became final after the United States Supreme Court denied Wyatt's petition for writ of certiorari in 1995. *Wyatt v. Florida*, 514 U.S. 1023 (US 1195). (sic) Absent any evidence that the publication of the NRC report could not have been discovered through the use of due diligence until sometime within the year prior to the filing of Claim 26, the claim is time-barred. *See Glock v. Moore*, 776 So.2d 243, 251 (Fla. 2001) (holding claim of newly discovered evidence in capital case must be brought within one year of date evidence was discovered or could have been discovered through due diligence.)

[FN12] Wyatt's initial postconviction motion was filed in 1997 pursuant to Florida Rule of Criminal Procedure 3.850, the predecessor to Rule 3.851 for capital collateral relief. . . . And the [one-year] time limitation after the new evidence could have been discovered. *See generally, Adams v. State*, 543 So.2d 1244 (Fla. 1989). Thus, Wyatt's new CBLA claim is untimely because the third amended motion was filed more than two years after the NRC report was issued and more than ten years after the judgment and death sentence became final.

(PCR.34 6569-71) (emphasis in original)

When the matter (new Claim 38) was considered on remand for a second evidentiary hearing following the disclosure of the August 7, 2008 FBI letter specific to Wyatt's case, the trial

court ruled:

> Wyatt claims that the case specific letter dated August 7, 2008, is newly discovered evidence that FBI expert testimony at Wyatt's trial exceeded the limits of . . . (CBLA) science. Defense Exhibit 107B, section 15. In support of this claim Wyatt presented two expert witnesses: metallurgist, William Tobin; and statistics professor, Clifford Spiegelman. But for the limited reference to the 2008 FBI letter, the court finds the testimony of both experts cumulative to the testimony presented to Judge Davidson at the August 2007 evidentiary hearing.
>
> To qualify as newly discovered evidence, the letter must have been in existence at the time of trial, and unknown to the trial court, the Defendant, or counsel, and if presented at trial, the evidence would have resulted in a acquittal or lesser sentence. *Kearse v. State*, 969 So.2d 976, 987 (Fla. 2007). The court finds that the 2008 letter does not meet the standard for newly discovered evidence because the letter was not in existence at the time of the 1991 trial; and is merely a reevaluation of the FBI's understanding of the opinions that can be drawn from CBLA scientific results based on the . . . (NRC) report published on February 10, 2004.
>
> In addition, the claim is time-barred in that it was presented more than a year after the NRC report was published. The court incorporates by reference Judge Davidson's February 29, 2008, order and adopts the reasoning in claim 26 in finding that the substance of the 2008 letter was actually in the NRC report und underlying CBLA research reported on February 10, 2004.
>
> Finally, even if the August 7, 2008 FBI letter constituted newly discovered evidence and even if this claim was timely filed, this court still finds no prejudice in the FBI expert testimony where the testimony did not directly establish that Wyatt murdered the victim, and where cross-examination undermined the probative value of the CBLA evidence. In support of this finding, the court incorporates by reference and adopts the State's citation to the postconviction and trial records as follows:

> FBI Agent Riley's testimony did not directly establish that Wyatt murdered the victim. The defense at trial was that his co-defendant, Lovette, was responsible for the murder. Wyatt's trial counsel, Diamond Litty ("Litty"), testified at the evidentiary hearing that this was the strategy. (PCR-T 607) At trial, State witness, Freddie Fox ("Fox"), testified that Wyatt gave him a bag of bullets and a gun. (R 850) When Wyatt testified, he admitted that he possessed both a .38 caliber pistol and bullets around the time of the murder, although he claimed that he had not given those items to Fox; rather, he claimed Fox stole them from him. (R 1780-1781) As Litty explained at the evidentiary hearing, the fact that Wyatt possessed the bullets used to kill the victims was irrelevant in light of the chosen defense. (PCR-T 607-608).
>
> Litty cross-examined Riley at trial in such a way that undermined the probative value of the CABL evidence. She established that there was no way to tell what store sold the bullets, or where that store was located. (R 1450-1451) Riley admitted that no one knew how many bullets with the same elemental composition were manufactured in any given time period for a particular manufacturer. He testified that there could be thousands of boxes of bullets with the same composition since billions of bullets were manufactured each year in the United States. Further, he conceded that a box of ammunition could contain bullets with different elemental compositions. (R 1451-52)

State's Post-Hearing Written Closing Argument for Claims 36-39, pages 21-22.

Further, the court finds no merit in Wyatt's *Brady* and *Giglio* claims with respect to the limits of CBLA science. To obtain relief under *Brady*, Wyatt must establish . . . . The court finds that even though the substance of the 2004 report and 2008 letter could be considered favorable to the Defendant, the evidence

> did not exist at the time of the 1991 trial, thus it could not have been suppressed by the State. In the absence of willful or inadvertent suppression of the evidence, the Court does not even get to the resulting prejudice. Nevertheless, even had Wyatt been able to establish that evidence favorable to him had been suppressed by the State, in light of the overwhelming evidence of guilt, this court still finds that Wyatt was unable to establish that he was prejudiced in any way by the admission of the CBLA testimony.
>
> To obtain relief under *Giglio* . . . . The court finds that the Defendant did not show that the 1991 FBI expert testimony was false and that the prosecutor knew it was false, only that current science no longer supports the opinions rendered previously. In this hearing, Wyatt presented no evidence that CBLA testimony did not comport with protocols valid at the time of the 1991 trial. This court does not find that the prosecutor knowingly presented false testimony regarding CBLA in Wyatt's trial. In fact, the court does not find that "false testimony" was presented by Agent Riley at all, and therefore the materiality of the CBLA testimony is not an issue. Accordingly, Wyatt is not entitled to relief under *Brady* or *Giglio*.

(SPCR.4 675-78)(footnotes omitted)

Newly Discovered Evidence Claim[10] - Initially, it must be noted that Wyatt's attack upon the use of CBLA testimony is time-barred as the claim was raised more than two years after the publication of the February 10, 2004 NRC report calling into question the CBLA opinions reached by the FBI.[11] Wyatt's

[10] The State will address the prejudice prong of the newly discovered evidence, Giglio, Brady, and Strickland claims together at the end of this argument.

[11] William Tobin ("Tobin"), the defense metallurgist expert, testified at the first evidentiary hearing that the process of analyzing the composition of bullet lead is a process that involves testing a sample of lead for seven different elements:

conviction and sentence became final on March 20, 1995 with the denial of certiorari. Wyatt, 514 U.S. at 1119. On or about March 14, 1997, Wyatt filed his initial postconviction relief motion, and it was not until his third amendment on March 24, 2006 that he added his CBLA claim. A capital defendant has one

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antimony, copper, arsenic, bismuth, silver, tin, and cadmium. Bullets are examined through a scientific process known as inductively coupled plasma - optical emission spectroscopy. The instrument examining the bullet lead sample determines the percentage of the seven elements in the sample, and the examiner then compares the percentage of each element present in the bullet lead sample to another bullet lead sample and determines whether the percentages of each element in the samples are analytically indistinguishable. If the bullet lead samples were analytically indistinguishable, then the examiner would render an opinion explaining the meaning of the match. (PCR.12 2250-52, 2254-55, 2263-64). Tobin testified that Agent Riley used a statistical method called "chaining" to declare matches between bullet fragments and that chaining was not a proper statistical method to use when determining whether the elemental composition of bullets matched. However, Tobin admitted that at the time of Wyatt's trial, chaining was an accepted method of statistical analysis. (PCR-T.12 2328, 2395). At the second evidentiary hearing in August, 2009, Tobin reiterated that CBLA analysis could no longer support a conclusion that a bullet could be traced to a particular box of bullets. (SPCR-T.5 2675-83, 2702-06). Such was confirmed by Professor Spiegelman ("Spiegelman"), a statistician, where he reported that the science of statistics would not support a finding that a bullet came from a particular box of ammunition. (SPCR-T.5 2730-33, 2741, 2744-48). The pith of the NRC report, subsequent FBI decision, and the defense experts' testimony is that the statistical analysis and subsequent opinions drawn from the CBLA testing no longer comported with accepted statistical procedure/science. While the chemical analysis conducted on the bullet lead was proper, the FBI was found to exceed the science of statistics when it drew connections between an individual bullet and a particular box or batch of ammunition. It was the ultimate opinion drawn by the FBI that was found wanting, not the metallurgical results, and resulted in the FBI ceasing to offer CBLA forensic testing.

year from the discovery of his new evidence to present a postconviction claim. See Glock v. Moore, 776 So.2d 243, 251 (Fla. 2001) (holding claim of newly discovered evidence in capital case must be brought within one year of date evidence was discovered or could have been discovered through due diligence).[12] Wyatt missed that deadline and should be found time-barred by this Court as the trial court found.

Here, Wyatt asserts that the 2008 FBI letter is newly discovered evidence because this is the first time the FBI repudiated the opinion it offered at trial.[13] Wyatt likens the FBI letter to recanted testimony. The reassessment of scientific analysis and principles is more akin to subsequent scientific studies in medical journals and legal publications where other experts conduct peer reviews, explore the propriety of existing scientific procedures, and offer other methods of testing. A reassessment of scientific analysis and opinions is

[12] See Buenoano v. State, 708 So.2d 941, 947-48 (Fla. 1998); White v. State, 664 So.2d 242, 244 (Fla. 1995); Bolender v. State, 658 So.2d 82, 85 (Fla. 1995), Porter v. State, 653 So.2d 374 (Fla.), cert. denied, 514 U.S. 1092 (1995); Adams v. State, 543 So.2d 1244, 1247 (Fla. 1989).

[13] Neither the 2004 NCR report nor the 2008 FBI letter existed at the time of trial, thus, neither meets the definition of newly discovered evidence, namely admissible evidence in existence at the time of trial but unknown and undiscoverable with due diligence. However, challenges to CBLA, as conducted by the FBI, was challenged for decades prior to Wyatt's 1991 trial, (SPCR-T.5 2694), thus, the **grounds** for challenging CBLA do not satisfy the definition of newly discovered evidence as such could have been discovered with due diligence.

not the same as a witness admitting to having offered perjured testimony. Recanted testimony, i.e., testimony which was untrue at the time of trial, was unknown to the parties and could not be discovered with due diligence as only the witness knew of the prevarication cannot be deemed equivalent to a peer critique of two experts disagreeing about the conclusions that may be reached based upon scientific study. The recanted testimony is considered newly discovered, whereas reassessments of scientific opinions are not. In Tompkins v. State, 994 So.2d 1072, 1080-83, 1085 (Fla. 2008) and Diaz v. State, 945 So.2d 1136 (Fla. 2006), this Court found such materials as the ABA report and Lancet medical journal article did not constitute newly discovered evidence.

Moreover, this Court has consistently defined the phrase "newly discovered evidence" as admissible evidence which was **in existence at the time of trial**, but was unknown to the court, defense counsel, and the defendant, and could not have been discovered with the use of due diligence. Kearse v. State, 969 So.2d 976, 987 (Fla. 2007); Porter v. State, 653 So.2d 374 (Fla. 1995), Trepal v. State, 846 So.2d 405 (Fla. 2003)(receded from on other grounds in Guzman v. State, 868 So.2d 498 (Fla. 2003)), Wright v. State, 857 So.2d 861 (Fla. 2003) Kearse, 969 So.2d at 987. Clearly, neither the 2004 NRC report or the 2008 FBI

letter were in existence at the time of Wyatt's 1991 trial.[14]

However, even if the NRC report and FBI letter are considered challenges to the veracity of Agent Riley's trial testimony, they still do not qualify as "newly discovered" evidence. This Court has rejected claims alleging newly discovered evidence where the new materials collaterally called into question the veracity of a police investigation or a expert's veracity. In Wright, the capital defendant moved for collateral relief claiming newly discovered evidence in the form of an internal police memorandum questioning the veracity of the lead investigator in his murder case, a police report detailing a claim by an elderly resident in the victim's neighborhood that an early suspect in the murder had battered her and stolen her money, and police reports on another State witness who was a suspect in a different murder. Id. at 871. None of this

[14] Also, Wyatt's claim fails because neither the report nor the FBI letter existed at the time of the 1991 trial; in fact, the NRC research behind the study did not exist at the time of Wyatt's trial. At the evidentiary hearing, Tobin testified that the National Research Council began its analysis of the CBLA issue in 2003. He claimed that a research study co-authored by him, and published in 2002, was the first meaningful research study questioning the reliability of CBLA. Characterizing his own research as "pioneering," Tobin admitted he did not begin his research until 1999. (PCR-T.12 2247, 2286, 2295, 2386) Therefore, neither the NRC report nor the research behind it qualifies as newly discovered evidence under the tests in Porter, Trepal, Wright, and Kearse. Furthermore, even if Wyatt's claim is analyzed as "newly discovered evidence, he has failed to show that the new evidence would likely produce an acquittal at re-trial.

evidence existed at the time of the defendant's trial. Id. This Court again noted that:

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

Id. at 870-871. This Court reiterated: "that newly discovered evidence, by its very nature, is evidence that existed but was unknown at the time of the prior proceedings. See Porter v. State, 653 So.2d 374, 380 (Fla. 1995)." Wright, 857 So.2d at 871. Since the documents offered by the defendant as new evidence did not exist at the time of the defendant's trial, this Court held that the evidence did not qualify as newly discovered evidence. Id.

Similarly, in Trepal, 846 So.2d at 424, the capital defendant sought collateral relief by arguing that documents from the Federal Bureau of Investigation and a report from the Department of Justice's Office of Inspector General were newly discovered evidence of false testimony by a FBI analyst who testified at his trial. Id. at 424. The Court determined that these documents did not qualify as newly discovered evidence because none of the documents existed at the time of the trial.

Id. The documents were not admissible evidence, and did not meet the requirement that newly discovered evidence be admissible evidence. Id.

In Kearse, the defense argued that it had newly discovered evidence arising from an unrelated federal case which would impeachment the State's expert who had testified at trial. However, Kearse's trial and sentencing had concluded before the incident in the federal case occurred. Kearse, 969 So.2d at 987. This Court held that given "the evidence did not exist at the time of the resentencing" Kearse failed to prove the first prong of the "newly discovered evidence" test. Id.

