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IN THE SUPREME COURT OF FLORIDA

BRETT A. BOGLE,

Appellant,

v.

Case No. SC11-2403
Lower Tribunal No. 91-12952

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS[1]

Bogle was represented at trial by two very experienced trial attorneys, Douglas Roberts and Paul Firmani. Roberts testified that at the time of Bogle's trial, he had tried two to three hundred felonies during his 10 to 15 years at the State Attorney's Office and also handled several capital murder cases at the Public Defender's Office, obtaining an acquittal in one of them. (V63/580, 650-51) Judge Firmani testified as to his extensive experience also. (V88/5143-46) He started trying capital cases a year or two before the Bogle trial; Bogle was the seventh capital case he tried in some capacity in the second phase. Prior to handling capital cases, he handled around 50 other felony cases. Judge Firmani testified that he was required by the PD to attend Death Penalty seminars on an annual basis. At the time of Bogle's trial, there were others at the PD's office with extensive capital experience that he consulted with and watched in their capital cases. Both attorneys testified that they had strategic reasons for not putting on the evidence and witnesses urged by collateral counsel and the lower court agreed with those decisions. (V16/3101-02, 3106-08, 3110, 3113-14, 3137-40, 3142)[2] For example, Roberts testified:

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[1] The State generally accepts the procedural history outlined in Bogle's brief, but cannot accept the statement of the facts as it is misleading and ignores findings of fact and credibility determinations made by the lower court. Consequently, the State provides the following overview of the facts which will be addressed in more detail under the relevant issues in the argument, *infra*.

[2] The trial court's "Order Denying Defendant's Amended Motion to Vacate Judgment of Conviction and Sentence" is attached as Appellee's Exhibit A.

(*about presenting evidence in general*) It would have to be pretty significant like I would like a statement by Guy Douglas that he did commit the murder. [. . .] All this other stuff that you are talking about is wonderful in these kind of hearings, but when you look at my theory of defense like you are talking about he fell down the ditch that wasn't the crux of the case by the government or myself. It was like a question and answer and that was the end of it. It was all the scientific evidence was the big deal in the case. [. . .] Yes, sir. I believe we followed all the leads we could follow. When we get information we send the thing to the investigator do this and make a note to ourselves to do that. We went back at the crime scene again. We had been out there and we went back again. There is no stone uncovered in these cases. (V63/680-81).

(*when questioned about presenting evidence about Guy Douglas*) Not necessarily. Presenting evidence is a big deal. In those days once you do that and unless it is the defendant testifying you lose your closing rebuttal. I think that's a very important thing in trial cases. I have been doing a few of them. I would never give that up unless I was getting something that was substantial in the case. (V63/605).

(when questioned about presenting evidence that Marcia Baurle Turley[3] *said Douglas wanted an alibi*) I am not sure because we didn't attempt to blame somebody else for this. Our theory of the case is the State couldn't prove this case and Mr. Bogle -- there wasn't enough evidence in the case to present it. Our theory of the defense was not he didn't do it somebody else did it. We didn't pursue because we didn't think there was enough evidence. Even with this evidence I don't know if that was enough to give up opening and closing. (V63/607-08).

Regarding Bogle's representation that prosecutor Cox's notes reflect that she had information that Guy Douglas confessed to the crime, the lower court made a factual finding that there "was no persuasive evidence presented that Ms. Cox had any actual evidence that either of these things were true." (V16/3089) Cox testified

[3] Marcia Baurle Turley, hereinafter, is referred to as Marcia Turley.

that the note only indicates that she wanted to talk to somebody about whether Mr. Douglas had confessed, not that she actually possessed any information that he did. (V62/424-25) Cox also testified that if she had any information that a person other than Appellant confessed to being part of the murder, she would have disclosed that information to the defense immediately." The court found this testimony "highly credible." Further, the court noted that trial counsel Roberts testified that he believes that he knew about the rumor regarding multiple people being involved. (V16/3089).

The lower court also found that Bogle failed to show that prosecutor Cox had any communication with Turley prior to trial. The court noted that Turley did not recall speaking with law enforcement prior to trial and admitted that during that time she was trying to make herself "scarce." The evidence presented by the defense in an attempt to show that there was communication between Ms. Cox and Ms. Turley was rejected, with the court finding that it appeared much more likely the State wanted to speak with Turley but was unable to locate her. (V16/3090).

Next, Bogle asserts that he presented "evidence" that Roger Kelly testified that Torres was drinking and dancing with another man and that later he saw her outside arguing with a man. No substantive evidence in support of that statement was admitted during the trial or the evidentiary hearing. At the evidentiary hearing, Bogle attempted to question trial counsel Douglas Roberts regarding hearsay

statements made by Roger Kelly at a deposition Roberts took of the potential witness prior to trial and his death. (V63/594-603) The State's objection that it was hearsay and that because Kelly was confusing Marcia Turley with Margaret Torres, without the opportunity to cross-examine the witness, the State would be prejudiced if it was admitted as substantive evidence, was sustained. (V63/597) Bogle cannot now rely on it as substantive evidence. Furthermore, Roberts testified that even before he took the deposition he was investigating Guy Douglas; that the deposition added nothing to his investigation. (V63/604).

Bogle's factual assertions about the collection of hair and fiber evidence are addressed at length in Issue II. In general, however, his claims were refuted by the record and rejected by the lower court. The court found that there was no evidence presented that Technician Cashwell's handling of Appellant's pants contaminated the evidence and the reprimand gives no indication that the pants touched or otherwise came into contact with another piece of evidence. (V16/3095) The court also found that there was no evidence presented that anyone touched the pants from the time they were sealed and placed in the evidence room until Detective Lingo examined the pants on September 17, 1991. Thus, while Detective Lingo's trial testimony is ambiguous, the court found that it was not conclusively false. Further, the court found that the difference between Detective Lingo testifying that Technician Cashwell had placed the pants in the drying room prior to sealing them

and how Detective Lingo actually answered the question at trial is of no significant value to the defense. (V16/3096).

The court also found Agent Malone's testimony during the evidentiary hearing that the reference to K7 was purely a transcription error and not the reference to PH, pubic hair, because he would not "confuse public hair with head hair" to be extremely persuasive, unknown to the State, and of minimal impeachment value. The court noted that Malone testified that every hair analysis had to be confirmed by another agent and that was done in the instant case. The court found the reference in the bench note to a pubic hair only makes sense if he is referring to K6, a pubic hair, as opposed to K7 which is a head hair. (V16/3126).

There are a number of DNA issues before the court in this appeal based upon new testing done during the postconviction proceedings. RFLP DNA testing on the seminal fluids found in the victim's vagina and anus was originally done in 1991-92 and came back as consistent with Bogle's DNA. During the postconviction proceedings, over the objection of the Appellant, STR testing was done on the same sample. (V69/1265-66) Patricia Bencivenga, crime lab analyst in the biology DNA section of FDLE, testified that upon testing the sample that was remaining after the prior RFLP testing done at the time of trial, she got two profiles: one major contributor which was male and one small contributor which was a profile that matched the victim, Margaret Torres. There was no third profile,

just the victim and the male contributor which was identified as Brett Bogle. She also did DNA testing on black underwear of the victim; the profile was a mixture, one was Margaret Torres' profile and one was consistent with the profile from Bogle. (V75/1564-69).