Based on the foregoing, the trial court properly concluded that the NRC and FBI letter are not newly discovered evidence. Moreover, Wyatt is unable to show that even if considered newly discovered, the evidence probably would have produce an acquittal on re-trial. (see Prejudice argument below).

Giglio claim - Wyatt points to the FBI letter as proof that Riley's testimony is false/misleading under Giglio. Yet, Wyatt's metallurgy expert, Tobin, testified that the process of CBLA had been used for at least 40 years, and at the time of Wyatt's 1991 trial1, CBLA testing, to his knowledge, had never been excluded from evidence in any criminal trial. Further, Tobin agreed that the testing process is the appropriate method for determining the elemental composition of bullets and that

the NRC report concluded that CABL is a reasonably accurate way of determining whether a suspect bullet came from a source of compositionally indistinguishable lead. Tobin admitted that the NRC concluded that CABL testimony could provide relevant evidence in a criminal case to either inculpate or exonerate a defendant. (PCR-T.12 2382, 2388, 2391-92). Given this, Wyatt has failed to prove that Riley's 1991 testimony/CBLA evidence was false, that the State knew the evidence was false, and that it was material.

Wyatt's citation to Haynes v. United States, 451 F.Supp. 2d 713, 719 n.3 (D. Md. 2006)[15] and innuendo that Agent Lundy perjured herself with respect to CBLA testing regarding a **1994** murder, that Agent Riley knew of Agent Lundy's **2003** plea, thus, resulting in common knowledge that CBLA was flawed and subject to criticism in 1991, and somehow this imputes knowledge to the State. Too much is made of Haynes as the following reveals:

> Haynes' claims that counsel was ineffective for failing to challenge the Government's comparative lead bullet analysis at [2000] trial. The Government's expert witness, FBI Special Agent Kathleen Lundy, testified that the bullets used to kill the victims in this case were the same as those Haynes had used in another shooting. He faults counsel for not cross-examining Lundy or offering testimony in rebuttal. Haynes states that the evidence presented by Lundy was "actually bogus science which has come under attack by

[15] Haynes was serving life sentences for a **1996 triple homicide**, United State v. Haynes, 26 Fed.Appx. 123, 2001 WL 1459702 (4th Cir. 2001) when he collaterally attached his **August 24, 2000 conviction and sentence**.

numerous defense counsels and criminal courts across the country." He further notes that in 2003, subsequent to Haynes' trial before this Court, Lundy pled guilty to giving false testimony about bullet composition at a pretrial motions hearing in a case in Kentucky.FN4

> FN4. The Associated Press issued the following report on or about April 29, 2003:
>
> LEXINGTON, Ky. (AP)-An FBI scientist will plead guilty to lying during testimony she gave at a hearing about a 1994 Kentucky slaying, her attorney said Tuesday.
>
> "There is going to be a guilty plea," attorney Larry Roberts said. The case was continued until June because the scientist, Kathleen Lundy, was out of state.
>
> Lundy served as an expert witness who used chemical comparisons to link lead bullets to suspects. In this case, she testified against Shane Ragland, who was convicted last year of gunning down University of Kentucky football player Trent DiGiuro in 1994.
>
> At a pretrial hearing, Lundy said a company melted its own bullet lead until 1996, when the company actually had stopped in 1986.
>
> She corrected her testimony during the trial and told her supervisors in Washington that she had lied. Tom Smith, who is prosecuting the case, said it was his understanding that Lundy is on leave from the FBI.
>
> In January, Circuit Judge Thomas Clark said Lundy's false testimony would not have altered the course of the case against Ragland.
>
> Federal authorities decided not to prosecute her, but Kentucky prosecutors brought a misdemeanor charge of false swearing, a misdemeanor that carries a maximum sentence

> of 90 days in jail and a $250 fine.
>
> Roberts declined to say why Lundy chose to plead guilty.
>
> "I cannot explain why I made the original error in my testimony ... nor why, knowing that the testimony was false, I failed to correct it at the time," Lundy wrote in a sworn affidavit to Justice Department officials. "I was stressed out by this case and work in general."

All these claims fail the first prong of *Strickland*.

> As the Government argues, conceding Haynes' guilt was central to counsel's reasonable strategy of "coming clean" with the jury and fighting to keep Haynes off death row. It obviously would have undermined that strategy if counsel had sought to challenge the ballistics evidence with respect to those murders. . .
>
> For the same reason, Haynes' "bogus science" assertion provides no succor. Nothing would have been gained by disputing the similarity of the bullets if the fact that Haynes was the shooter was admitted. **Beyond that, while the comparative lead analysis Lundy employed may have been subject to criticism since Haynes' trial, it was a widely accepted technique in federal and state courts as of that time. *See, e.g., United States v. Davis*, 103 F.3d 660, 673 (8th Cir. 1996), *cert. denied* 520 U.S. 1258, 117 S.Ct. 2424, 138 L.Ed.2d 187 (1997); *State v. Noel*, 157 N.J. 141, 723 A.2d 602 (1999). Counsel cannot fairly be deemed ineffective if they chose not to dispute the conventional scientific wisdom of the time.**

Haynes, 451 F.Supp.2d at 719-20 n. 4 (emphasis supplied).

Wyatt points to Moon v. Head, 285 F.3d 1301, 1309 (11th Cir. 2002); United States v. Diecidue, 448 F. Supp. 1011, 1017 (M.D. Fla. 1978), and Bell v. Haley, 437 F. Supp. 2d 1278, 1307-08 (M.D. Ala. 2005) to further suggest the state had imputed

knowledge of the flawed nature of CBLA.[16]

These cases do not assist Wyatt. Here, the state investigated and prosecuted the case, merely, contracting with the FBI to conduct testing on specific pieces of evidence. Wyatt has failed to show that the federal and State governments "pooled their investigative energies," jointly investigated the matter, shared information, divided tasks, and functioned as an agent for the other. Moon, 285 F.3d at 1309 (citing United States v. Antone, 603 F.2d 566, 570 (5th Cir. 1979)).

All Wyatt has shown is that the FBI conducted tests for the State, offered an opinion, and in 2004, the NRC decried the opinions drawn from the CBLA analysis to the extent that they offered that a bullet could be linked to a particular box of ammunition and that in 2008 the FBI announced that the testimony offered in Wyatt's Nydegger case was no longer backed by the science. Such in no way establishes that the testimony given at

[16] In Moon, the circuit court refused to impute to the Georgia prosecutor evidence held by a Tennessee law enforcement officer even where the officer testified for the prosecution because the state governments were not investigating the matter together with shared responsibilities nor was one acting as the agent of the other. Conversely, in Diecidue, 448 F.Supp at 1017 the federal government was investigating a federal employee for taking a bribe as part of his federal employment, the government could not compartmentalize its own agencies. In Bell, 437 F. Supp 2d at 1307-08 knowledge of a witness's pre-trial statement to an Alabama Bureau of Investigation (ABI) agent was imputed to the local state prosecutor as the statement found in the prosecutor's file and the ABI and local official worked closely together investigating the matter.

the time was false or that the State knew it to be false, thus, Wyatt has not carried his initial burden under Giglio. Ferrell, 29 So.2d at 977 (finding relief denied properly on Giglio claim where defendant failed to prove evidence was false and prosecution knew it was false). Such is competent substantial evidence supporting the trial court's findings, and the denial of relief should be affirmed. Id. Moreover, as will be explained more fully below in the "Prejudice" section, the fact that the science no longer supports the FBI's 1991 opinion, has no impact on the evidence in this case where Wyatt admitted that the bullets found were his.

Brady claim - Contrary to Wyatt's suggestion, the trial court did not err in relying upon the fact that the FBI letter was not in existence at the time of Wyatt's 1991 trial, thus there was no suppression of favorable material, and a Brady violation did not occur. To counter that dispositive fact, Wyatt again asserts that the FBI knew of the flaws in CBLA, that this information is imputed to the State, and given that CBLA was unsound in 1991 and the State did not disclose this, thus foreclosing defense counsel's ability to seek a Frye hearing, a Brady violation resulted.[17] The State relies upon its argument

[17] In Claim 34 of the third amended motion for postconviction relief, Wyatt argued that counsel was ineffective in part for failing to seek a Frye hearing on CBLA testimony and for failing to investigate the reliability of bullet lead comparison

on imputed knowledge offered above and maintains no Brady violation was committed. The court correctly denied relief.

Here, the FBI letter did not exist at the time of trial, thus, it could not have been and was not suppressed. Moreover, when it was provided to the State recently, the State Attorney's office disclosed it to the defense. Furthermore, while the critics of CBLA have prevailed upon the FBI and the experts have changed their opinion as to the reliability of the conclusions that may be drawn from CBLA analysis, such does not equate to suppression of favorable evidence. At best, it is the development of new conclusion that may be favorable, but not one of constitutional dimension. See Agurs, 427 U.S. at 109-110 (recognizing that "mere possibility that an item of undisclosed information might have helped the defense...does not establish 'materiality' in the constitutional sense."

Strickland Claims[18] - This challenge was presented in Claim

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testimony. However, Strickland and Brady claims are mutually exclusive, i.e., either the State suppressed evidence, or the defense failed to discover it and take action upon the discovery. Also, given the state of the science in 1991, it was generally accepted science, thus, a motion for a Frye hearing would have been fruitless. It was not until 2004 that it became accepted that the statistics used to generate the opinion were accepted as flawed and CBLA no longer generally accepted.

[18] Wyatt's appellate argument is insufficiently plead as it does not offer how counsel was deficient or discuss prejudice. The argument should be found abandoned See Pagan v. State, 29 So.3d 938, 957 (Fla. 2009) (finding issue waived on appeal were defendant merely references without elaboration issue raised

34, and was not revisited on remand under Claim 38. The court, following the 2007 evidentiary hearing denied relief on all sub-claims of Claim 34 based on a time bar/procedural bar. (PCR.32 6202). The following is offered for this Court's convenience.

At the 2007 evidentiary hearing, Wyatt failed to present any testimony on this claim. While he called Diamond Litty ("Litty"), his only living trial counsel, he did not question her about the defense team's strategy with regard to CBLA evidence. However, on cross-examination the State elicited testimony rebutting Wyatt's accusations.

Litty testified the defense retained Dr. Hart, a metallurgist, to examine the FBI's CBLA evidence. However, he did not render an opinion helpful to Wyatt, but had he offered, Litty would have presented him. When cross-examined by the defense, significant concessions were obtained from Riley.[19]

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below); Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) (finding notation to issues without elucidation insufficient).

[19] In Wyatt's Nydegger trial, defense counsel's cross-examination of Agent Riley undermined the value of the CBLA evidence. It established that there was no way to tell what store sold the bullets, or in what town, city, or state they were sold. (R 1450-1451) Riley admitted no one knew how many bullets with the same elemental composition were manufactured at any given time period for a particular manufacturer and that there could be thousands of boxes of bullets with the same composition since billions of bullets are manufactured yearly in the United States. Riley also conceded that a box of ammunition could contain bullets with different compositions. (R 1451-52)

Further, Litty pointed out that the defense theory that Lovette murdered Nydegger with a gun and bullets that Wyatt had in his possession, which was testified to by Wyatt at trial while was intact after Agent Riley testified; Agent Riley was not damaging to the defense case in the least. (R 1850-1851). With regard to the same issue raised in "Wyatt I," Litty explained that in her opinion a failure to cross-examine Agent Riley would not have harmed their case since his testimony dovetailed into the defense. She and co-counsel made a tactical decision not to challenge the admissibility of this evidence because their own expert did not provide them with a basis for a challenge and there was no reason to draw unnecessary attention to it. (PCR-T.10 1971-76)

A defense attorney is not ineffective for failing to present a meritless claim when the defense retained an expert who did not provide them with a basis upon which to present that claim. See Smith v. State, 931 So.2d 790, 801 (Fla. 2006) (holding counsel was not ineffective for failing to challenge CABL evidence when counsel retained an expert who found no problems with the FBI's analysis); Huffington v. Nuth, 140 F.3d 572, 582 (4th Cir. 1998) (noting that because counsel's strategy involved asserting that his client was not even present during the commission of a crime, attacking the expert testimony on ballistic evidence would do little to advance that strategy);

Haynes, 451 F.Supp at 719 (holding counsel not ineffective for failing to challenge CABL testimony).

The un-controverted evidence at the hearing clearly rebuts Wyatt's claim that counsel was ineffective for failing to investigate the issue, properly cross-examine Riley, or seek a Frye hearing. With regard to this latter issue, Litty's testimony showed that the defense did not have a good faith basis to request a Frye hearing. See Smith v. State, 931 So.2d 790, 801 (Fla. 2006) (holding counsel was not ineffective for not challenging CABL evidence when defendant's expert at evidentiary hearing admitted that no research was available at time of trial to challenge the evidence.); Smith v. Secretary, Department of Corrections, 2007 WL 2302207 (M.D. Fla. August 8, 2007) (finding petitioner failed to establish counsel was ineffective for failing to challenge CBLA testimony at trial when expert at evidentiary hearing admitted that no research, including his own, was available at the time of petitioner's trial to challenge the evidence), affirmed part, vacated in part on other grounds, 572 F.3d 1327 (11th Cir. 2009) Moreover, in assessing counsel's 1991 performance, hindsight is not to be used. Strickland. As such, it is not what the scientific community accepts now, but what the norm was in 1991. Clearly, CBLA was accepted in the scientific community at large and, the science was neither new nor novel, thus counsel had no basis to

seek a Frye hearing.

Lack of Prejudice/Materiality - Even assuming that the NRC report and/or FBI letter qualify as newly discovered evidence, Wyatt has failed to meet his burden of proving the evidence would likely produce an acquittal at re-trial. Likewise he has failed to show prejudice/materiality under Brady and Strickland. As noted above, Wyatt failed to prove the first two prongs of Giglio, but if it is assumed he did, the State's evidence conclusively rebuts and suggestion of prejudice. Furthermore, where Wyatt cannot and has not met his burden under Giglio, the more lenient burden for a defendant to meet, Wyatt cannot meet the Brady or newly discovered evidence burdens. As this Court has recognized, the Brady standard is actually more difficult for the defendant to meet than the Giglio standard applied below. Ventura v. State, 794 So. 2d 553, 563 (Fla. 2001).