The fingernail scrapings were also retested. Reliagene's February 9, 2007 report shows they did standard STR testing, finding only one female profile and no evidence of a male. The evidence was submitted for the more sensitive Y-STR testing and a trace of male DNA was found. (V81/1958-60) Dr. Tracey opined that under these circumstances if blood was part of the material tested then the blood would have had to have come from the female. (V81/1959-60) This is consistent with the evidence presented at trial that the victim was found face down in a pool of her own blood. (DR 5/212).

Finally, in light of the suggestion that Guy Douglas should have been a suspect in the murder, the state requested *and Douglas volunteered* to have his DNA tested and submitted to CODIS. (V81/1851-54; V82/1967; V84/1979) Douglas was excluded as the source of the semen found within the victim. The State noted that the sample was available for any additional testing. Counsel for Bogle requested it be sent to her lab and the court directed her to do "whatever she thought appropriate." (V85/1982-83). The record is silent as to any further action.

SUMMARY OF THE ARGUMENT

The postconviction court did not deny Bogle a full and fair evidentiary hearing when the court sustained the State's objections to collateral counsel's attempts to impeach witnesses on irrelevant and collateral matters and precluded collateral counsel's expert from expressing an opinion on matters outside of her expertise and by denying his requests for discovery. Bogle has failed to establish that the court abused its sound discretion in ruling on the State's objections during the hearing. Finally, this Court has previously rejected Bogle's claim that the court erred in denying his motion to disqualify the judge and, because there have been no material changes, the law of the case doctrine requires this Court to once again deny Bogle's claim.

Appellant's alleged *Brady/Giglio* claims were litigated at the evidentiary hearings below. In denying Bogle's claims, the postconviction court set forth detailed factual findings which are supported by competent, substantial evidence. Appellant failed to prove a *Brady* or *Giglio* violation. Inasmuch as no procedural or substantive errors have been shown with regard to the factual findings or the trial court's application of the relevant legal principles, no relief is warranted and this Court must affirm the trial court's order denying postconviction relief.

Bogle failed to establish either deficient performance or resulting prejudice based upon trial defense counsel's performance during the guilt or penalty phases.

The experienced defense attorneys made reasonable tactical decisions in the course of representing Bogle which, as the trial court found below, have not been shown to fall below prevailing professional norms. Further, after having received a full and fair hearing on this claim below, Bogle failed to present any significant evidence counsel overlooked or failed to present which calls into question the outcome of his trial. Accordingly, this claim was properly denied below.

The postconviction court properly denied Bogle's claim that newly discovered evidence entitled him to relief. In analyzing Bogle's claim under the proper legal standard, the court properly considered *all* of the newly discovered available evidence, including new evidence of Bogle's guilt. Contrary to collateral counsel's assertion, the newly discovered evidence that two unidentified males' DNA was found in the victim's fingernail clippings was not evidence establishing that the victim was murdered by two assailants as there was no way to determine when the victim came into contact with the two unidentified males. As the court correctly found, when considering all of the newly discovered evidence, including newly discovered DNA evidence establishing that Bogle's semen was found in the victim's vaginal swabs and on her underwear, Bogle was unable to establish that the newly discovered evidence would probably produce an acquittal on retrial.

The Public Defenders assigned to represent Bogle did not personally represent any of the State witnesses or potential witnesses mentioned by Bogle in

his amended motion for postconviction relief and were unaware that the Public Defender's Office had represented any of these individuals. Bogle's claim is exactly the type of speculative allegation of conflict which this Court has repeatedly rejected as insufficient to impugn a criminal conviction.

Appellant's claim that trial counsel was ineffective for failing to challenge comments made during closing was properly rejected as Bogle established neither deficient performance nor prejudice. The challenged comments were proper comments on the evidence and logical inferences to be drawn from that evidence. Counsel is not ineffective for failing to object to proper argument. Additionally, the underlying claims are procedurally barred as direct appeal issues.

ARGUMENT

ISSUE I

BOGLE RECEIVED A FULL AND FAIR EVIDENTIARY HEARING.

In his first claim, Bogle alleges that he was denied due process and a full and fair evidentiary hearing when the trial court: (1) precluded collateral counsel from examining witnesses on collateral and irrelevant matters; (2) denied requests for discovery; and (3) denied Bogle's motion to disqualify the judge. Contrary to Bogle's assertions, the postconviction court acted within its sound discretion in denying these motions and Bogle has failed to establish any violation of his due process rights.

(A) Examination of Witnesses

Bogle's first sub-claim challenges the trial court's ruling precluding collateral counsel from questioning FBI Agent Michael Malone and Steve Robertson regarding collateral matters. At Bogle's trial, FBI Agent Malone testified that he examined the evidence recovered from Bogle's trousers and found one Caucasian pubic hair which microscopically matched the known pubic hair of Margaret Torres; it had been naturally (as opposed to forcibly) removed. (DR 6/317-18) Malone conceded that hair "is not like a fingerprint," and hair comparisons do not constitute a basis for absolute personal identification. (DR 6/313, 320).

At the evidentiary hearing, Malone testified that he conducted the hair analysis in this case and that a pubic hair found in debris on the suspect's pants was microscopically indistinguishable from the victim Margaret Torres. He noted that there was a transcription error in his bench notes; that instead of putting down K-6 (a pubic hair), he put down K-7 (a head hair), but his final finding remained the same.[4] (V75/1455-58; 1508-10).

On cross-examination, collateral counsel questioned Malone regarding an

[4] Collateral counsel erroneously states that Malone's testimony regarding his transcription error was "pure speculation" and he could have easily made an error and compared a head hair rather than a pubic hair. To the contrary, Malone did not speculate on the transcription error and explained that it was "Basic Hair 101" that you cannot compare a head hair to a pubic hair. (V75/1508-10).

investigation into his work by the Office of the Inspector General, and the witness testified that he had only been found to have testified falsely in one civil case. (V75/1459) Collateral counsel proceeded to question the witness regarding published opinions from this Court, *see Rhodes v. State*, 986 So. 2d 501 (Fla. 2008), and the Rhode Island Supreme Court, *see Bleau v. Wall*, 808 A.2d 637 (R.I. 2002). Because the witness was unaware of both cases, the court allowed counsel to proffer the opinions rather than read them to the witness. (V75/1459-71) A review of the entire cross-examination establishes that the court did not abuse its discretion in any fashion by allegedly limiting collateral counsel's impeachment of Agent Malone; rather, the court gave counsel wide latitude in impeaching Malone. *See Patrick v. State*, 104 So. 3d 1046, 1057 (Fla. 2012)(stating that this Court reviews a trial court's ruling limiting cross-examination for an abuse of discretion).

At the evidentiary hearing, the State presented evidence from Steven Robertson, an expert in the field of hair analysis. Robertson testified that he was contacted by the FBI in 1999 to review FBI Agent Malone's work in approximately 150 cases, including the instant case. (V88/5190-93) Robertson testified that there was an inconsistency between Malone's written report and his bench notes based on the misidentification of a pubic hair as a head hair. Nevertheless, Robertson concluded that Malone's trial testimony was consistent with his final report as to the comparison of the victim's known pubic hair to the

hair found on Bogle's pants. (V88/5192-97, 5228-29).

During the cross-examination of Robertson, collateral counsel attempted to question the witness on whether his review of Malone's cases demonstrated that Malone had a history of making bookkeeping errors. The prosecutor objected that it was improper impeachment and the witness indicated that the Department of Justice precluded him from testifying as to any of Malone's other casework. After hearing argument from counsel, the trial court sustained the State's objection and allowed defense counsel the opportunity to proffer Robertson's response within the limitations placed on him by the DOJ, at which time Robertson confirmed that he was not allowed to discuss Malone's other casework or he would face possible sanctions. (V88/5208-19).

The trial court acted within its sound discretion in sustaining the prosecutor's objection to collateral counsel's attempt to impeach Malone by asking Robertson about Malone's work in other cases. In the factually similar case of *Farinas v. State*, 569 So. 2d 425, 429 (Fla. 1990), the defense objected to the prosecutor's questioning of a defense expert witness regarding allegations of unethical conduct in unrelated cases and this Court held that "[e]vidence of particular acts of misconduct cannot be introduced to impeach the credibility of a witness. The only proper inquiry into a witness' character, for impeachment purposes, goes to reputation for truth and veracity." In the instant case, the trial

court followed *Farinas* and found that collateral counsel could not impeach Agent Malone with alleged misconduct in other cases, but allowed counsel to question the witness on whether he knew of Malone's reputation in the scientific community for his accuracy in bookkeeping. (V88/5210). As Bogle has failed to establish that the lower court abused its discretion, this Court should reject the instant sub-claim.

Likewise, the court acted within its discretion in refusing to allow collateral counsel's expert, Dr. Terry Melton, to testify regarding her opinions on the reliability of Agent Malone's microscopic analysis of the hair samples. The prosecutor objected to Dr. Melton's opinion testimony regarding Agent Malone's microscopic examination of the hair samples because she was not qualified to express an opinion on microscopic hair analysis as she does not perform that type of work and was not qualified to express such an opinion; rather Dr. Melton's expertise is in the distinct area of mitochondrial DNA (mtDNA) analysis. (V67/1068-96) Because Dr. Melton was not qualified to express an opinion on microscopic hair analysis, the court properly excluded this aspect of her testimony. *See Simmons v. State*, 934 So. 2d 1100, 1117 (Fla. 2006)(noting that "a trial judge has the discretion to determine if a witness's qualifications render him or her an expert, and this determination will not be overturned absent clear error").

Collateral counsel further asserts that the court abused its discretion in preventing counsel from questioning Karen Cox regarding her actions in unrelated

cases. Collateral counsel called prosecutor Karen Cox as a witness and she testified that she became involved with Bogle's case shortly after his indictment on October 2, 1991. (V62/406-09) Collateral counsel questioned Karen Cox on various documents contained in the case file, including an email from a member of the Victim's Assistance Program. (V62/410-14) On cross-examination, Cox testified that it was her standard practice to speak with the victim's family members regarding the case, and if she had obtained any information that could be substantiated indicating that someone other than Bogle had confessed to the murder, she would have turned it over to the defense and law enforcement. (V62/480-83) On re-direct, collateral counsel asked Cox about her standard practices in 1992 and asked her if a *Brady* violation had occurred in her case involving defendant Michael Mordenti. The State objected and the trial court sustained the objection. (V62/488-89) Collateral counsel responded that "it seems to me what was done and what happened in other cases both in the Mordenti case and the case of Karen Cox is relevant to what the standard practice was back then."

The trial court acted within its sound discretion in sustaining the State's objection to collateral counsel's question regarding Karen Cox's actions in the unrelated case of Michael Mordenti, as counsel's question was clearly not relevant and was simply an improper attempt to discredit the witness. *See generally Farinas v. State*, 569 So. 2d 425, 429 (Fla. 1990)(holding that "[e]vidence of particular acts

of misconduct cannot be introduced to impeach the credibility of a witness"); *Jackson v. State*, 545 So. 2d 260, 264 (Fla. 1989)(finding that trial court did not err in excluding evidence of detective's prior department reprimands); § 90.610, *Fla. Stat.* (2009). Because Cox's prior actions in an unrelated case were irrelevant and not proper grounds for impeachment, the trial court properly sustained the State's objection to collateral counsel's question.

Similarly, the trial court properly sustained the State's objection when collateral counsel attempted to cross-examine FDLE DNA analyst Patricia Bencivenga regarding a document relating to contamination issues at the FDLE lab in an unrelated case. As the trial court correctly noted, Bogle failed to show how any contamination issues at the FDLE lab were related to his case, and therefore, the question was irrelevant. (V76/1581-84).

Collateral counsel also argues that the trial court denied him a "full and fair hearing" by sustaining the State's objections to questions posed to Marcia Turley and Gary Turley. During collateral counsel's examination of Marcia Turley, counsel inquired into instances involving threats and violence between Marcia Turley and her boyfriend, Guy Douglas.[5] Turley testified that on the night of the victim's murder, she had been to Club 41 with Guy Douglas, Brett Bogle, and a female named Trish. According to Turley, after leaving Club 41 and returning to

[5] Marcia Turley was married at the time to Gary Turley.

her hotel room and passing out, Guy Douglas entered her room and took a shower. When she woke up and asked Douglas why he was there, he told her to shut up. (V62/496-504) At some later unknown time, Douglas told Marcia Turley that Bogle was being questioned for the victim's murder and Douglas told her he had nothing to worry about because he had been with Turley all night. (V62/504-05) Marcia Turley responded that he had not been with her all night, and Douglas told her that she better say he had been or they would be lucky to find her body. (V62/504-05).

When collateral counsel asked Marcia Turley why she was scared of Guy Douglas, the judge ultimately allowed collateral counsel to ask the witness if her fear of Douglas was based on his threat following the victim's murder over the objection of the State. (V62/507-13) Bogle was not prevented from eliciting this information. Likewise, when the State objected to testimony regarding Douglas's statements to Marcia Turley during the commission of a battery, the court "sustained" the State's hearsay objection, but ultimately allowed collateral counsel to ask the witness, "Did Guy Douglas say anything to you during this episode?" (V62/516-18) Because the record clearly establishes that the trial court did not preclude collateral counsel from eliciting any testimony from Marcia Turley, Bogle's claim is without merit.

Counsel also complains that the court mistakenly ruled that hearsay

testimony from Marcia Turley's husband, Gary Turley, was inadmissible.[6] Collateral counsel argued that the hearsay was admissible to show what could have been discovered by defense counsel had the State turned over the witness' name. As noted by the prosecutor, however, there was never any evidence introduced that the State was aware of Gary Turley or had ever spoken to him prior to Bogle's trial. (V62/1020-24) As the court properly noted, the questions posed to Gary Turley regarding statements allegedly made by his wife were inadmissible hearsay and collateral counsel has not established that the court abused its discretion in sustaining the State's objection.

Collateral counsel next asserts that the trial court erred in precluding him from questioning trial counsel Douglas Roberts regarding hearsay statements made by Roger Kelly at a deposition Roberts took of the potential witness.[7] (V63/594-603) The State objected because collateral counsel was attempting to introduce hearsay statements made by Roger Kelly at a pretrial deposition as substantive evidence. Contrary to counsel's assertions, the court did not preclude collateral counsel from arguing why the hearsay was allegedly admissible, but rather, correctly found that counsel's argument was without merit as the hearsay evidence

[6] Collateral counsel proffered that Gary Turley would testify that his wife told him Guy Douglas came to her motel room on the night of the victim's murder with blood on his clothes. (V67/1024) Marcia Turley, who testified earlier at the evidentiary hearing, did not recall ever observing blood on Douglas or his clothing. (V62/535-37).