Excluding Riley's CBLA testimony, the trial evidence against Wyatt was overwhelming including: (1) Wyatt was seen with, and admitted to being with Nydegger at the bar; (2) he was seen leaving the bar with her, returning without her and her body was found the next day west of Vero Beach; (3) Wyatt was seen the next day driving her car, his hair was found in the vehicle, and the car was later abandoned; (4) Wyatt stayed at a Yeehaw Junction motel; (5) a pillow was found near Nydegger's body which was similar to the pillows used at that hotel where

Wyatt stayed which was 3.5 miles from the bar where he met Nydegger; (6) Wyatt possessed a Charter Arms handgun which was consistent with having fired the fatal shot; (7) Wyatt admitted being in Vero Beach where he abandoned the stolen Cadillac and hitched a ride to Lake Whales and later went to Bradenton; and (8) making admission that his alter ego had killed and did bad things in Florida.[20] The result of the trial would not have been

[20] Jennifer, the Club 92 bar maid, placed Wyatt at the bar with Nydegger, subsequently leaving with her, only to return alone to ask Lovette to accompany him and she was not seen alive again. (R 545-56, 735-39). Forensic evidence including hair, fiber, and fingerprint, as well as eye-witness testimony, place Wyatt in Nydegger's car and later abandoning it, carrying a gun and bullets consistent with those used to kill Nydegger, and at a motel close to the bar which Nydegger frequented. (R 806-11, 843-44, 847, 850-53, 878-87, 890-91, 1418-20, 1561-77). Wyatt admitted to possessing the suspected murder weapon just days before the killing. (R 1196-97. 2015). Forensic and eye-witness testimony placed Wyatt near the place where Nydegger's body was found. There was testimony Wyatt was seen driving a stolen red Cadillac, later abandoned and burned off State Road 60 a few miles from Nydegger's body. Wyatt and Lovette were picked up by a trucker as they hitchhiked along State Road 60 near where a fire had been set, and then dropped off at a Lake Wales motel. Wyatt and Lovette were known to have been in the area via the records of the Budgetel Inn and a pillow from that Inn recovered from near Nydegger's body. The pillow was made by the same company supplying Budgetel and it was covered with two pillow cases, in the same way Budgetel covered its pillows. (R 978-82, 1015-24, 1054-58, 1064-65, 1070, 1078, 1087, 1108-21, 1127-34, 1174). Wyatt's roommate after the murders turned over evidence Wyatt left behind which link Wyatt to the stolen Cadillac (R 964-66, 828-29). Wyatt admitted to much of the evidence linking him to Nydegger's murder. He confessed to possessing the Charter Arms .38 pistol, the bag of bullets, and stealing the Cadillac with Lovette, only to leave it burning on State Road 60 west of Vero Beach. After abandoning the car, Wyatt admitted he hitched a ride with Darrell Booth to Lake Wales. Later, he and Lovette went to the Club 92 in Brandon, where he played a "skill crane"

different if Riley's testimony had been excluded or if he could have been challenged with the FBI's new position on CBLA testing. Relief was denied properly.

Patrick McCoomb's alleged recantation - With respect to McCoombs, Wyatt asserts that his trial testimony was false/misleading as it related to his federal sentence as supported by the prosecutor's post-trial assistance in helping McCoombs obtain mitigation of his federal sentence shows that Brady and Giglio violations were committed. (IB 36-43). Alternately, it is Wyatt's position he has newly discovered evidence McCoombs was not truthful and trial, and given this, an acquittal would have been obtained had the jury known. (IB 44). The trial court rejected these claims following the first evidentiary hearing (PCR.34 6546-60) and when re-litigated on remand. (SPCR.4 678-80). The factual findings are supported by substantial competent evidence, and the law was applied

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game with Nydegger. Wyatt confessed he told investigators his alter-ego "Jim" had killed and done bad things. He admitted he was friendly with McCoombs, but denied admitting to Nydegger's murder. (R 1628, 1644, 1647-50, 1655-57, 1698-1701, 1828).

The aggravation affirmed on appeal included aggravators: (1) under sentence of imprisonment; (2) prior violent felonies; (3) felony murder (merged with pecuniary gain); and (4) avoid arrest. Such is significant and Wyatt's collateral complaints do not disturb these findings or the sentencing calculus. See Eaglin v. State, 19 So.3d 935, 950 (Fla. 2009) (noting "under sentence of imprisonment to be weighty aggravator); Rivera v. State, 859 So.2d 495, 505 (Fla. 2003) (finding prior violent felony aggravator to be weighty factor)

properly. Relief was denied properly and should be affirmed.

In denying relief on the August 2007 testimony, the trial court summarized McCoombs' Wyatt II trial testimony.[21] (PCR.34

[21] McCoombs was housed in a South Carolina jail in March-May 1989 where he spent time with Wyatt prior. Wyatt gave McCoombs details about the Nydegger murder including that Wyatt had stolen a Cadillac, but not what he did with it. Wyatt said he was drunk at a bar with Nydegger and he took her to the car to have sex, but once there, he just wanted to kill her. He shot her in the head and characterized her as a bar fly who nobody cared about. Wyatt admitted to dumping her body at Yeehaw Junction on Route 60 and getting a ride from "Fast Eddie." While staying in Clearwater, Wyatt assumed the name John. He left after he stole a Ford Taurus. From Clearwater, he went to North/South Carolina. In South Carolina, he was stopped by the police, and ran when a stolen car check was made. He was arrested, but was bailed out by his employer, only later to steal his truck. Wyatt laughed because the authorities did not know who they had. He was subsequently arrested for the stolen truck. He played split personalities roles and told the police he was not mean, but "Jim" was.

Wyatt spoke of using two types of bullets, regular and hollow points. In jail, Wyatt received a letter from Lovette demanding Wyatt stop calling Lovette a snitch and accusing him of the crimes. Wyatt was going to respond that he was not putting the crimes on Lovette, but if Lovette testified against Wyatt, Wyatt would say Lovette killed Nydegger. Wyatt revealed his defense would be that he was drunk, fell asleep in the car, and when he awoke Nydegger was gone, and Lovette said he had let her out of the car. Wyatt wanted Lovette killed should he decide to testify against him.

McCoombs was unaware of Wyatt's charges and stated he had never read any newspaper accounts of the case. McCoombs testified against Wyatt because he was made to feel like a participant in Nydegger's death. McCoombs reached out to the prosecution through the Federal Marshalls. McCoombs was incarcerated from the age of 18 to 31 for all but 17 months. He committed numerous crimes involving theft, larceny, burglary, armed robbery, and escape and was incarcerated in many Florida prisons and used several aliases. McCoombs described the "convict code" as "see no evil, hear no evil, speak no evil. Prior to contacting the Marshalls, McCoombs pled guilty to armed bank robbery and was sentenced under the federal guideline. The

6547-49; R.10 1479-1538). The court found that after McCoombs testified in the Wyatt trials, he was placed in a security protective unit ("WIT/SEC PCU") and what later released in 1993 only to reoffend in 1994. At that time he did not qualify for WIT/SEC, but still required protection based on his Wyatt testimony and a gang threat against him. (PCR.34 6551).

The trial court noted that eventually, McCoombs was placed in the ADX maximum security segregation unit in Florence, Colorado where he was "housed with terrorists, notorious criminals, and other government witnesses not qualified for WIT/SEC PCU placement." He was dissatisfied with ADX as it deprived him of privileges, programs, and other services provided to other government witness in a WIT/SEC PCU; and some of these inmates manipulated the system in an attempt to be transferred to a WIT/SEC PCU." (PCR.34 6551-52).

The court found "some prison personnel and inmates mistakenly concluded that McCoombs was a co-defendant that

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state prosecutor did not appear at his federal sentencing and did not promise early release; no prosecutor or law enforcement officer promised McCoombs anything in return for his testimony nor was he threatened or forced to testify. McCoombs did not ask for a deal to testify or accept one if offered.

Neither the state nor federal prosecutors offered McCoombs a plea option for his federal case and McCoombs did not ask for one. While he asked for protection, he did not ask for a reduced sentence. He received 80-months, a "guidelines sentence for going into a bank and sticking a gun in a woman's face." He was housed in protective custody during the trial and was to be placed in witness protection later should he pass the polygraph. (PCR.34 6047-49; R.10 1479-1538)

turned on Wyatt, and as a result retaliated against McCoombs." (PCR.34 6552). McCoombs met Scoot Rollins in 1989 an 1990 when they were at Florida's Marianna prison. There, Rollins had access to the news accounts and knew McCoombs testified in the Wyatt trials. When housed in ADX in November 2002, "Rollins and Dennis Morrison went to authorities attempting to get McCoombs transferred out of J unit, the least restrictive unit at ADX. Rollins and Morrison told authorities that McCoombs admitted that he lied at Wyatt's trials and had been 'significantly untruthful.' As a result the witness protection liaison came to McCoombs and told him to stop talking about the case or McCoombs would be sent back to D unit, the 23-hour-a-day lockdown unit." (PCR.34 6552). On December 20, 2002, McCoombs informed his unit manager he had been "significantly untruthful," but provided no details. He was transferred to D unit. On December 23, 2002 he wrote to his case manager referring to the "significantly untruthful" statement made earlier. (PCR.34 6552).

It was the trial court's finding that McCoombs denied that he lied at trial and that it was his belief the transfer to the lockdown unit was a result of manipulation by Rollins and Morrison. "Further, McCoombs explained that all of his comments to unit and case managers, and contacts with authorities were out of frustration and anger with the harsh conditions of confinement; and were attempts to regain WIT/SEC PCU privileges,

programs, and services. McCoombs believed he was being punished for being a government witness. McCoombs explained that he was not good at manipulating the system as he had been in segregation since 1994." (PCR.34 6552-53). The court found:

> McCoombs' evidentiary hearing testimony was consistent with the testimony of former Assistant State Attorney Lawrence Mirman. In communications subsequent to the recantation letter and during the 2003 interview at ADX, McCoombs asserted that he did not lie at the Wyatt trials, he never intended to recant his testimony, he did not give authorities a recantation ultimatum, and he did not recant his testimony. Mirman opined that McCoombs' veiled threats of recantation were motivated by his desire to improve his prison conditions.
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> . . .the evidentiary hearing testimonies of inmates, Rollins and Morrison, were perpetuated by video deposition. Rollins and Morrison testified that McCoombs admitted that his trial testimony was "significantly untruthful." When examined on the specifics of untruthfulness, both Rollins and Morrison limited their responses to murder weapon testimony. Specifically, the inmates testified that McCoombs told them that detectives want McCoombs to get Wyatt to disclose the location of the murder weapon, that detectives already knew the gun's location but wanted to tie the weapon to Wyatt, and that Wyatt didn't disclose the location but detectives fed McCoombs the information.
>
> At trial it was established that Wyatt gave Freddie Fox a firearm that was sold and recovered by a detective. (Wyatt II R Vol 880-883) The detective not McCoombs testified concerning the location of the firearm. Further, Wyatt stipulated that he and Lovette possesses two handguns, and later testified that the two guns were Lovette's. (Wyatt II R Vol VII 1197; Vol IX 1666, 1717-18) McCoombs did not testify about the two guns.
>
> The court finds that the 2002 inmate statements (Rollins and Morrison) and the 2002 recantation letter

(PCR Def. Exh 29) were unknown at the time of trial and could not have been discovered with due diligence.

As to the second prong of the *Jones* standard, the court finds the inmate statements inconsistent with McCoombs' trial testimony that did not contain information about the firearms or their location. And the inmate statements are not otherwise relevant or credible because they do not address or refute any material fact contained in McCoombs' extensive trial testimony (See summary of McCoombs' Wyatt II trial testimony above.) As a result, the court finds McCoombs' evidentiary hearing testimony more credible than the perpetuated testimonies of Rollins and Morrison. Consequently, even if admissible, the inmate statements would have no evidentiary or impeachment value.

In evaluating the second prong of *Jones* for the recantation letter, the court finds that McCoombs did not recant his trial testimony but merely made veiled threats of recantation to call attention to harsh conditions of confinement eleven years after he was a government witness at Wyatt's trials. Further, the court finds no evidence that McCoombs lied at trial. Much of McCoombs' extensive trial testimony at both the Wyatt I and II trials is consistent with, and corroborated by, other trial testimony and evidence. In support of this finding, the court incorporates by reference and adopts the State's citation to the corroborating testimony and evidence:

> Judge Morgan also testified during the evidentiary hearing that there was a great deal of trial testimony and evidence that corroborated McCoomb's trial testimony. In Wyatt I, McCoombs testified that Wyatt told him that employees at the Domino's store were taken to the bathroom of the business during the robbery. (R 2760) A photograph of the crime scene taken by one of the first officers on the scene verified this fact. (PCR-T 338) McCoombs said that Wyatt told him that he had pistol-whipped the store's manager before killing him. (R 2761) Blood evidence recovered from the manager's office showed that the manager had been pistol-

whipped, and co-defendant Michael Lovette confessed that Wyatt had struck the manager with a pistol. (PCR-T 339) McCoombs told the jury that Wyatt had told him he placed the gun inside "the Cuban's ear" before pulling the trigger. (R 2767) Judge Morgan testified that the medical examiner, Dr. Fred Hobin, verified that Matthew Bornoosh, a dark skinned Middle Eastern male, had been shot with a gun that was placed inside his ear. (PCR-T 340).

McCoombs further testified that Wyatt told him that after the murders, he and Lovette had gotten a ride with a cab driver named "Fast Eddie." (R 2769) That cab driver, "Fast Eddie" Pugh, testified at trial that he gave Wyatt and Lovette a ride in his cab. (PCR-T 342) Wyatt also told McCoombs he had stolen a car in Madeira Beach, Florida, after a girl he was with found the keys to that car on the ground next to it. (R 2781) Witness John Rassell was with Wyatt when he stole that car and testified that that was how Wyatt stole the vehicle. (PCR-T 343-344) McCoombs testified that Wyatt told him that he fled from police in South Carolina after he was caught in a stolen car with a homosexual. (R 2782) The officer who attempted to apprehend Wyatt and Wyatt's own testimony verified these facts. (PCR-T 344-345) McCoombs also testified that Wyatt told him that he was arrested in South Carolina under a false name and that his boss had bonded him out of jail. (R 2784) Both Wyatt and that boss, Larry Bouchette, testified to those same facts. (PCR-T 345) McCoombs testified that Wyatt told him that he had used two different bullets to kill the victims. (R 2787) The bullets recovered from the autopsy bore this out. (PCR-T 347) Finally, McCoombs testified that Wyatt told him the murder weapon was thrown out of the car and into water. (R 2787) Co-defendant Michael Lovette told officers the same thing in his confession. (PCR-T 348).