[7] Roger Kelly died before Bogle's trial.

was inadmissible at the postconviction proceedings and would have been inadmissible at trial. *See Randolph v. State*, 853 So. 2d 1051, 1061-63 (Fla. 2003)(holding that court did not err in refusing to admit affidavit of deceased witness at postconviction proceeding as affidavit did not fall under any of the hearsay exceptions under section 90.804(2)); *Reichmann v. State*, 966 So. 2d 298, 311 (Fla. 2007). Furthermore, trial counsel Roberts testified that he was aware of Guy Douglas as a possible suspect and Kelly's deposition "didn't do anything that I already wasn't doing" regarding investigating Guy Douglas. (V63/604) Trial counsel also testified that he would have never attempted to introduce Roger Kelly's deposition as that would have prevented him from having rebuttal closing argument. (V63/604-05). Because the trial court properly sustained the State's objection and collateral counsel has failed to establish any abuse of the court's discretion, this Court should reject the instant sub-claim.

Collateral counsel also complains that he was deprived of a full and fair hearing because the trial court sustained the State's objection when collateral counsel questioned Brian Bogle, Appellant's twin brother, regarding a letter he wrote which was introduced at Appellant's penalty phase proceeding. In the letter, Brain Bogle wrote that on one occasion he was whipped so hard that he urinated himself. (V64/768-69) At the penalty phase, this statement in Brian Bogle's letter was omitted by court order and the postconviction court sustained the State's

objection that this was not relevant to a claim of ineffective assistance of penalty phase counsel because trial counsel had obviously unsuccessfully sought to introduce the statement. The court agreed and sustained the objection. Even if the court erred in sustaining the objection, Appellant's argument that he was denied a fair and full hearing is without merit. *See Marquard v. State*, 850 So. 2d 417, 425-26 (Fla. 2002)(stating that postconviction court did not deny defendant a full and fair hearing by refusing to permit hearsay testimony and, even if court erred, error was harmless).

(B) Access to Discovery

Appellant argues that the court deprived him of a full and fair hearing by denying his requests for discovery material relating to FBI Agent Michael Malone's work in other cases, access to the Florida DNA database, and access to jail calls. After reviewing the written motions and hearing argument of counsel, the trial court denied each of the discovery requests. Appellant has failed to show that the court abused its discretion in denying these requests. *See Floyd v. State*, 18 So. 3d 432, 446 (Fla. 2009)("The ruling of a postconviction court on a motion for discovery is reviewed for an abuse of discretion."); *Kelley v. State*, 974 So. 2d 1047, 1050-51 (Fla. 2007)(stating when a defendant sets forth good reason, a court may allow limited discovery into matters which are relevant and material, but the court does not abuse its discretion when the request is merely a fishing expedition).

The trial court denied Bogle's request for documents relating to FBI Agent Michael Malone's work in other unrelated cases because the area of inquiry was irrelevant and collateral to the instant proceedings. (V81/1878-84) With regard to Bogle's request for access to FDLE's DNA database, the court noted that collateral counsel had never asked the State's DNA analyst any questions regarding any similar DNA profiles within the database and the prosecutor stated that the defense's expert simply wanted access to conduct research and engage in a fishing expedition. The prosecutor further noted that the defense expert admitted that a private expert had never been given access to such a database in the United States. (V81/1875-78) Because Bogle failed to establish good cause, the trial court properly denied his discovery request. *Kelley*, 974 So. 2d at 1050-51. Likewise, the court acted within its discretion in denying Bogle's overly broad request for access to jail phone records. (V81/1884-88).

(C) Disqualification of Judge

Bogle asserts the court erred in denying his repeated motions to disqualify the judge based on allegations that Judge Timmerman and his wife were "material" witnesses at the evidentiary hearing based on testimony from Marcia Turley that she recalled Timmerman's name when she gave her baby up for adoption.[8]

[8] Marcia Turley testified that her adoption attorney was a female and that she recalled telling her that she feared the child's father because he had committed a murder. (V62/514, 524). Suzanne

Contrary to Appellant's assertions, the judge and his wife were not "material" in the instant case as the issues surrounding the adoption of Marcia Turley's child were simply irrelevant to any postconviction claim in this case. Furthermore, conveniently absent from collateral counsel's argument on this sub-claim is the fact that this issue has already been litigated in this Court when Bogle filed a Petition Seeking Review of a Non-Final Order in a Death Penalty Postconviction Proceeding and/or Petition for Writ of Prohibition, and this Court specifically found that "the trial court did not abuse its discretion in denying Bogle's renewed motion to disqualify" because "**neither Judge Timmerman nor his wife were material witnesses**." *Bogle v. State*, 10 So. 3d 631 (Fla. 2009)(unpublished decision)(emphasis added). Because this Court has previously found that Bogle's claim lacks merit and that Judge Timmerman and his wife were not material witnesses, this Court's prior rejection of the claim is law of the case. *Henry v. State*, 649 So. 2d 1361, 1364 (Fla. 1994)(finding "law of the case" doctrine applies to preclude review of a suppression issue raised in prior appeal and denied by a majority of this Court.) Under the law of the case doctrine, "all points of law which have been previously adjudicated by a majority of this Court may be reconsidered only where a subsequent hearing or trial develops material changes in the evidence,

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Timmerman testified that she was a paralegal for her husband's firm and attorney Elizabeth Hapner rented office space from her husband. Mrs. Timmerman vaguely recalled going to the hospital and notarizing some papers for Hapner's adoption case, but did not recall any conversations about the father committing a murder. (V65/816-20).

or where exceptional circumstances exist whereby reliance upon the previous decision would result in manifest injustice." *Id.* As the facts remain the same, and there have been no material changes, there is no basis to overturn this prior finding. The denial of the motion to disqualify should once again be affirmed.

ISSUE II
BRADY/GIGLIO CLAIMS

In this claim Bogle asserts a number of *Brady/Giglio* violations occurred. The trial court granted an evidentiary hearing to afford Bogle the opportunity to prove his claim that the State withheld material exculpatory evidence or knowingly presented false or misleading evidence.[9] Bogle's attempt to expand his argument or present claims that were not previously raised to the postconviction court should be squarely rejected.[10]

"Both *Giglio* and *Brady* claims present mixed questions of law and fact.

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[9] Relevant to Bogle's *Brady/Giglio* claim, Bogle's postconviction motion alleged (1) the prosecution failed to disclose and/or presented misleading testimony/argument with regard to Guy Douglas being involved in the murder of Margaret Torres; (2) the State's argument regarding Bogle's facial scratches was false; (3) the State failed to disclose information regarding Jeffrey Trapp's probation; (4) testimony given by FBI agents Malone and Deadman, was inaccurate and/or false, and (5) the Tracey transcript revealed that the witnesses Katie Alfonso, Phillip Alfonso, and Det. Larry Lingo testified inconsistently. (V7/1201-06, 1251-55, 1338-47; V13/2518-25). The postconviction court granted a hearing regarding the Guy Douglas claim, the Malone and Deadman claim, the Jeffery Trapp claim, and the Tracey testimony claim. (V15/2968-69, 2975-78, 2980, 2993). The claim regarding the facial scratches was summarily denied as procedurally barred and insufficiently plead. (V15/2978-79).

[10] Allegations which change the factual or legal bases of the claims raised below are procedurally barred. *Henyard v. State*, 883 So. 2d 753, 759 (Fla. 2004); *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003); *Vining v. State*, 827 So. 2d 201, 211-13 (Fla. 2002); *Thompson v. State*, 759 So. 2d 650, 668 n.12 (Fla. 2000); *see also Brown v. State*, 894 So. 2d 137, 154 (Fla. 2004)(disapproving of attempts to raise new claims in post-hearing memorandum).