At trial, the defense tried to

> discredit McCoomb's testimony by suggesting he learned facts of the murders from sources other than Wyatt. (PCR-T 334-335) Most important, Judge Morgan testified that none of the foregoing facts were available to the defense in discovery, and that at the time McCoombs was housed with Wyatt, none of the facts had been released to the media, and none of the facts were contained within the State's extradition affidavit, to which Wyatt may have had access.
>
> In Wyatt II, in addition to many of the same details that McCoombs' testified to in Wyatt I, he told the jury that Wyatt said that he and Lovette had met Nydegger in a bar while playing pool. (R 1499) Bartender, Jennifer Oler, testified to this fact. (PCR-T 349-350) Wyatt also told McCoombs that he had "blown the top" of her head off when he shot Nydegger. (R 1499) The medical examiner verified this fact. (PCR-T 350) Finally, McCoombs testified that Wyatt told him that Nydegger was just a barfly and that no one would miss her anyway. (R 1500-06) Judge Morgan testified that both Jennifer Oler and Nydegger's step-father, Frank Kitterman, testified that the victim was an unemployed, regular patrol of the Club 92 bar. (PCR-T 350-51)

(State's Post-Hearing Memorandum/Written Closing Argument, Pages 65-68)

In addition the court finds that Wyatt has not proven a source other than Wyatt for any facts testified to by McCoombs, or disproved any of the facts testified to by McCoombs. Consequently, the recantation letter is immaterial to the merits of the case, and lacks impeachment value when viewed as a complaint concerning conditions of confinement eleven years after Wyatt's trials.

. . .

The court finds that the "Convict Code" manuscript is not newly discovered evidence because Wyatt's counsel knew of the existence of the document in 1991.

> Although a copy of the manuscript was not provided collateral counsel until 2004, unrebutted evidentiary hearing testimony established that McCoombs gave the manuscript to the prosecutor in 1991 between the Wyatt I and Wyatt II trials, Wyatt's counsel knew of the existence of the manuscript in 1991, Wyatt's counsel had access to the manuscript through the prosecutors open file discovery procedure, and the prosecutor had a memory of Wyatt's counsel actually looking at the document. (PCR-T Vol III 303-307).
>
> . . .
>
> Consequently, Wyatt fails to show how McCoombs' limited "convict code" trial testimony or the "Convict Code" manuscript rendered the Wyatt II conviction unreliable.

(PCR.34 6553-58)(court's summation of "Convict Code" omitted)

As to Wyatt's claim McCoombs lied about the assistance he received on his federal sentence in exchange for his testimony and that McCoombs received an undisclosed reduced sentence, the court found that in 1992, the prosecutor, David Morgan, wrote a letter to the federal authorities recommending a sentence mitigation. However, both Mr. Morgan and McCoombs testified that at the time of the trial, neither was aware of the possibility of a sentence reduction and that there was no agreement for such mitigation in exchange for McCoombs' testimony. "McCombs' unrebutted testimony was that he did not know of the prosecutor's mitigation recommendation until 1993 when McCoombs' federal sentence was actually reduced. It was the court's conclusion that the letter "has no evidentiary or impeachment value because it is irrelevant and immaterial in

showing McCoombs' motivation or bias at the time of Wyatt's 1991 trials." (PCR.34 6558-59).

Turning to the claim that McCoombs received other undisclosed post-trial assistance from the prosecutor, the prosecutor's girlfriend, and other state officials which involved an offer to read and type the "convict Code" (neither of which was done by the prosecutor), receipt of some public records at no-charge, and contact with the federal authorities regarding McCoomb's treatment in WIT/SEC. The court found that "[n]o evidence was presented showing that any assistance, except witness protection, was provided by the State and accepted by McCoombs in exchange for his trial testimony against Wyatt. Further the evidentiary hearing, Wyatt did not identify the prosecutor's girlfriend or prove that she provided any assistance to McCoombs." (PCR.32 6193).

In conclusion the trial court stated:

> The court has already determined that the "Convict Code" manuscript does not qualify as newly discovered evidence . . . And even though the other post-trial assistance could not have been discovered with due diligence as the time of trial, Wyatt has failed to meet his burden to show that the assistance was relevant or material to Wyatt's 1991 trials where there was no agreement for consideration, where the cost for provision of public records was *de minimus*, and where post-trial contacts with government authorities merely sought fair treatment for McCoombs in the witness protection program.
>
> Further, the court finds McCoombs' post-trial relationship with Florida authorities adequately

> explained when considered in the context of adverse conditions of McCoombs' witness protection confinement and the tortured history of this postconviction case. Thus, any related post-trial assistance did not undermine McCoombs' credibility or otherwise render Wyatt's conviction unreliable.
>
> Conclusion
>
> The court concludes that any admissible newly discovered evidence found in Claim 4 above, when evaluated with other new evidence and the evidence presented at trial, is of insufficient weight to produce an acquittal or lesser sentence on retrial.

(PCR.34 6559-60). In rejecting the Brady and Giglio claims raised against McCoombs' trial testimony and the "convict Code" manuscript, the court relied on its analysis for Claim 4, discussed above, "to find that the State did not suppress evidence or present false testimony at the guilt or penalty phases concerning federal sentence mitigation or the "Convict Code" manuscript." (PCR.34 6561).

On remand for a hearing on an additional witness to McCoombs' alleged recantation the court found:

> Wyatt claims newly discovered evidence from federal inmate Emilio Bravo that State witness Patrick McCoombs lied at trial. On July 7, 2009, the court entered a stipulated order reflecting the parties' agreement to perpetuate and admit Bravo's testimony. The parties traveled to the maximum security facility in Florence, Colorado where Bravo refused to give his video testimony, but instead executed an affidavit dated July 31, 2009.
>
> Wyatt did not move to compel Bravo's testimony. Bravo was never shown or found to be "unavailable" under 90.804(1), At the evidentiary hearing, Wyatt offered Bravo's affidavit not as substantive evidence, but

merely to impeach McCoombs' testimony that he was truthful at trial. The court reserved ruling on admission of Bravo's affidavit, court exhibit 9.

In the affidavit, Bravo does not address any facts relative to Wyatt's trial on count IV, but states that McCoombs did not testify at Wyatt's first trial on counts I-III consistent with facts told to McCoombs by Michael Lovette (Wyatt's co-defendant) while McCoombs and Lovette were in jail together. Bravo claims that McCoombs said that Lovette admitted to being the shooter in the Domino's case, and that Lovette stated that Wyatt was passed out in the car and never entered the Domino's restaurant. However, no evidence was presented at any proceeding showing that McCoombs had been in jail with Lovette, or that McCoombs had ever met Lovette.

Also, Bravo states that the State coached McCoombs to change his story to say Wyatt, not Lovette, was the shooter in counts I-III. And in exchange for this testimony the State helped McCoombs get into the witness security program and gave McCoombs money through his witness security program account. Although it is undisputed that the State helped McCoombs get into the federal witness security program; no evidence was presented to show that the State assisted McCoombs in exchange for his testimony, that the assistance was provided before McCoombs testified, that McCoombs knew of the assistance before he testified, or that the State gave McCoombs any money through his witness security program account. Further, the facts Lovette was purported to have told McCoombs conflict with the physical evidence of Wyatt's DNA found inside the Domino's restaurant supporting Wyatt's convictions on counts I-III.

The court concludes that Bravo's hearsay testimony is not admissible as former testimony, statement under impending death, statement against interest, or statement of family or personal history. *Lightbourne v. State*, 644 So.2d 54, 56-57 (Fla. 1994). However, even if Bravo's affidavit was admissible to impeach McCoombs' claim that he was truthful at both of Wyatt's trials, the impeachment value would be negligible as Bravo's allegations do not address count IV; and either conflict with, or are uncorroborated

> by, other competent evidence presented at trial on counts I-III, and during the postconviction proceedings. The overwhelming evidence of Wyatt's guilt in this case much of which was established without the assistance of McCoombs' testimony, would not have been materially affected by an impeachment value of Bravo's allegations, even if that testimony was admissible. Furthermore, McCoombs again affirmed that his trial testimony was truthful and his testimony was corroborated by numerous, independent facts, including Wyatt's own testimony and admissions. As such, this court agrees with the State's argument that Wyatt failed to carry his burden of proving that the admission of Bravo's testimony would have put this case in such a different light that he would have received an acquittal or life sentence.
>
> The court adopts the reasoning in claim 4 Judge Davidson's order in concluding that Bravo's allegations viewed cumulatively with prior postconviction claims would be of insufficient weight to produce an acquittal or lesser sentence on retrial of count IV in light of McCoombs' extensive trial testimony that was consistent with, and corroborated by other trial testimony and evidence found by Judge Davidson.

(SPCR.4 678-80). The denial of relief was proper.

Brady and Giglio claims - Here Wyatt asserts that the prosecutor's post-trial letter to the federal government is proof of a pre-trial agreement of assistance in exchange for McCoombs' trial testimony establishing that the testimony was false in violation of Giglio and the failure to disclose the agreement a violation of Brady. The trial court's findings and conclusions regarding these claims are supported by the records and law. Wyatt's challenge to the order finding no pre-trail agreement for federal assistance except for witness protection

fails. A trial court's decision on witness credibility will not be disturbed where supported by competent, substantial evidence. Marquard, 850 So.2d at 424. Here Wyatt merely makes innuendos that the timing of the prosecutor's letter is questionable, but he brought forward no evidence to support his claim. Instead, the trial court found David Morgan, now Judge Morgan credible and corroborative of McCoombs' testimony. The record supports these conclusions as McCoombs testified that when he testified at trial, he did not think mitigation of his federal sentence was possible and no one had brought up such a possibility. (PCR-T.8 1591) He further testified that he first learned about mitigation in his federal sentence, through Federal Rule of Criminal Procedure 35, in 1992 when he received a letter from Assistant United States Attorney Thomas Blair informing him that he was eligible for such a reduction. He had no idea that Florida officials were involved in the mitigation request until after it happened, and he first learned that Judge Morgan had assisted in the effort when he filed a public records request for documents with the State Attorney's Office. (PCR-T.8 1484-85) McCoomb's testimony was unknowingly corroborated by Wyatt when he admitted Defense Exhibit 18, a letter dated January 23, 2001 from McCoombs to Judge Mirman, in his capacity as a Assistant State Attorney. In that letter, McCoombs tells Judge Mirman that he had never requested mitigation of his sentence

and that Judge Morgan had written a letter in support of him entirely of his own volition. (PCR-T.8 1591-92).

Judge Morgan testified that McCoombs had never requested anything in return for his testimony except protection. (PCR-T.9 1676, 1680) Given this, there is no evidence of a pre-trial agreement, thus, there was nothing favorable to Wyatt that was suppressed and his Brady claim fails. Likewise, as there was no pre-trial agreement for a mitigated sentence and McCoombs did not even know his sentence could be modified until 1992, a year after the trial, his trial testimony regarding his sentence was not false, nor did Judge Morgan know it to be false, thus there was no Giglio violation.

Alleged recantation – Wyatt claims three inmates have reported McCoombs recanted his trial testimony. However, the record reflects that there was no recantation, only an inarticulate response to federal authorities threatening to put him in a lock-down prison unit and veiled threats to recant in order to maintain the prison privileges he had even as onerous as they were. Wyatt's claim the trial court failed to credit his federal inmates, Scott Rollins and Dennis Morrison, or to use Emilio Bravo's affidavit[22] as

[22] There is no basis for admission of the affidavit as either substantive or impeachment evidence. During the hearing, Wyatt admitted that the affidavit was not admissible as substantive evidence, but under Williamson v. State, 961 So.2d 229 (Fla.

supportive of McCoombs' alleged recantation is refuted from the record and the courts' rejection of this evidence is supported by substantial, competent evidence.

McCoombs testified that he has not recanted his trial testimony and never intended to recant his trial testimony in spite of the note he wrote to his federal case manager stating "I informed Unit Manager Watson that I had been significantly untruthful in my testimony." (Defense Exhibit 107B Tab 15). In fact, he explained the reason for the note[23] and re-affirmed that

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2007), the document should be considered as general impeachment of McCoombs. Neither the case law nor Williamson supports this position. The affidavit is not admissible as substantive evidence. The affidavit is hearsay and Wyatt has failed to show that the affidavit met one of the four exceptions set forth in Lightbourne v. State, 644 So.2d 54, 56-57 (Fla. 1994). As reasoned in Williamson:

> In *Randolph v. State*, 853 So.2d 1051 (Fla. 2003), this Court affirmed the exclusion from a postconviction evidentiary hearing of an affidavit by a witness who died before the hearing. In concluding that the trial court did not abuse its discretion, we noted that the affidavit fell outside the four hearsay exceptions for a statement by an unavailable declarant: (1) former testimony; (2) statement under belief of impending death; (3) statement against interest; and (4) statement of family or personal history. *Id.* at 1062; *see also Lightbourne v. State*, 644 So.2d 54, 56-57 (Fla. 1994) (concluding that affidavits and letter from inmates unavailable to testify in postconviction hearing constituted inadmissible hearsay).

Williamson, 961 So.2d at 234-35. Moreover, McCoombs was not asked to comment on the allegation in Bravo's affidavit. As such, he may not be impeached with hearsay evidence without first being given the opportunity to comment.

[23] McCoombs explained the note reporting his Wyatt testimony had been "significantly untruthful" was written because he had been

his trial testimony was truthful and accurate. (PCR-T.8 1496, 1525; PCR.T.9 1620). This testimony is substantial competent evidence supporting the trial court's conclusion that McCoombs was not recanting his testimony, but merely objecting to his difficult incarceration and trying to obtain relief.