Thus, as to findings of fact [this Court] will defer to the lower court's findings if they are supported by competent, substantial evidence. This Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court. [This Court] review[s] the trial court's application of the law to the facts de novo." *Franqui v. State*, 59 So. 2d 82, 102 (Fla. 2011)(citations omitted). As will be demonstrated, the postconviction court's findings are supported by competent, substantial evidence and the court correctly applied the law to the facts. As such, Bogle has not demonstrated any reason to disturb the judgment below.

After reviewing Appellant's Motion, Closing Argument, and all evidence presented at the extensive evidentiary hearing, the court found that Bogle failed to show that the State possessed and failed to disclose information regarding Mr. Douglas that was favorable to the defense. (V16/3086-90)(footnotes omitted)(emphasis added). Specifically, the court concluded there was no persuasive evidence presented that Ms. Cox had any actual evidence that either of these things were true, that Ms. Cox's testimony was highly credible that if she had any evidence that another person confessed to being involved, she would have immediately disclosed that to the defense and that Bogle has failed to show that Ms. Cox had any communication with Ms. Turley prior to Bogle's trial.

After concluding Bogle failed to establish that favorable evidence was

suppressed, contrary to Bogle's assertions, the postconviction court correctly identified the standard for a prejudice analysis under *Brady*. The court observed:

> To establish that the evidence suppressed was material, the defense must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler*, 527 U.S. at 290, 119 S.Ct. 1936 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). (V16/3091).

Relevant to this analysis, the postconviction court outlined key pieces of the evidence against Bogle at trial. This included, (1) evidence Bogle was angry with the victim, physically assaulted her, and threatened if she pressed charges "she would not live to tell about it"; (2) testimony that in the early morning hours of the night of the murder Bogle (who earlier appeared clean and uninjured) now appeared dirty, his crotch was wet, and he had scratches on his forehead; (3) the evening following the murder Bogle was found clothed hiding in a shower with the pants he wore the previous night on the shower floor, and he appeared to have fresh scratches on his face; (4) a hair from these pants was consistent with the victim's pubic hair; and (5) a DNA profile was created from the semen present on the victim's vaginal swab, and Bogle was in 12.5% of the Caucasian population that was a match to that profile. (V16/3091)[11] The postconviction court further

[11] Bogle erroneously asserts the lower court's reliance on this trial evidence was error as the evidence had been undermined in postconviction. Appellant's Brief at 45-46. Bogle is mistaken. The court properly viewed the evidence from trial, and analyzed whether there was a reasonable

observed that Bogle failed to present any direct evidence that Douglas or anyone else actually confessed to the murder. The court rejected testimony which "showed that there was a rumor that more than one individual was involved; a rumor which no first hand testimony or direct evidence presented at the evidentiary hearing substantiated, and even if substantiated, does not exonerate Bogle." Nor, the court found, was there any evidence which indicates that disclosing the note would have led the defense to interview Turley, who was by her own admission, attempting to make herself scarce or that evidence Douglas was "involved," would exonerate Bogle. The court also found that Bogle failed to show that the State knowingly presented or failed to correct false testimony. Therefore his *Giglio* claim regarding Douglas was denied. (V16/3092-93).[12]

The evidence at the hearing revealed Karen Cox testified that she had received an e-mail from their victim's assistance person, Elaine Sims, that Katie Alfonso-Tucker told her someone named Andy, who was present at the bar with

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probability that the verdict would have been different had the suppressed information been used at "trial." *Strickler*. He further erroneously argues the court's analysis should have considered what the defense could have discovered and presented. Appellant's Brief at 47. However, what evidence could have been presented is not the burden Bogle must satisfy. To establish materiality under *Brady*, it is Bogle's burden to establish a reasonable probability of a different result. *Strickler*.

[12] Bogle attempts to raise as a *Giglio* claim that Cox never revealed that Guy Douglas' alibi was not confirmed, and that Det. Lingo's testimony on this point was false and Cox knew this. Appellant's Brief at 39. However, Bogle did not raise this claim to the court below. (V7/1201-06, 1251-55; V15/2858-64) As such, this claim should be denied as procedurally barred. *Green v. State*, 975 So. 2d 1090, 1104 (Fla. 2008)(claim is "procedurally barred because it was neither raised in Green's 3.851 motion nor addressed by the trial court").

Bogle, was saying there was more than one person involved in the murder.[13] Due to its unclear nature, it is not the type of thing she would normally give to the defense, but she said she presumably followed up on it because she got their phone numbers. (V62/411-14).[14] When presented with Defense Exhibit 2,[15] which Bogle suggested proved Cox had evidence that Guy Douglas confessed and that should have been disclosed, Cox testified that the note did not indicate information that Marcia Turley had provided because there is no phone number for Marcia Turley, that it was ambiguous and suggests she was supposed to talk to somebody about whether or not he did. She also testified that she vaguely recalled the name Marcia Turley, but did not recall Guy Douglas in particular. She could not say for certain that these three items were even related or if those all were told to her at the same time or different times. (V62/424-25, 440-41). Cox denied having evidence that Douglas had confessed; she did not recall speaking to either Marcia Turley or Guy Douglas. Moreover, after reviewing the investigation subpoena[16] for Marcia Turley and a discovery list, she explained that apparently she did not talk to Marcia because she had no recollection of her, there were multiple addresses and the

[13] Alfonso-Tucker testified the contents of the e-mail were simply rumor and hearsay. (V62/393-94, 398-402) Bogle's counsel believed he was aware of the rumor. (V63/609-10).

[14] *See* Defense Exhibit 1, V18/3372-73.

[15] V18/3374-75.

[16] Defense Exhibit 5, V18/3393-95. Contrary to Bogle's argument, the subpoena does not establish that Cox "connected the dots" as to Marcia and Douglas' involvement in Bogle's case. Appellant's Brief at 44.

discovery list says she had not spoken to her. (V62/425-26, 429-31)[17] Further, Cox testified she had no recollection of Guy Douglas' criminal case or viewing the reports related to the case. (V62/434-435, 441, 443).

In fact, the testimony of Marcia Turley confirms that she had not spoken to the police or prosecution about the murder of Margaret Torres. Turley confessed that she knew the police were looking to talk to her about the murder because her sister told her but she made herself scarce by moving around a lot after the murder. Turley specifically testified that she did not remember speaking to any prosecutor in 1991 or 1992. (V62/543)[18] When asked specifically if she spoke to Cox, Turley indicated she did not recall speaking to Cox. (V62/543) Moreover, as Turley's

[17] Bogle's argues that Defense Exhibit 15 referencing Gary Turley indicated that Cox had information from Marcia Turley. Appellant's Brief at 44. However, this argument should be rejected as this exhibit was not even entered into evidence. (V18/3490-91) Likewise, Bogle's argument that a phone memo indicating Wayne Timmerman returned a call establishes Cox wanted to verify what Turley told the attorney handling her adoption should be rejected. Appellant's Brief at 44. First, the note only indicated Timmerman was returning a call, the memo did not reference any person, case, or case number. (V22/4310-11) Second, Elizabeth Hapner, who shared office space with Timmerman, handled the adoption for the adoptive parents. (Supp. V89/5253-56) While Marcia had a "belief" that the potential father was involved in a murder, she did not provide Hapner any details she could pass along to law enforcement. (Supp. V89/5260-61) Cox never contacted Hapner regarding Marcia. (Supp. V89/5258) Furthermore, no evidence was presented Timmerman had any information regarding Turley, he simply shared office space with Hapner, they were not in practice together. (Supp. V89/5254).

[18] Bogle asserts that Defense Exhibit 23 indicates that Turley was interviewed in connection with Douglas' case and was not making herself "scarce." Appellant's Brief at 44. The address for Turley contained in the file does not refute the finding that she was making herself "scarce" as Bogle claims. The address does not indicate the date it was obtained, whether the address was correct, or who obtained the information, and from whom it was obtained. (V18/3564-71; V19/3572-93) While Bogle could have "connected the dots" here, he did not. Lastly, the handwritten notes in the file were not Cox's. (V62/562-63). The State also notes that trial counsel for Firmani testified Turley "disappeared" or otherwise made herself unavailable. (Supp. V88/5156).

testimony reveals, she did not have any evidence Douglas was involved in the murder. (V62/544-45, 549).

Essentially, Bogle is arguing that even though the State clearly had not spoken to Marcia Turley, but had noticed the defense that Turley may have information pertaining to the case, the failure to track Marcia Turley down somehow constitutes a *Brady* violation. It does not. The law is quite clear that while the "State is required to produce for discovery the criminal records of any witness the prosecution intends to call at trial," *Smith v. State*, 641 So. 2d 1319, 1321-1322 (Fla. 1994), the "State has no duty, however, 'to actively assist the defense in investigating the case.' *Hansbrough v. State*, 509 So. 2d 1081, 1084 (Fla. 1987)." *Id*.

Additionally, Marcia Turley and Guy Douglas were both Bogle's friends and with him at the bar. Under these circumstances, the Florida Supreme Court in *Occhicone v. State*, 768 So. 2d 1037 (Fla. 2000), held that there was no *Brady* violation where the allegedly material witnesses were material *precisely because they were with him during the hours before the murders*. "Therefore, no one better than [Bogle] himself could have known about these witnesses." *Id.* at 1041-42. Like *Occhicone*, Bogle cannot honestly allege that he did not know of these witnesses. "Although the 'due diligence' requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a

Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant." *Id. See also, Maharaj v. State,* 778 So. 2d 944, 954 (Fla. 2000)(denying *Brady* claim where contents of briefcase was returned to owner by State without investigation because it does not meet the materiality prong of the test and both the prosecutor and the defense were aware of the information.).

As the evidence irrefutably establishes that Bogle knew about Marcia Turley and Guy Douglas, Bogle cannot satisfy his burden. Marcia Turley testified at the evidentiary hearing that she went with Guy Douglas and Bogle to the bar on the night of the murder. Defense counsel, Doug Roberts, testified that he was aware of Guy Douglas and, in fact, he was investigating Guy Douglas as a suspect because he believed he was the perpetrator of the crime. (V63/594) Roberts testified that he did not have to disprove the crime. If he had evidence Guy Douglas committed the crime, he would have presented it, but he did not. He was not going to present mere evidence that Guy Douglas was arguing with the victim. He did not think testimony that Guy Douglas had threatened Marcia Turley would be substantial enough to warrant giving up opening and closing. (V63/605-07) He knew they wanted to interview Douglas but had trouble finding him and then there was a warrant out for him. (V63/610-11) He testified that he worked on a lot of cases with ASA Cox and the flow of information was pretty open. "Nobody is trying to

hide anything." (V63/634).

Even if defense counsel had been able to locate the elusive Ms. Turley, this testimony of a collateral event would not have been relevant or admissible. *See Jones v. State,* 678 So. 2d 309, 313-314 (Fla. 1996)(alleged hearsay confessions not admissible as substantive evidence under the exception for declarations against penal interest because declarant was not shown to be unavailable); *Jones v. State*, 709 So. 2d 512, 524 (Fla. 1998)(alleged hearsay confessions inadmissible where there were no corroborating circumstances to show the trustworthiness of the statement.). Inadmissible evidence cannot support a *Brady* violation. *Wood v. Bartholomew*, 516 U.S. 1 (1995). Nor could it have been used as impeachment evidence. As such, it is not material. *Duest*, 12 So. 3d 734, 746 (Fla. 2009)(statement is neither admissible nor leads to the discovery of admissible evidence; therefore, it does not constitute exculpatory evidence under *Brady*). This is especially true, given that defense counsel clearly stated that based on his experience, his strategy was to keep first and last unless he had substantial other evidence and he did not consider this evidence to be of such substance. Despite Bogle's attempt to create whole cloth out of the hearsay and innuendo based on out-of-context statements and notes, there is no credible evidence that material evidence was withheld concerning Guy Douglas. Bogle's claims, while at first glance appear to be based on some actual proven fact, are pure speculation and

thus cannot form the basis for relief. *See Wyatt v. State*, 71 So. 3d 86, 107 n. 17 (Fla. 2011). The judgment of the postconviction court must be affirmed.

(A) Forensic Issues

Bogle asserts a number of claims relating to the physical evidence, and the testing of the evidence. These claims center around Det. Lingo and Agents Malone and Deadman.[19] Again, the postconviction court had an extensive hearing on this issue. Bogle was denied relief, and he presents nothing to this Court to disturb the judgment below. (V16/3094-96).[20] Bogle also asserts that the State withheld material evidence with regard to Det. Lingo's and Crime Scene Technician Cashwell's collection of evidence and that Det. Lingo testified falsely at trial. Bogle failed to prove the instant claim.

First, Cashwell **testified at trial** that he collected the white pants from the bathtub at the trailer. The pants were laying in the bathtub like they had been rung out; they were still damp. He told the jury that when he picked them up he noticed there was a pubic hair or some kind of fiber on them so he informed Det. Baker

[19] The State notes it appears that Bogle's Lingo claim regarding the physical evidence was first raised in his closing argument. (V15/2864-67).

[20] Bogle argues that the lower court failed to consider the "ambiguous" standard under *Brady*. Appellant's Brief at 40. However, the Lingo claim was presented as a *Giglio*/false testimony claim. As evidenced by the above referenced order, it was properly addressed. Bogle further argues the trial court failed to address Lingo's inconsistent testimony regarding what he collected. Appellant's Brief at 53. First, any claim not ruled upon should be deemed barred. *Green v. State*, 975 So. 2d 1090, 1104 (Fla. 2008). Second, there is no error as inconsistencies do not constitute a *Giglio* violation. *United States v. Michae*l, 17 F.3d 1383, 1385 (11th Cir. 1994), *Maharaj*, 778 So. 2d at 956.

and then went and got a bag and put them in a bag. He told the jury he tried to preserve what was on there and allow them to dry. (DR 6/346-47) He said he packaged them separately and then transported them to the ID garage. (DR 6/350) Cashwell was not called to testify at the evidentiary hearing.

Contrary to Bogle's assertion, the fact Det. Lingo removed the pants was not suppressed. Det. Lingo testified that on September 17 he checked the pants out of the evidence room at the main office. He said that he "took a piece of brown wrapping paper put out on the counter and opened the pants up on top of this and as they were laying on the paper looking down at them, the zipper part opened. [He] found several what appeared to be pubic hairs inside of the pants and also inside of the legs of the pants." He then put them in a white envelope and shipped them to the FBI. (DR 6/365-66) In response to counsel's question if anybody else came into contact with the pants from the time that they were put into property until the time that he took them out to collect this evidence, Det. Lingo responded, "No, they were sealed when he checked them out."