Initially, the record shows Rollins and Morrison suffer from a lack of credibility.[24] Moreover, their testimonies suffer

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placed in administrative segregation. McCoombs had been admitted into the WIT/SEC program due to his involvement in Wyatt's case and threats of bodily injury he had received from the Outlaws motorcycle gang. While in the segregations, he was attacked repeatedly, including two that required hospital care. He was taunted constantly by inmates who contaminated his food and disrupted his sleep. (PCR-T.8 1587-91, 1594-95) Even Rollins verified McCoombs had a difficult time as a protected witness. (Rollins Perpetuated Testimony - PCR.35 35, 43-44, 48) McCoombs had been in segregation for seven years, housed with some of the nation's most notorious criminals, when he wrote to the State Attorney's Office seeking assistance in finding a better housing arrangement within the prison system. Receiving no assistance, he wrote a letter to Florida's Governor asking for help. After again receiving no help, out of frustration and in haste, he wrote a letter allegedly recanting his testimony. McCoombs also explained that he wrote the note assuming that his unit manager would throw it away. (PCR.33 123-36; PCR.36 31-33, PCR-T.8 1493-97, 1587, 1593-96; PCR-T.9 1618, 1621-22) When he realized the note had been forwarded to Florida authorities, he took steps to ameliorate the situation. He testified that he met with State Attorney Bruce Colton, one of the original trial prosecutors, and Assistant State Attorney Lawrence Mirman, and told them that he had never intended for the letter to reach them and that he had not recanted his trial testimony. Later he sent a letter to the State Attorney with a notarized affidavit re-affirming his trial testimony, the truthfulness of it, and apologizing for the problems his prior note had caused. (PCR.34 1211-22, 1503, 1511-12; PCR-T.9 1622)

[24] Rollins initially stated he had only one alias, but conceded that, in fact, he had used seven. He admitted he was housed in

from a lack of detail,[25] thus, undermining the suggestion that McCoombs recanted, and in fact Rollins and Morrison, as well as

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administrative segregation because he was a disciplinary problem in prison; among other things he had a conviction for distributing narcotics as an inmate and being involved in a fight with a Latin King gang member because he was an "Aryan-type person," meaning only that he was “white.” Eventually Rollins admitted he had caused administrative problems for McCoombs, by writing a letter to prison officials complaining about him. Rollins admitted writing to the Florida Attorney General’s Office regarding McCoombs and the Wyatt case so someone would visit him, but confessed he had not contacted Wyatt’s counsel. When asked why he wanted to see the Attorney General and what he thought to gain, he replied that he was just "bullsh***ing" in the letter and that he was not seeking any benefits. Rather he admitted he was trying to manipulate the Florida authorities. (Perpetuated Testimony 32-33, 38-39, 41, 45, 53-54, 63-71, 76-77).

As for Morrison, a bomb maker and bank robber, he testified that he was a "classic" career criminal who couldn't stop committing crimes. Like Rollins, he was housed in administrative segregation in part because he was a high risk inmate. He confessed that the affidavit he had signed under oath in Wyatt’s case was incorrect in a material respect. Morrison also admitted that he was aware of bad blood between Rollins and McCoombs, but was not sure of its cause. (Perpetuated Testimony 28-29, 31, 34, 51-52, 56-57).

[25] Rollins testified McCoombs said that when incarcerated with Wyatt, two Florida detectives approached and asked him to seek information from Wyatt. McCoombs claimed to have testified in court about where the murder weapon was found, but said that he only testified to what the detectives had told him to say rather than what Wyatt had told him. Finally, Rollins claimed McCoombs told him and Morrison that detectives told him to find out from Wyatt where Wyatt had left the murder weapon, because they had found a gun and needed to know from Wyatt where he had left it. (Rollins’ Perpetuated Testimony 58-59).

Morrison's version of McCoombs' recantation was that McCoombs said he never received any information from Wyatt and only testified at trial based on what detectives had told him to say. McCoombs allegedly said detectives arranged for him to be in a cell next to Wyatt and fabricated testimony for him to say regarding where Wyatt said he left the murder weapon. (Morrison Perpetuated Testimony 14, 17).

Bravo, get details wrong. Such supports the trial court's rejection of the testimony. In general, Rollins and Morrison lack credibility, but more important the facts are contrary to the evidence[26] further undermining their claim that McCoombs recanted to them.

Likewise, with respect to Bravo's affidavit, no evidence was offered supporting his hearsay allegations that Lovette confessed to McCoombs, that they were incarcerated together, that the State told McCoombs what to say at trial, and paid him for that testimony, thus supporting the trial court's rejection of the claim. Moreover, although it is the State's position that Bravo's affidavit is not admissible as impeachment of McCoombs, the record shows that McCoombs' trial testimony is corroborated by other witnesses, forensic evidence, and Wyatt's trial testimony, while Bravo's allegations are not.

None of the "recantations" attributed to McCoombs is believable or truthful. First, McCoombs testified that he never discussed the case with either Rollins or Morrison; McCoombs was not asked about Bravo's allegations. (PCR-T.8 1494) Second, the

[26] Both Rollins and Morrison claimed to have heard McCoombs make statements about false testimony in Wyatt's case. Although they claimed McCoombs made these statements while the three men were together, (Rollins Perpetuated Testimony 83, Morrison Perpetuated Testimony 10), the statements Rollins and Morrison attributed to McCoombs are factually distinct and neither statement comports with the evidence presented at Wyatt's trial or the known facts.

trial evidence (see footnote 20 for evidence not based on McCoombs' account) and Judge Morgan's evidentiary hearing testimony as to the corroborated case facts render the statements of Rollins, Morrison, and Bravo factual impossibilities. Judge Morgan explained that the Rollins/Morrison facts were incorrect. Judge Morgan was present for all of the interviews with McCoombs and no detective ever asked McCoombs to seek out information from Wyatt which would also rebut Bravo's claims. Further, McCoombs never testified about finding a murder weapon. In fact, a murder weapon was never found in the Domino's case and detectives already had evidence placing the suspected murder weapon in Wyatt's hands for the Nydegger trial. Judge Morgan testified that no detective told McCoombs what to say. (PCR-T.9 1744, 1747, 1750-52).

Moreover, as explained by Judge Morgan, the vast majority of the facts testified to at Wyatt's trial by McCoombs were corroborated by other independent evidence. These included from Wyatt I: (1) Domino's victims had been taken to the bathroom (confirmed by crime evidence); (2) Wyatt pistol-whipped the Domino's manager before killing him (also confirmed by Lovett); (3) Bornoosh had been shot with a gun placed inside his ear (confirmed by Dr. Hobin); (4) Wyatt and Lovette took a cab driven by "Fast Eddie" (confirmed by "Fast Eddie" Pugh) (5) Wyatt stole a car in Madeira Beach, Florida after the keys were

found next to it (confirmed by John Rassell); (6) Wyatt was apprehended in South Carolina after he was spotted in a stolen car with a homosexual (confirmed by Wyatt and the arresting officer); (7) Wyatt was arrested under a false name and his employer had bailed him out of jail (confirmed by Wyatt and Larry Bouchette); (8) two different types of bullets were used to kill the victims (confirmed by Lovette and ballistics testing) (PCR-T9 1689-91, 1693-96, 1698-99; PCR.34 6555-56; Wyatt I R 2760-61, 2767, 2781-82, 2784, 2787). In Wyatt II, McCoombs offered many of the same details as he did in Wyatt I, and added, specific to the Nydegger homicide, that: (1) Wyatt said he and Lovette had met Nydegger in a bar while playing pool (confirmed by bartender Jennifer Oler); (2) Wyatt said he had "blown the top" of Nydegger's head off when he shot her (confirmed by the medical examiner); and (3) Wyatt told McCoombs that Nydegger was just a barfly and no one would miss her anyway (Frank Kitterman, Nydegger's step-father, testified she was an unemployed, regular patron of the Club 92 bar. (Nydegger's step-father, (R 1499, 1500-06; PCR-T.9 1698-1703) Additionally, at trial the defense tried to suggest McCoombs learned of the facts of the crimes from a source other than Wyatt, however, Judge Morgan testified that none of the foregoing facts were available to the defense in discovery, and that at the time McCoombs was housed with Wyatt, none of the facts had been released to the

media, and none of the facts were contained within the State's extradition affidavit, to which Wyatt may have had access. (PCR-T.9 1686-91)

The perpetuated testimony of Rollins and Morrison as well as the inadmissible affidavit of Bravo, who refused to testify at the 2009 hearing, do not call into question McCoombs' testimony that there was no recantation and that his trial testimony was truthful. Moreover, Judge Morgan's testimony establishes that McCoombs was truthful at trial and Wyatt has not shown that he would be acquitted or receive a life sentence at a re-trial under Jones, 709 So.2d at 521-22 and Consalvo, 937 So.2d at 561-62. Wyatt's "newly discovered evidence," Brady, and Giglio claims were denied properly. This Court should affirm.

ISSUE II

THE REJECTION OF WYATT'S CLAIM OF INEFFECTIVENESS OF PENALTY PHASE COUNSEL IS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE AND STRICKLAND (restated)

It is Wyatt's position penalty phase counsel was ineffective under Strickland for: (1) not fully investigating his social history; (2) failing to interview and/or call additional family and friends to discuss Wyatt's abusive/traumatic childhood, history of drug/alcohol abuse, mother's mental health issues, and Wyatt's molestation by a teacher; (3) for not giving this information to Dr. Rifkin so his evaluation violated Ake v. Oklahoma, 470 U.S. 68 (1985); and

for not calling a mental health expert in penalty phase. (AB 69, 71-79, 85). The State disagrees. A professional competent investigation was conducted, background information was supplied to the mental health experts, and reasoned strategies were developed as to which witnesses and what mitigation should be offered. The trial court's rejection of this claim is supported by competent, substantial evidence and Strickland was applied properly. This Court should affirm.

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

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

Arbelaez v. State, 889 So.2d 25, 32 (Fla. 2005).

To prevail on an ineffectiveness claim,[27] the defendant must show (1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. 688-89. See Valle v. State, 778 So.2d 960, 965 (Fla. 2001). At all times, the defendant bears the burden of proving both prongs of Strickland. Gamble v. State, 877 So.2d 706, 711 (Fla. 2004).

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

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

[27] In Davis v. State, 875 So.2d 359, 365 (Fla. 2003), this Court reiterated that the deficiency prong of Strickland requires the defendant establish counsel's conduct was "outside the broad range of competent performance under prevailing professional standards." With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Davis, 875 So.2d at 365. In assessing the claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89. The ability to create a more favorable strategy years later does not prove deficiency. See Patton v. State, 784 So.2d 380 (Fla. 2000); Cherry v. State, 659 So.2d 1069 (Fla. 1995). "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986).

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

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

Ineffectiveness of penalty phase counsel claims alleging counsel failed to conduct a proper mitigation investigation and failed to secure a proper mental health evaluation by failing to provide pertinent materials to the mental health expert are governed by Strickland and it progeny as well as the principals announced in Ake v. Oklahoma, 470 U.S. 68 (1985). To prove a claim under Ake, the defendant must establish that the psychological examination was "grossly insufficient" and that the expert "ignore[d] clear indications of either mental

retardation or organic brain damage" before a new sentencing hearing is required. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). In Windom v. State, 886 So.2d 915, 928 (Fla. 2004), this Court denied an Ake claim because the defendant "failed to demonstrate that his defense was 'devastated by the absence of a psychiatric examination and testimony [and that] with such assistance, the defendant might have [had] a reasonable chance of success.'"

In rejecting this claim, the court found:

> Wyatt relies on *Ake v. Oklahoma*, 105 S.Ct. 1087 (1985) to claim that at the guilt and penalty phases, counsel failed to provide neuropsychological testing that was appropriate given Wyatt's long history of drug and alcohol abuse, and history of head injury. To prevail on this postconviction *Ake* claim, Wyatt must establish that the mental health examinations of Wyatt were "grossly insufficient" and that the mental health experts "ignore[d] clear indications of either mental retardation or organic brain damage." *State v. Sereci*, 502 So.2d 1221, 1224 (Fla. 1987).
>
> The record reveals that prior to the first trial Wyatt was confidentially examined by appointed psychologist, Sheldon H. Rifkin. During the examination Wyatt refused to discuss details of the crimes, limiting the scope of Dr. Rifkin's evaluation. In his extensive report, Dr. Rifkin found "some inconsistencies in regard to [Wyatt's] pattern of thinking that is suggestive of the possible presence of an organic impairment or dysfunction," and recommended obtaining Wyatt's head injury medical records for review by a neurologist. (PCR, State Exh. 29) On Dr. Rifkin's recommendation the parties entered a stipulated motion for a neurological examination. The trial court appointed neurologist, David M. MacMillan to conduct the examination on January 2, 1991. (PCR, State Exh. 29; *Wyatt* I, R. 4149-4251) Dr. MacMillan did not find any evidence of head injury and could offer nothing to

support mitigating circumstances. (PCR-T, Vol. V 548).

Later, before Wyatt's second trial, counsel moved to appoint neuropsychologist, Ernest Bordini to conduct a neuropsychological examination. The court denied the appointment of Dr. Bordini but allowed Wyatt to undergo an MRI examination. The MRI results revealed no signs of brain injury. (PCR-T Vol V 549-554)

At the guilt phase, Wyatt's defense was that het murder was by co-defendant Lovette. So any evidence of Wyatt's impaired mental state at the time of the murder would be contrary to his defense. And at the penalty phase, no mental health testimony was presented from either Dr. Rifkin or Dr. MacMillan.

At the evidentiary hearing, no evidence was presented to show that the mental health examinations conducted by Dr. Rifkin or Dr. MacMillan were "grossly insufficient" or that either doctor "ignored clear indications of either mental retardation or organic brain damage." And Wyatt did not refuse to explain the 1991 MRI results revealing no signs of brain injury.

At the evidentiary hearing Wyatt offered the testimony of neuropsychologist, Ernest Bordini who interviewed Wyatt and administered standard neuropsychological tests. During the interview with Dr. Bordini, Wyatt denied any culpability for the murders, limiting the scope of Dr. Bordini's evaluation. (PCR-T, Vol VIII, 1093) In the course of testing, Dr. Bordini found that Wyatt had "generally average" IQ scores; average verbal fluency; no indication of thought disorder, bipolar disorder, or major psychotic types of thinking; no major attention problems; and intact language and memory functions. (PCR-T, Vol. VII, 1055, 1058-1061.) However, Dr. Bordini saw a "pattern of frontal lobe difficulties including "some mild frontal lobe difficulties with planning, inhibition, and sequencing." (PCR-T, Vol. VIII 1060-1061.) Dr. Bordini opined that frontal lobe damage most likely occurred as the result of a motorcycle accident in 1984. (PCR-T, Vol. VIII, 1071.) Dr. Bordini explained that this type of brain damage, when combined with alcohol abuse, increases the risk that a person will act impulsively. (PCR-T Vol VIII 1066.) Dr. Bordini

concluded that the frontal lobe damage by itself would not constitute a substantial inability to conform to the requirements of the law. But in combination with Wyatt's history of alcohol and sexual abuse, may cause a substantial impairment in terms of Wyatt being able to control his behavior. (PCR-T Vol VIII 1112)

The court finds that Wyatt has failed to show that the mental health examinations of Wyatt were "grossly insufficient" and that the mental health experts ignored "clear indications" of brain damage. Psychologist, Dr. Rifkin reported the possibility of brain damage; and neurologist, Dr. MacMillan and the results of the MRI found no evidence of brain damage. Dr. Bordini did not undermine the sufficiency of the mental health examinations conducted by Drs. Rifkin and MacMillan, or refute the results of the MRI. And Dr. Bordini's testimony did not reflect a "clear indication" of brain damage where he rendered a qualified opinion of "mild frontal lobe difficulties" that may impair Wyatt's ability to control his behavior. Further, Wyatt cites to no authority showing that *Ake* otherwise entitles him to the appointment of a neuropsychologist after having been appointed a psychologist and a neurologist that met the requirements of *Sereci*. Therefore, Wyatt is not entitled to relief.

. . .

Claim 11 . . .

Wyatt claims that counsel was ineffective for failing to adequately investigate and present mitigating evidence. The crux of Claim 11 is that counsel failed to investigate and/or present the testimony of five additional lay witnesses: Sara Cox, Wyatt's ex-wife; Renee, Wyatt's daughter; and Wayne Edmonson, Wyatt's maternal uncle. Wyatt contends that these lay witnesses would have disclosed additional facts concerning: the abuse and neglect of Wyatt by his father, step-father, and grandmother; the impact on Wyatt of his mother's severe mental illness and her related hospitalizations; the history of Wyatt's substance abuse since he was a teenager; the sexual abuse of Wyatt by a teacher; and the impact on Wyatt of his child's death. In addition, Wyatt claims that

trial counsel failed to present expert witness, Dr. Rifkin, or another expert to provide the jury with "some basis of understanding" Wyatt's behavior and to "explain the nexus between Wyatt's long history of abuse and drug use and crime." (See Defendant's Post Hearing Memorandum pages 59 and 68)

As to the lay witnesses, examination of the trial record reveals that during the penalty phase, counsel presented the mitigation testimony of six lay witnesses; Norberto Pietri, a fellow death row inmate; Jean McDaniels, Wyatt's mother; Pamela Caudill, Wyatt's sister; Barry Wyatt, Wyatt's brother; Kim Wyatt, Wyatt's sister-in-law; and Max Phillips, Wyatt's maternal uncle. These lay witnesses testified to: Wyatt's caring character (PCR-T Vol XIII 2216-18; Vol XIV 2254-55, 2262-63, 2276); the abuse and neglect of Wyatt by his father and stepfather (PCR-T Vol XIV 2233-34, 2237, 2243-53, 2258, 2260-61, 2265, 2276, 2280, 2287); the impact on Wyatt of his mother's severe mental illness and her related hospitalizations (PCR-T Vol XIV 2229-32, 2237-38, 2243-45, 2248, 2260, 2278-81); the history of Wyatt's substance abuse since he was a teenager (PCR-T Vol XIV 2239, 2242, 2253, 2261, 2267, 2287); and the sexual abuse of Wyatt by a teacher (PCR-T Vol XIV 2239-40) Consequently, Wyatt was not prejudiced by the failure to present the five additional law witnesses because their mitigation testimony would have been largely cumulative to the evidence presented by the six lay witnesses that did testify at the penalty phase. *Gilliam v. State*, 817 So.2d 768, 781 (Fla. 2002) And, counsel cannot be found ineffective for failing to investigate and present cumulative mitigation evidence. *Downs v. State*, 740 So.2d 506, 516 (Fla. 1999).

As to the expert witnesses, none were presented at the penalty phase even though Dr. Rifkin and Dr. MacMillan were consulted in the preparation of mitigation evidence. At the evidentiary hearing, Litty described the mitigation investigation that was conducted for the penalty phase including the documents that were delivered to Dr. Rifkin and reviewed by Litty. PCR-T Vol 517, 519-26, 535) Wyatt points to no specific mitigation document that defense counsel failed to obtain and deliver to Dr. Rifkin and/or Dr. MacMillan, or that counsel failed to review for the penalty

phase.

Litty explained that counsel made a tactical decision to present mitigation testimony through lay witnesses who were “very cooperative, very compelling, and very effective” (PCR-T Vol V 531; thus preventing the introduction of the following unfavorable evidence that would come in if Dr. Rifkin and/or Dr. MacMillan had testified; Wyatt displayed no evidence of brain damage (Claim 8 above); Wyatt had a notorious and infamous reputation for being aggressive starting in middle school (PCR-T Vol V 560); in middle school and junior high school Wyatt was involved in all kinds of criminal activities (PCR-T Vol V 561); Wyatt had been physically abusive toward his wife (PCR-T Vol V 565); Wyatt beat a person for at least 30 minutes and locked him in a trunk (PCR-T Vol V 567); Wyatt demonstrated a bias toward homosexual advances (PCR-T Vol V 569); Wyatt had been locked up since he was a juvenile (PCR-T Vol V 570); Wyatt “has shown great entrepreneurship and ingenuity manipulating the system” (PCR-T Vol V 571); Wyatt’s prison nickname was “Killer” for his willingness to fight (PCR-T Vol V 572); Wyatt was diagnoses with an antisocial personality with no psychological defenses to his actions (PCR-T Vol V 573); Wyatt’s frustration could lead to unpredictable, violent and traumatic, if not catastrophic results” (PCR-T Vol V 574); Wyatt demonstrates underlying dependency needs and a need to dominate most interpersonal situations (PCR-T Vol V 576); Wyatt is insensitive to the needs of others; relies heavily on immediate gratification; steals and deals drugs; is irritable, aggressive, and belligerent when he does not obtain his immediate goals and desires (PCR-T Vol V 577); and Wyatt is impulsive, impetuous, demonstrates a pattern of lying, is reckless and shows a disregard for personal safety (PCR-T Vol V 579).

Wyatt counter that counsel should have presented a mental health expert, like postconviction expert witness Dr. Faye Sultan, at the penalty phase to explain how Wyatt’s violent childhood resulted in Wyatt becoming a violent adult; and to “neutralize” otherwise damaging mental health and social history such as the harmful information contained in Dr. Rifkin’s report, and Wyatt’s prior psychological assessments and prison records. The court finds Dr.

> Sultan's evidentiary hearing testimony merely a different mental health opinion based on facts largely cumulative to the mitigation evidence investigated and presented by counsel at the penalty phase, and thus not sufficient to support a claim of ineffective assistance of counsel. *Cornell v. Dugger*, 558 So.2d 422, 426 (Fla. 1990)(reasoning mental health examination is not inadequate simply because defendant is able to find experts later to testify favorably based on similar evidence). Therefore, absent a finding that Wyatt's mental health evaluation was inadequate (see Claim 8 above), Wyatt fails to demonstrate deficient performance and prejudice.
>
> Based on the foregoing analysis, the court finds that counsel conducted a reasonable investigation into Wyatt's background. Further, the court finds that counsel made a reasonable tactical decision to present mitigation evidence through lay witnesses after conducting the reasonable mitigation investigation. *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000).

(PCR.34 6561-68).

These factual findings are supported by competent substantial evidence, and the legal reasoning is consistent with Strickland and Ake. Further, the investigation conducted was proper under Wiggins, 539 U.S. at 533 and Rompilla v. Beard, 125 S.Ct. 2456 (2005) as Litty, unlike counsel in Wiggins and Rompilla conducted a "meaningful" mitigation investigation. Here, other than the head injury, which Litty knew of but could not use as a basis for mental health mitigation, Wyatt has failed to present anything new of substance which was available and that Litty did not present.

The record reveals Litty investigated mental health mitigation, secured the appointment of two mental health

experts, was permitted to conduct an MRI,[28] and discovered lay witnesses to present Wyatt's family history of an abusive and traumatic childhood for mitigation in spite of Wyatt's consistency throughout the pre-Wyatt I litigation that he did not want a mitigation presentation. During the evidentiary hearing she testified that prior to the Domino's trial, and regardless of Wyatt's insistence otherwise, she began preparing a mitigation case. (PCR-T.10 1841-42) She contacted family members, friends, and teachers; in fact, she, and co-counsel, Mr. Sidaway ("Sidaway"), made several trips to the Carolinas to interview witnesses. Many discussions were had with Wyatt regarding mitigation, even though, from the outset, he said he did not want such a presentation. (PCR-T.10 1842-45). During her investigation, in addition to meeting with potential witnesses, Litty obtained 15 banker boxes of materials and reports addressed to Wyatt's social, medical, and criminal history[29] (PCR-T.10 1885). In addition to reviewing each

[28] Dr. Rifkin was appointed as a confidential expert to examine Wyatt, and based upon his examination, recommended Wyatt be evaluated by a neurologist which Litty accomplished.

[29] The records/reports included: various documents, school histories, Department of Corrections reports, Wyatt's socioeconomic background, psychological assessment by Vera Watford; psychological testing summary by Lewis Robertson with the North Carolina Department of Corrections ("NC-DOC"); socioeconomic history from Western Correctional Center of NC-DOC; socioeconomic history from parole officer, Chris Carter, with NC-DOC; a psychological assessment done by Barry Blakely, from NC-DOC; a psychological assessment by Kay Rubel with the

document with the intent "[to find anything favorable to use in the penalty phase portion of the trial," the records were delivered to defense mental health expert Dr. Rifkin. (PCR-T.10 1888-94, 1897-99, 1903).

Wyatt's family and medical history were contained in the reports obtained by Litty which she reviewed for favorable information and "if Wyatt had any kind of mental disorders or psychological difficulties or anything of that nature. You just -- you go through every bit of it to see if there's anything you can use." She was aware of the statutory mental health mitigators, and reviewed the documents with an intention to support those factors or a non-statutory factor. Litty noted "[t]here were some things, some reports that may have had one thing that would have been useful to use in it, however, it had four or five damaging portions, so you have to make a Defense tactic -- a tactical decision whether or not the good outweighs the bad."[30] She did not want negative information, such as Mr.

NC-DOC; prison records from the NC-DOC; medical reports on Wyatt from NC-DOC; S.P. Scott's parole report; a social and criminal prepared by Ray Hall of NC-DOC; Wyatt's inmate profile from Polk Youth Diagnostic Center; psychological assessment by Dr. Haywood, various educational course records and disciplinary reports from NC-DOC; Wyatt's North Carolina Baptist Hospital records stemming from a motorcycle accident; Wyatt's Florida jail records; David Lambert's report with a socioeconomic history of Wyatt; and a play entitled "Butt Bandit Follies."

[30] For example, she decided not to use Mr. Haywood's report because it contained such unhelpful statements as "[o]n examination Tommy was well oriented with no indication of

Haywood's notation that Wyatt was antisocial/sociopath or Wyatt's musings in "The Butt Bandit Follies" to be given to the jury. Given the negative information contained in Wyatt's documentation, Litty made the tactical decision to rely on family and friends to present mitigation as they were "family who were, very cooperative, very compelling, and very effective. (PCR-T.10 1897-1900, 1903-04).

As the record reflects, Litty retained the services of a mental health professional, Dr. Rifkin, another at his suggestion, and attempted to retain a third, but was denied by the court only to be given permission for additional MRI testing. The background materials she had collected were provided to the experts.[31] Litty provided Dr. Rifkin background

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psychotic processes; seemed to appear very normal. He appears to be bright and articulate and functioning well." and "[Wyatt] appears also to be an impulsive and easily frustrated individual who possesses many antisocial attitudes. He has low frustration tolerance." (PCR-T.10 1894-96)

[31] Litty explained she and Sidaway had collected a larger amount of psychological records than provided as part of the collateral review and she had reviewed those records. Dr. Rifkin, a well respected psychologist who had credibility within the legal community was retained as a confidential expert. He was provided records in preparation for his examination of Wyatt. Dr. Rifkin's primary purpose was to develop evidence for mitigation and to evaluate Wyatt for competency and a possible insanity defense. Litty explained she reviewed Dr. Rifkin's report with the doctor, Sidaway, and Wyatt before deciding not to present Dr. Rifkin as a witness, primarily because he found no mental disorders or brain damage and the report contained details very damaging to Wyatt. Dr. Rifkin's name and single-spaced 19-page report was withheld from the state as Dr. Rifkin

materials and met with him many times in hopes of developing mitigation evidence and for a determination if an insanity defense were possible (PCR-T.10 1902-12). Dr. Rifkin conducted testing,[32] found no basis for an insanity defense, and determined Wyatt was competent to stand trial. Dr. Rifkin confirmed Wyatt was of above average intelligence, bright, and articulate. He

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was a confidential expert. His report revealed he reviewed background information and that Wyatt was given multiple tests. Dr. Rifkin found Wyatt competent to stand trial, no basis for an insanity defense, and that Wyatt had above average intelligence; Wyatt was bright and articulate. There was no evidence Wyatt suffered a closed head injury. Even so, Dr. Rifkin asked for and was provided additional records (North Carolina Baptist Hospital records) regarding Wyatt's motorcycle accident. After reviewing the records, Dr. Rifkin sent the defense a letter dated December 26, 1990 (State's Evidentiary Hearing Exhibit 30) concluding he could not find any evidence of any kind of brain damage resulting from the motorcycle accident. Despite this, Dr. Rifkin recommended a neurologist be retained, Dr. MacMillan, and the defense hired the doctor to examine Wyatt. Litty attended Dr. MacMillan's examination of Wyatt before the first trial and recalled he too found no evidence of any head injury, or any other information useful to the defense for mitigation. **Prior to Wyatt's second trial**, and in spite of the experts saying there is no need for additional testing, Litty moved for neuropsychological tests (Halstead-Reitan Test and Revised Wechsler Adult Intelligence Test) and appointment of Dr. Bordini. While the motions were denied, the trial court allowed for an MRI to be conducted of Wyatt. (PCR-T.10 1908-27).