Bogle now argues that Defense Exhibit 12 establishes that the evidence was contaminated and that Det. Lingo conceded based on that exhibit that he testified inaccurately. Neither claim is true. Neither Cashwell nor the drafter of the report was called to explain what happened or how it could possibly impact the case. The report itself is not evidence of contamination or false testimony. The only evidence

actually before the Court was the testimony from Malone and Lingo. Malone testified on cross:

> Q. Were you aware the pants, before the debris was collected, had been put in a dry room with other evidence in an unsealed bag?
>
> A. No.
>
> Q. Would that be significant to you?
>
> A. Drying rooms are standard procedure for wet evidence. You can't package wet evidence because it molds. There is no problem with drying rooms as long as you don't allow the items that are being dried to touch each other. In other words, hair is not going to float through the air and jump on another item.
>
> Q. This is a handwritten report and you can read the whole thing. I am calling your attention to the sentence right after this little mark there.
>
> A. She is saying the items are unable to be separated from each other can contaminate each other. I don't know if she is talking about items from the victim or from a suspect or both.

And then on redirect:

> Q. Mr. Malone, does the fact the potential two items of evidence in close proximity cause or result in the possibility of contamination or necessarily result in contamination?
>
> A. No. There is always a possibility. Once again, hairs and fibers do not float through space. They have to come into close contact.
>
> Q. You have been shown disciplinary report defense exhibit number two concerning Ron Cashwell and the drying shed. The portion you have read is there anything in that report that causes you to change or alter or modify your opinion concerning the match of Q-18 and K-6 in this case?
>
> A. No.
>
> (V75/1482-83, 1507-08).

Detective Lingo testified at the evidentiary hearing that he had no knowledge of the disciplinary report and other than reading the report itself when

questioned by collateral counsel, he could offer no evidence in support of it. While Bogle argues that Det. Lingo admitted that his trial testimony was not accurate, the only inaccuracy was as to what happened to the pants *after* he collected the hair, as the report showed that Don Hunt had the pants in the drying room the day *after Det. Lingo collected the hair evidence*. (V74/1386-1401) As Malone made apparent, what happened to the pants after Det. Lingo collected the hair does not impact the collection of the hair. The fact that the pants were sent back to the drying room a second time does not show that the State presented false testimony or withheld material evidence. This claim was properly denied.

Bogle next claims the prosecution failed to reveal that Agent Deadman's testimony was false as he was not the DNA analyst. Appellant's Brief at 40, 55. An evidentiary hearing was held on this issue and relief was denied. (V16/3128-29) Deadman testified at trial, and at the hearing, that he was "a supervisor in that unit." He supervised other individuals that assisted him in conducting his examinations and comparisons and repeatedly used the pronoun "we" in discussing the testing done. (DR 7/458, 462-464; V69/1244, 1291-96) The lower court found that Appellant "failed to provide any evidence that Agent Malone or Agent Deadman did not interpret the data and come to the ultimate conclusions that they testified to at Defendant's trial. Furthermore, Defendant failed to provide any evidence that the results of the FBI lab's testing was somehow deficient for

utilizing technicians." (V16/3128) As the jury and counsel were clearly aware that the testing was done by a team, no error has been shown. Even if the jury was not aware that other people assisted in some manner, Bogle has failed to establish how this evidence was withheld or that it was material, i.e., that there is "a reasonable probability that had the suppressed evidence been disclosed the jury would have reached a different verdict." *Rhodes v. State*, 986 So. 2d 502, 508 (Fla. 2008). Relief was properly denied.

In a related claim concerning Deadman, Bogle claims that he was not provided with the FBI file regarding RFLP DNA testing. He asserts that with the file he could have undermined the DNA evidence. This claim was refuted at the evidentiary hearing where Agent Deadman reconfirmed the validity of the RFLP testing that was previously done. Contrary to Bogle's claim that the evidence could have been undermined, Deadman confirmed that controls were done, there was no evidence of contamination and they produced very reliable results. He found no errors in the DNA analysis in this case. (V69/1255-62)[21] Deadman also testified that the procedures used in RFLP analysis by the FBI in this case were the procedures used by essentially all laboratories doing this type of testing and were generally accepted in the relevant scientific community. (V69/1260-61) The lower court properly denied relief, finding "Deadman's testimony regarding the protocols

[21] *See also*, Defense Exhibit 20 indicating interpretation of data was confirmed. (V21/4065)

and controls employed by the FBI for RFLP testing in 1991 and his explanation for running multiple tests to be very persuasive" and that the "Defendant has failed to demonstrate that if law enforcement would have disclosed Agent Deadman's bench notes and data prior to trial, the result of the proceeding would have been different." (V16/3097)[22]

Even if there were some error with the RFLP testing, the evidence introduced was that the STR testing, subsequently done on the same sample, is much more sensitive and can produce results on infinitely smaller samples. (V69/1265-66) '[O]n a motion for postconviction relief alleging newly discovered evidence, the circuit court considers all admissible evidence when evaluating whether a new trial is warranted. This includes new evidence of guilt.' *Wright v. State*, 995 So. 2d 324, 327-28 (Fla. 2008)(citation omitted). *See also Johnston v. State*, 27 So. 3d 11, 19 (Fla. 2010)('[I]n deciding if a new trial is warranted, the trial court must consider all admissible evidence, which in this case includes the

[22] Bogle's assertion that the lower court erred in accessing the credibility of Deadman should be dismissed, as this was precisely the court's responsibility in reviewing the evidence. Appellant's Brief at 57. *Franqui v. State*, 59 So. 3d 82, 102 (Fla. 2011). Further, Bogle's assertion the trial court used the incorrect *Brady* materiality standard is without merit. Appellant's Brief at 57. *See Conahan v. State*, 2013 WL 1149736, *6 (March 21, 2013). ("To establish the materiality element of *Brady*, the defendant must demonstrate 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' *Guzman v. State*, 868 So. 2d 498, 506 (Fla. 2003)(quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Id* (quoting *Bagley*, 473 U.S. at 682)").

new DNA evidence matching Johnston's profile.')." *Mazzara v. State*, 51 So. 3d 480 (Fla. 1st DCA 2010). Since this evidence was retested using STR testing, which established even more conclusively that Brett Bogle was the contributor of the sample, any error with regard to the prior RFLP testing is not material and is harmless. (V75/1556-70). Accordingly, no relief is warranted.

Bogle asserts the failure to supply Agent Malone's bench notes constitutes a *Brady* violation and the testimony Malone provided was based upon speculation. At trial, FBI Agent Michael Malone testified that he examined the evidence recovered from the trousers seized from the trailer and found one Caucasian pubic hair which microscopically matched the known pubic hair of Margaret Torres; it had been naturally (as opposed to forcibly) removed. (DR 6/317-318) Malone conceded that hair "is not like a fingerprint," and hair comparisons do not constitute a basis for absolute personal identification. (DR 6/313, 320) Apart from the debris from the trousers, Malone also examined 39 other items, which he grouped into three categories: items from the crime scene, items from Brett Bogle, and items from Margaret Torres. (DR 6/327) All of the suitable hairs from the scene were consistent with Torres. (DR 6/328) All of the suitable hairs from items pertaining to Bogle (except the one pubic hair) were consistent with his hair. (DR 6/328) All of the hairs from Torres herself matched her hair, except for one dark brown head hair that exhibited mixed racial characteristics. (DR 6/328).

Malone testified at the evidentiary hearing that he conducted the hair and fiber analysis in this case and that he testified that a known pubic hair found in debris on the suspect's pants was microscopically indistinguishable from the victim Margaret Torres. (V75/1454-55) He noted during his testimony that there was a transcription error in his bench notes; that instead of putting down K-6, he just put down K-7, which was a head hair but his final finding remained the same. He also noted that if the pants from which the pubic hair had been removed had been wet for several days and perhaps even resulted in mold accruing on the pants, it could not have led to a false or inaccurate microscopic comparison and that there was no evidence of contamination. (V75/1458-59).