[32] Dr. Rifkin administered the following tests and reviewed related material: "Bender Visual Motor Gestalt Test; Draw A Person Test, House, Tree, Person Test; Memory for Designs Test; 15 Item Memorization Test; Wide Range Achievement Test Revised, Level 2; Wechsler Adult Intelligence Scale Revised; Rorschach; Thematic Apperception Test, Sentence Completion Test; Review of provided documentation including affidavits in aid of extradition that we talked about; and portions of trial transcripts from South Carolina; and clinical interviews." (PCR-T.10 19123-14).

found no evidence Wyatt had suffered a closed head injury; Wyatt had no brain injuries. (PCR-T.10 1913-15)

Nonetheless, at Dr. Rifkin's suggestion, Dr. MacMillan, a neurologist was consulted. Dr. MacMillan confirmed Wyatt had no head injuries and found he could offer nothing to support mitigation. (PCR-T.10 1915-16). Following this investigation, and between Wyatt I and Wyatt II, Litty sought the assistance of Dr. Bordini, however, the trial court denied her request in part, but allowed for Wyatt to undergo an MRI examination. The MRI revealed nothing of assistance as it showed no signs of brain injury or mental disorder (PCR-T.10 191917-28)[33] Based

[33] Dr. Rifkin reported that one of the difficulties he had with Wyatt was that he denied being present as the crime scene and that was contradicted by the forensic evidence. It was Dr. Rifkin's position that Wyatt's non-cooperation/unwillingness to discuss his behavior limited the doctor's examination for mitigation. Dr. Rifkin's position given Wyatt's behavior was one of the reasons Litty felt he would be detrimental to the defense should Dr. Rifkin be called to testify. According to Litty "[t]here was nothing positive . . . No good could have come from Dr. Rifkin testifying." In fact, Dr. Rifkin put in writing that there did not appear to be any significant circumstances in Wyatt's case. (PCR-T.10 1928-29) The record shows that this was the same behavior Dr. Bordini reported, thus, resulting in his unwillingness to find mental health mitigation except is a very qualified sense. At best, Dr. Bordini might have found, with qualifications and reservations, the statutory mitigator of inability to conform ones conduct to the requirements of law, as Wyatt was not fully cooperative, and denied committing the crimes, in spite of having been found guilty. (PCR-T.13 2531-32) Cf. Teffeteller v. Dugger, 734 So.2d 1009, 1021-22 (Fla. 1999) (finding counsel may not be deemed ineffective in the presentation of mental health mitigation where defendant failed to be candid with expert resulting in expert not finding mitigation).

upon this, Wyatt was provided a proper mental health evaluation under Ake and Strickland.

Likewise, the decision to not present a mental health expert in the penalty phase was proper under Strickland. Litty conducted hundreds of hours of investigation and review of background investigation and mental health reports and findings (State's evidentiary hearing exhibits 29-36) and consulted with co-counsel, Sidaway, and Wyatt before deciding not to present a mental health expert. See Freeman v. State, 858 So.2d 319, 327 (Fla. 2003) (acknowledging antisocial personality disorder is "a trait most jurors tend to look disfavorably upon." Moreover, an ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword. See Carroll v. State, 815 So.2d 601, 614-15 & n. 15 (Fla. 2002); Ferguson v. State, 593 So.2d 508, 510 (Fla. 1992) (finding counsel's decision to not put on mental health experts to be "reasonable strategy in light of the negative aspects of the expert testimony" where experts had indicated that defendant was malingering, a sociopath, and a very dangerous person); see also State v. Bolender, 503 So.2d 1247, 1250 (Fla.1987) (holding that "[s]trategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected").; Jones v. State, 446 So. 2d 1059 (Fla. 1984) (finding counsel not ineffective for

failing to introduce mental health examination which rendered an unfavorable diagnosis of defendant).

With respect to the allegation that the judge and jury "received an incomplete personal portrait" of Wyatt because substantial mitigating evidence was available from his family members that was not presented to discuss his abusive childhood, substance abuse, sexual molestation, and mother's mental illness. However, the record refutes this allegation as all of the information Wyatt suggests should have been presented was presented, although through other witnesses. At the Nydegger penalty phase, Wyatt's mother, brother, sister, sister-in-law and maternal uncle testified at about his mother's mental illness throughout Wyatt's life and the abuse he suffered at the hands of his father and step-father. They also testified about Wyatt's drug and alcohol addiction and his sexual molestation by a teacher/principal. At the evidentiary hearing, Dr. Sultan reported the same information provided to the jury via Wyatt's family and friends.[34] Penalty phase counsel cannot be deemed

[34] Dr. Sultan discussed Wyatt's childhood, his abusive household, his mother's mental illness, substance abuse, and related issues which she had learned from conversations with Wyatt, family members, and friends. (PCR-T 699-754) With respect to the substance abuse, Litty had objected at trial to admission of such evidence (R 2200). Also, to the extent that Dr. Sultan made a link between an abusive household and later violence in life, such would not further Wyatt's defense as he continuously claimed innocence and that Lovette was the perpetrator. Hence, Wyatt's violent tendencies would not coincide with his announced

ineffective for failing to present cumulative mitigation during sentencing. Gilliam v. State, 817 So.2d 768, 781 (Fla. 2002)(finding that the record refutes any claim of prejudice, as the substance of the testimony that Gilliam argues should have been presented would have been largely cumulative to the evidence presented at trial); Downs v. State, 740 So.2d 506, 516 (Fla. 1999) (affirming trial court's denial of defendant's claims that counsel was ineffective for failing to investigate and present additional mitigating evidence where the additional evidence was cumulative to that presented during sentencing).

Further, Wyatt has failed to establish prejudice, that is, he cannot show that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different because the testimony is cumulative to what was presented at trial. Strickland, 466 U.S. at 694; Patton,

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defense. "Claims expressing mere disagreement with trial counsel's strategy are insufficient." Stewart v. State, 801 So.2d 59, 65 (Fla. 2001). Moreover, there was nothing new presented via Dr. Sultan which would put the sentencing case in such a different posture, that a life sentence would be obtained. Gudinas v. State, 816 So.2d 1095, 1106 (Fla. 2002) (finding that trial counsel was not ineffective for failing to present evidence in mitigation that was cumulative to evidence already presented in mitigation); see also Cherry v. State, 781 So.2d 1040, 1051 (Fla. 2000) ("[E]ven if trial counsel should have presented witnesses to testify about Cherry's abusive background, most of the testimony now offered by Cherry is cumulative.... Although witnesses provided specific instances of abuse, such evidence merely would have lent further support to the conclusion that Cherry was abused by his father, a fact already known to the jury.").

784 So. 2d at 392(finding that counsel cannot be ineffective for failing to present cumulative mitigation during sentencing).

In Cherry v. State, 781 So.2d 1040, 1052 (Fla. 2000), this Court found that Cherry had failed to establish that he was prejudiced by counsel's failure to provide his mental health expert with sufficient information or to ensure a competent evaluation. This Court found that the mental health expert's report indicated that he was aware of Cherry's background and possible alcohol and drug use, and after reviewing the materials, the doctor concluded that no statutory mitigators existed and that Cherry satisfied the criteria for antisocial personality disorder. Id. Also, this Court went on to find that the supplemental evidence Cherry claimed counsel was ineffective for not providing, was cumulative to the mental health expert's initial findings. Id. The fact Cherry found a new expert who reached conclusions different from those of the expert appointed during trial does not mean that relief is warranted. Id.

There is no chance that the result of the penalty phase would have been different even if cumulative evidence were presented through Dr. Sultan and Dr. Bordini[35] had testified and offered his, marginal at best, conclusion that Wyatt's mild frontal lobe damage along with his history of alcohol and sexual

[35] Litty may not be deemed ineffective for not calling Dr. Bordini as the trial court denied Wyatt Dr. Bordini, a third mental health professional.

abuse **may** cause a substantial impairment in terms of ability to control behavior, but alone, the frontal lobe damage would not constitute a substantial inability for Wyatt to conform his conduct to the requirements of the law. (PCR-T.13 2480-91, 2531-32). The following aggravators were affirmed on appeal: (1) under sentence of imprisonment; (2) prior violent felonies; and (3) felony murder (merged with pecuniary gain); outweighed the same mitigation offered on collateral review. Such is significant aggravation and Wyatt's new mitigation from Dr. Bordini does not change the sentencing calculus or undermine confidence in the death sentence. Relief was denied properly, and should be affirmed.

ISSUE III

THE COURT'S SUMMARY DENIAL OF THE INEFFECTIVENESS CLAIMS ADDRESSED TO EVIDENCE SUPPORTING THE PRIOR VIOLENT FELONY AGGRAVAOR AND SHACKLING WAS PROPER (restated)

Wyatt asserts it was error to deny certain claims summarily and to not attach records[36] supporting the summary denial. Wyatt claims ineffective assistance of counsel (1) for not challenging

[36] Rule 3.851 does not require the attachment of records so long as the trial court's rational for denying relief is stated. See McLin v. State, 827 So.2d 948, 954 (Fla. 2002) (reaffirming "[t]o support summary denial without a hearing, a trial court must **either state its rationale in its decision** or attach those specific parts of the record that refute each claim presented in the motion.") (quoting Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993)) (emphasis supplied).

the admission of allegedly gruesome photographs[37] and testimony; (2) for permitting the admission of testimony in addition to the certified judgment of conviction for prior violent felonies; and (3) for not preserving for appeal that Wyatt was shackled improperly during his trial. Contrary to Wyatt's argument, summary denial was proper[38] and should be affirmed.

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[37] Wyatt cites to pages "(R. 1225, 1353, 1490)." (IB at 90). This appears to be a record citation to Wyatt I involving the Domino's murders. These are photographs are of objects in the Domino's store (overturned trash can, daily receipts, phone bank, safe, different parts of the store) or blood drops on the desk drawer or bloody footprints (R 1225-32). None of these were pictures of the murder victims and cannot be considered gruesome. Contrary to Wyatt's contentions, the photos admitted on R 1353 and R 1490 were objected to by counsel in Wyatt I as unnecessarily gruesome; these were photos of the victims. Moreover, even if counsel had failed to object, the admission of the photographs was not error. This Court "has held on numerous occasions that photographs will be admissible into evidence 'if relevant to any issue required to be proven in a case.'" Wilson v. State, 436 So.2d 908, 910 (Fla. 1983), citing State v. Wright, 265 So.2d 361, 362 (Fla. 1972); Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882 (1982); Welty v. State, 402 So.2d 1159 (Fla. 1981); Straight v. State, 397 So.2d 903 (Fla.), cert. denied, 454 U.S. 1022 (1981). See Rutherford v. Moore, 774 So.2 637, 646-47 (Fla. 2000); Larkins v. State, 655 So. 2d 95, 98 (Fla. 1995); Jones v. State, 648 So. 2d 669 (Fla. 1994; King v. State, 623 So. 2d 486 (Fla. 1993); Henderson v. State, 463 So. 2d 196, 200 (Fla. 1985).

[38] This Court has stated that "[i]n reviewing a trial court's summary denial of postconviction relief, this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. See Rolling v. State, 944 So.2d 176, 179 (Fla. 2006). Grossman v. State, 29 So.3d 1034, 1042 (Fla. 2010). A summary denial of relief will be affirmed where the law and competent, substantial evidence support the findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998). "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially

Gruesome Photographs and Prior Violent Felony Evidence - In denying the ineffectiveness claim for failing to object to or in conceding admissibility of evidence supporting the prior violent felony aggravator including photographs, the trial court found the issue barred as it was raised on direct appeal and ineffective assistance of counsel could not be used to re-litigate the matter. (PCR.34 6518). Such is a proper decision.

On direct appeal, Wyatt argued it was error to present hearsay testimony and to admit photographs in support of the prior violent felony aggravators. This Court concluded:

> Wyatt also contends that the State presented improper hearsay testimony of several police officers concerning Wyatt's prior violent felonies which violated his constitutional right to confront his accusers. While Wyatt's counsel objected to the testimony regarding the prior felonies based on its inflammatory nature, no objection was made at trial to the testimony on the basis of hearsay. Therefore, this point was not preserved for appeal. In any event, hearsay evidence of this nature is admissible in the penalty phase. *Waterhouse*, 596 So.2d at 1115. Wyatt further argues that, over objection, the State was improperly allowed to use photographs of victims of the prior violent crimes and such evidence was cumulative and prejudiced the defense. However, the trial court has discretion to admit relevant photographic evidence. *Thompson v. State*, 565 So.2d 1311, 1314 (Fla.1990). We do not find that the trial court abused its discretion in admitting the photographs in question.

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invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." Lucas v. State, 841 So.2d 380, 388 (Fla. 2003) (citation omitted). See State v. Coney, 845 So.2d 120, 134-35 (Fla. 2003).

Wyatt, 641 So.2d at 360.

Given that Wyatt challenged the testimony and photographic evidence supporting the prior violent felony aggravator on direct appeal, he may not use a claim of ineffective assistance to re-litigate the matter. See Rivera v. State, 717 So.2d 477, 480 n.2 (Fla. 1998) (finding it impermissible to recast claim which could have or was raised on appeal as one of ineffectiveness to overcome procedural bar or re-litigate appellate issue). Moreover, given that Wyatt's counsel objected to the photographs, but was overruled, no Strickland deficiency can be found. Also, given this Court's finding of no abuse of discretion in admitting the photographs and testimony, no prejudice can be found. See White v. State, 559 So. 2d 1097, 1099-1100 (Fla. 1990) (rejecting ineffective assistance of counsel claim regarding counsel's failure to preserve issues for appeal in postconviction appeal based upon earlier finding by court on direct appeal that unpreserved alleged errors would not constitute fundamental error); Teffeteller v. Dugger, 734 So. 2d 1009, 1019 (Fla. 1988) (finding that defendant had failed to meet prejudice prong of Strickland on issue that counsel failed to adequately argue case below given that it was rejected without discussion) However, even if deficiency is shown, prejudice cannot be established given the overwhelming evidence

of guilt and the highly aggravated case. (See Footnote 20). Collateral relief was denied properly.

Shackling - Wyatt claims he was deprived of a fair trial because the jury **may have** seen him shackled at trial. However, he admits the record does not "indicate specific instances where the jury saw [him] shackled," but argues he could not have plead the matter more fully because collateral counsel was precluded from talking to the jurors under Rule Regulating the Florida Bar 4-3.5(d)(4). Again, in a one sentence argument, Wyatt alleges ineffective assistance of counsel. Wyatt offers nothing to support even a suggestion the jury saw him in shackles. The argument below and here is insufficiently pled.

The court found the matter pled in legally insufficient terms as it lacked "a specific allegation of prejudice"[39] and denied it in light of its rejection of the constitutional challenge to the Bar rule on juror interviews (Claim 21 of Wyatt's postconviction motion). (PCR.34 6531-32) Wyatt does not

[39] When a claim of ineffectiveness is plead in a single conclusory sentence, this Court has found the claim legally insufficient and properly denied without a hearing. See Foster v. State, 810 So.2d 910, 915 (Fla. 2002); Asay v. State, 769 So.2d 974, 989 (Fla. 2000); Freeman v. State, 761 So. 2d 1055, 1067 (Fla. 2000). Furthermore, Wyatt's single sentence argument on counsel's alleged ineffectiveness, should be found a waiver of the issue under Pagan, 29 So.3d at 957 (finding issue waived on appeal were defendant merely references without elaboration issue raised below); Duest, 555 So.2d at 852 (finding notation to issues without elucidation insufficient).

challenged the constitutionality of R. Regulating Fla. Bar 4-3.5(d)(4)[40] in his brief, and the matter should be deemed waived as no argument is presented in support.[41] Pagan, 29 So.3d at 957 (finding issue waived on appeal were defendant merely references, without elaboration, issue raised below); Duest, 555 So.2d at 852 (same). However, to the extent Wyatt's claim, as presented, is deemed a challenge to the rule, the State submits that the general prohibition of juror interviews had been affirmed repeatedly by this Court to be constitutional and Wyatt has not offered anything to undermine that determination. See Reese v. State, 14 So.3d 913, 919 (2009) (reaffirming rules prohibiting attorneys from interviewing jurors after trial are

[40] While this Court has approved Fla. R. Crim. P. 3.575 which codifies Florida law and provides for juror interviews where the proper showing is made, it has reaffirmed that "rule does not abrogate Rule Regulating The Florida Bar 4-3.5(d)(4), which allows an attorney to interview a juror to determine whether the verdict may be subject to legal challenge after filing a notice of intention to interview." See Fla. R. Crim. P (Court Commentary to 2004 Amendment).

[41] Furthermore, even if Wyatt raises the claim, it should be found procedurally barred as he failed to raise it on direct appeal. See Pooler v. State, 980 So.2d 460 (2008) (finding defendant procedurally barred from raising in postconviction motion claim that the rule prohibiting juror interviews was unconstitutional, where claim should have been raised on direct appeal. Griffin v. State, 866 So.2d 1, 20-21 (Fla. 2003)(rejecting claim that rule 4-3.5(d)(4) was unconstitutional as procedurally barred since it was not raised on direct appeal and without merit since Griffin "appears to be complaining about a defendant's inability to conduct 'fishing expedition' interviews with the jurors after a guilty verdict is returned").

constitutional); Barnhill v. State, 971 So.2d 106, 117 (Fla. 2007) (same); Power, 886 So.2d at 957; Sweet v. Moore, 822 So.2d 1269, 1274 (Fla. 2002); Johnson v. State, 804 So.2d 1218, 1225 (Fla. 2001).

ISSUE IV

FLORIDA RULE OF CRIMINAL PROCEDURE 3.852 AND §119.19 FLORIDA STATUTES ARE CONSTITUTIONAL (restated)

Wyatt maintains Rule 3.852 violates Article I §24 of the Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution as it requires him to prove relevancy of the records requested and that the requests are not overly broad or unduly burdensome. As the court concluded (PCR.34 6513-16),[42] the public records provisions pertinent to capital defendants are constitutional.[43] This Court has upheld those provisions and the denial of relief must be affirmed.

Initially, it must be noted that other than arguing the application of the public records provisions violates his

[42] The court cited Allen v. Butterworth, 756 So. 2d 52, 66 (Fla. 2000) in which this Court found the Death Penalty Reform Act purporting to amend section 119.19 unconstitutional. That Act has not been reenacted, thus, the 1998 version of the statute remains valid. This Court did not invalidate section 119.19(2), Florida Statutes which provided for creation of the Repository and archiving of records. Id. at 66 n.6. Following Allen, this Court re-adopted the present version of rule 3.852.

[43] Pure questions of law, are reviewed *de novo*. See State v. Glatzmayer, 789 So.2d 297, 302 n. 7 (Fla. 2001) (stating "If the ruling consists of a pure question of law, the ruling is subject to de novo review").

federal constitutional rights, Wyatt offers no argument or case law in support. Public records requests are purely state law issues governed by state statute and rule. In fact, he fails to cite any federal case finding he has a federal right to the records, thus, he cannot show a constitutional violation. Cf. McCleskey v. Kemp, 481 U.S. 279, 306 (1987) (finding proportionality review is not constitutionally required); Brown v. Wainwright, 392 So.2d 1327 (Fla.) (finding proportionality is matter of state law), cert. denied, 454 U.S. 1000 (1981).

Turning to state law, Section 119.19 and rule 3.852 were promulgated to address the very narrow issue of public records production in capital cases. Sims v. State, 753 So.2d 66, 69 n.4 (Fla. 2000) (recognizing section 119.19 "does not affect, expand, or limit the production of public records for any purposes other than use in a proceeding held pursuant to Rule 3.850 or Rule 3.851, Florida Rules of Criminal Procedure."). Wyatt, as an indigent capital defendant, is provided counsel and obtains public records at the State's expense, unlike other non-capital defendants or citizens. Hence, the State is permitted to place certain restrictions on the production of those records, i.e., that they be relevant to the current litigation and that they be submitted to the Repository which in turn will provide the defendant with copies. Cf. Henderson v. State, 745 So.2d 319, 326 (Fla. 1999) (noting Legislature's prerogative to

place reasonable restrictions on substantive right of public records access). Wyatt's Florida rights have not been violated.

The argument the rule and statute are unconstitutional because Wyatt cannot predict what will be deemed "overly broad or unduly burdensome" is meritless. He does not have to know the meaning of that phrase. He merely has to make the request and should it be overly broad or unduly burdensome, the agency will file its objections. During the hearing on the objections, the agency will advise why it cannot comply and what narrowing information is required and the court will decide. There is to merit to Wyatt's argument.

Likewise, the claim of a separation of powers violation is meritless. "Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law." Allen v. Butterworth, 756 So.2d 52, 59 (Fla. 2000); Orr v. Trask, 464 So.2d 131, 135 (Fla. 1985). "Judicial intervention in the decision-making function of the executive branch must be restrained in order to support the integrity of the administrative process and to allow the executive branch to carry out its responsibilities as a co-equal branch of government." Key Haven Associated Enterprises, Inc. v. Board of Trustees, 427 So.2d 153, 157 (Fla. 1982). The Legislature invades the Court's rule making authority and violates the separation of powers when the "legislatively imposed 'procedure'

is interfering with and intruding upon the procedures and processes of [the Florida Supreme Court] and conflicts with this Court's own rule regulating the procedure." Jackson v. Florida Dep't of Corrections, 790 So.2d 381, 385 (Fla. 2000).

Here, the Legislature was within its authority to provide for the creation of the Repository to archive public records reproduced in capital cases and to set time limits for the notification and production of records by state agencies. The Legislature was within its power to set out how certain confidential and exempt records defined in section 119.07(1), Fla. Stat. and the Florida Constitution are to be treated and disseminated within allotted time frames as the enactments were designed for the very limited purpose of providing for the archiving and dissemination of relevant public records to capital defendants. Records may be obtained by showing relevance, proof the records are not already with the Repository, and that the request is not over broad or unduly burdensome. Jurisdiction properly vested in the courts to resolve disputes. The Legislature was not telling the court how to carry out its duties, instead, it outlined how state agencies should handle public records in capital cases. There is no separation of powers violation.

Rule 3.852 does not invade the Legislature’s province. It provides the court procedure and time frames for the records

requests, objections, and production. It sets out the framework for tracking the litigation and mechanism for obtaining redress. The rule addresses how the litigation will proceed while section 119.19 sets up the agency and administration necessary for archiving the records. Each apply to different governmental functions, thus, there is no separation of powers violation.

ISSUE V

WYATT'S CHALLENGE TO THE CONSTITUIONALITY OF THE PENALTY PHASE INSTRUCTIONS IS INSUFFICENTLY PLED, PROCEDURALLY BARRED, AND MERITLESS (restated)

Wyatt asserts that except for an objection to the instruction on HAC, counsel failed to object to the instruction on the other five aggravators requesting in his case. He admits that the CCP and avoid arrest aggravators were stricken and that this Court affirmed the validity of the instruction of remaining aggravator, Wyatt, 641 so.2d at 360,[44] however, he is preserving

[44] On direct appeal, this Court reasoned:

> Wyatt's next argument, regarding alleged errors in the penalty-phase jury instructions, also fails. With one exception, there was no objection to these instructions, and thus, these claims are not preserved for appeal. **Even if objections had been made, Wyatt's claims would have no merit**. He did object to the instruction on the aggravating circumstance that the crime was especially heinous, atrocious, or cruel on the ground that the evidence did not support the instruction. The instruction given on this aggravating circumstance was that which is found in the current Florida Standard Jury Instructions in Criminal Cases rather than the one found wanting in *Espinosa v. Florid*a, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d

the issue for later litigation.

Given the lack of argument, the matter should be deemed abandoned. See Pagan v. State, 29 So.3d 938, 957 (Fla. 2009) (finding issue waived on appeal were defendant merely references without elaboration issue raised below); Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) (finding notation to issues without elucidation insufficient).

However, if the merits are reached, this Court previously found the challenges to the instructions meritless, Wyatt, 641 So.2d at 360, thus, Wyatt is unable to show deficiency and prejudice under Strickland. Nonetheless, of the aggravators found to apply to Wyatt's case this Court has upheld them against constitutional challenges. See Gorby v. State, 819 So.2d 664, 686 (Fla. 2002) (finding not constitutional infirmity with standard instruction on "under sentence of imprisonment") Moreover, counsel may not deemed ineffective for not objecting to standard jury instructions that have not been invalidated by

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> 854 (1992). We need not decide whether the evidence would support this aggravating circumstance because the jury was properly instructed and the trial judge did not find the existence of this aggravating circumstance. *Sochor v. Florida*, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992); *Johnson v. Singletary*, 612 So.2d 575 (Fla.), *cert. denied*, 508 U.S. 901, 113 S.Ct. 2049, 123 L.Ed.2d 667 (1993).

Wyatt, 641 So.2d at 360 (emphasis supplied).

this Court. See Anderson v. State, 841 So.2d 390, 394-97 (Fla. 2003) (finding felony murder aggravator constitutional); Vining v. State, 827 So.2d 201, 215 (Fla. 2002) (finding challenge to instruction barred and counsel not ineffective for not challenging standard instruction); Gorby v. State, 819 So.2d 664, 686 (Fla.2002) (declining to determine that the jury instruction for the "prior violent felony" aggravator is invalid); Blanco v. State, 706 So.2d 7, 11 (Fla.1997) (finding instruction on felony murder aggravator does not constitute an automatic aggravator); Parker v. State, 611 So.2d 1224 (Fla. 1992) (finding claim that "felony murder" aggravator failed to narrow class of persons eligible for death penalty procedurally barred). Wyatt is not entitled to relief.

ISSUE VI

FLORIDA'S CAPITAL SENTENCING IS CONSTITUTIONAL (restarted)

In nothing but conclusory terms, Wyatt argues Florida's capital sentencing statute is unconstitutional as it denied him due process and electrocution and lethal injection are cruel and unusual punishment. Contrary to Wyatt's position, this Court has repeatedly found Florida's capital sentencing constitutional.

In denying relief, the trial court initially found the claim as plead below to be conclusory under Ragsdale v. State,

720 So.2d 203, 207 (Fla. 1998) and meritless in light of this Court's well settled rulings. (PCR.34 6528, 6533-34) On remand, in part for the challenge to the lethal injection protocols, the court concluded (SPCR.4 673) rejected the claim based on this Court's decision in Kearse v. State, 11 So.3d 355 (Fla. 2009) finding the protocols constitutional. This Court should agree and find that the pleading here is so insufficiently plead as to be an abandonment of the claim. See Pagan, 29 So.3d at 957 (finding issue waived on appeal were defendant merely references, without elaboration, issue raised below); Duest, 555 So.2d at 852 (same).

However, if the merits are reached, Florida's death penalty sentencing and execution procedures are constitutional. See Schwab v. State, 995 So.2d 922 (Fla. 2008) (affirming Kentucky's lethal injection protocols against Eighth Amendment challenge and affirming summary denial of relief). See Tompkins v. State, 994 So.2d 1072, 1080-82 (Fla. 2008) (finding lethal injection procedures constitutional); Lightbourne v. McCollum, 969 So.2d 326, 350-53 (Fla. 2007) (same); Schwab v. State, 969 So.2d 318 (Fla. 2007) (same); Parker v. State, 904 So.2d 370, 383 (Fla. 2005) (rejecting constitutional challenges to death penalty based on Ring v. Arizona, 536 U.S. 584 (2002)); Sims v. Moore, 754 So. 2d 657 (Fla. 2000) (determining lethal injection constitutional); Provenzano v. State, 760 So. 2d 137 (Fla. 2000)

(same); Knight v. State, 746 So. 2d 423, 437 (Fla. 1998) (rejecting claim under international law); Provenzano v. Moore, 744 So.2d 413 (Fla. 1999) (finding electrocution constitutional), cert. denied, 528 U.S. 1182 (2000); Hunter v. State, 660 So.2d 244, 252-253 (Fla. 1995) (finding Florida's capital sentencing constitutional); Gamble v. State, 659 So. 2d 242, 246 (Fla. 1995); Robinson v. State, 574 So. 2d 108, 113 (Fla. 1991); Young v. State, 579 So.2d 721 (1990); Jones v. State, 569 So.2d 1234 (Fla. 1991).

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Rachel L. Day, Esq., and M. Chance Meyer, Esq., Office of the Capital Collateral Regional Counsel - South, 101 N.E. 3rd Avenue, Suite #400, Fort Lauderdale, FL 33301 this 9th day of July, 2010.

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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