Steven Robertson testified that he was contacted by the FBI in 1999 to review Malone's work in the instant case. Robertson testified that although Malone's bench notes misidentified the hair as a head hair, his trial testimony was consistent with his final report as to the pubic hairs and he believed that Malone had testified fairly. (Supp. V88/5196-97, 5228-29). This Court in *Rhodes v. State*, 986 So. 2d 501, 507-508 (Fla. 2008) (another case involving Malone) agreed that even when there is an error in the original process, there is no *Brady* violation when the conclusion remains unchanged.

As in *Rhodes*, it is clear that Malone was unaware of the transcription error in the bench notes until he testified at the evidentiary hearing. That unknown

transcription error did not alter the ultimate conclusion and was not material. Accordingly, there has been no showing that material evidence was withheld or that the State knowingly presented false or misleading testimony, this claim was properly denied. *Rhodes; Hannon v. State*, 941 So. 2d 1109, 1145-1146 (Fla. 2006)(denying postconviction challenges based on Malone's testimony.)[23]

Lastly, the State notes because there is and was no innocent version of events that can explain the unimpeachable presence of Bogle's semen in the brutally sexually battered homicide victim, this damning evidence, when coupled with the other evidence presented at trial including that Bogle had threatened to kill Torres, precludes any contention that Bogle has satisfied the *Brady* materiality standard. That is, that there exists no "reasonable probability that the jury verdict would have been different had the suppressed information been used at trial." *Smith v. State*, 931 So. 2d 790, 796 (Fla. 2006)(citing *Strickler*, 527 U.S. at 289, 296). Even if he had been able to establish a *Giglio* violation, i.e., that the State either knowingly suppressed or presented false evidence, any violation with regard to the pubic hair would be harmless beyond a reasonable doubt in light of the evidence before this court. Bogle's *Brady/Giglio* claims were properly denied.

[23] The State also notes that to the extent Bogle is challenging both the testimony of Malone and Deadman based on the State's failure to provide the defense copies of the bench notes, the evidence at the hearing does not establish that the State had copies of the bench notes. Moreover, the evidence made clear that if defense counsel had requested same from the FBI, they could have been obtained. (V69/1271-74) There is no *Brady* violation where the evidence is equally accessible to both parties. *Peede v. State*, 955 So. 2d 480, 497 (Fla. 2007).

Bogle is not entitled to any relief.

The State notes that Bogle's claim regarding the facial scratches was summarily denied, and as the postconviction court noted, was "procedurally barred". (V15/2978-80; V16/3130) Notwithstanding this ruling, the postconviction court heard evidence and concluded Bogle was not entitled to relief. The court below found the State's argument that the scratches were made by the victim was based on reasonable inferences drawn from the fact that three separate witnesses testified at trial that Appellant's face did not have visible scratches prior to him following the victim out of Club 41 and a police detective testified that the scratches were still "fresh" when he interviewed Appellant after the murder. (V16/3130). The trial court found that "[n]o evidence was presented during the evidentiary hearing that the State had *actual knowledge* that the scratches on Appellant's face on the night of the murder were the result of his automobile accident. (V16/3130 at n. 25).

Bogle also asserts that the lower court's conclusion that Cox's argument concerning the scratches was a "reasonable inference" based on the testimony is refuted by the record. However, Bogle does not explain how or where the record "defies the court's conclusion." This claim should be deemed to have been waived. *Duest v. Dugger,* 555 So. 2d 849, 852 (Fla. 1990); *see also Simmons v. State,* 934 So. 2d 1100 (Fla. 2006). Moreover, the facts surrounding Bogle's accident were

clearly known to Bogle - it was Bogle's accident afterall - and, as trial counsel Roberts acknowledged at the hearing, those facts were not contested by either side. (V63/657) Thus, any claim that the State withheld information or presented false testimony is patently absurd. As there was credible evidence[24] upon which the prosecutor could base her arguments, Bogle has not carried his burden of establishing that the State knowingly presented false or misleading evidence. *Gorby v. State*, 819 So. 2d 664, 679 (Fla. 2002)(denying *Giglio* claim because appellant failed to establish that the witness presented false testimony or that the State knew the witness' testimony was false). No material false evidence was presented. The judgment of the lower court must be affirmed.

Bogle was also granted an evidentiary hearing on his claim that grand jury testimony was withheld from him in violation of *Brady*. Bogle's attempt to transform this into a *Brady* claim should be rejected.[25] It is well settled that there is

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[24] The State notes nothing presented at the evidentiary hearing undermined the testimony of Tammy and Phillip Alfonso at both the original guilt phase and then again at the second penalty phase. They both testified that they did not notice any injuries to Bogle's forehead or face. (DR 6/410-11, 434; DR 13/1236, 1248) and that Bogle not only told Phillip about a car accident he had, but he also raised up his shirt to show him a scar on his side. (DR 6/411, 435; DR 13/1234-1235, 1247-1248, 1254) Moreover, Bogle can point to no alleged inconsistencies as to his testimony concerning the subsequent encounter with Bogle where he testified that Bogle approached their car from the direction of the Beverage Castle and asked for a ride. (DR 13/1236, 1249-1251) He "looked real dirty," had a wet spot in his crotch, and scratches on his forehead. (DR 13/1239, 1250-1251).

[25] In *Tompkins v. State*, 980 So. 2d 451 (Fla. 2007), the Florida Supreme Court distinguished the *Brady* standard from the newly discovered evidence standard, stating: "Unlike the second prong of *Jones*, which requires that the defendant establish that the new evidence is of "such nature that it would probably produce an acquittal on retrial," 591 So. 2d 911 at 915, the materiality prong

no pretrial right to inspect grand jury testimony as an aid in preparing a defense. *Evans v. State*, 808 So. 2d 92, 102 (Fla. 2001); *Keen v. State*, 639 So. 2d 597, 600 (Fla. 1994); *Jent v. State*, 408 So. 2d 1024, 1027 (Fla. 1981). Thus, any implication that the State committed a *Brady* violation by failing to provide the testimony earlier is clearly without merit. Even if this claim constituted *Brady* evidence, Bogle has not shown either that the evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler*.

Bogle, like *Evans*, *supra*, contends that variances in the testimony could have been used for impeachment. Relying on *Brookings v. State*, 495 So. 2d 135, 137 (Fla. 1986), this Court rejected the claim in *Evans* as there were no material differences in the testimony and the witnesses were adequately cross-examined at trial. *See also Anderson v. State*, 574 So. 2d 87, 92 (Fla. 1991)("Here, we are not faced with subsequent testimony that can be said to remove the underpinnings of the indictment.").

Similarly, in the instant case, the allegations of inconsistent testimony do not in any way undermine the testimony provided at trial. To support his argument, Bogle alleges that Katie Alfonso's testimony was inconsistent between the grand

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of *Brady* asks whether the evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler v. Greene*, 527 U.S. 263, 290 (1999)." *Tompkins*, 980 So. 2d at 459 fn 8.

jury proceeding and the trial and could have been used for impeachment. To warrant any kind of relief, Bogle has to show that her testimony was "materially" different. It was not.

For example, he contends that Alfonso's testimony differed regarding what occurred at Bogle's apartment. A comparison of her testimony in the two proceedings refutes this contention. (V24/4643-44; DR 5/270-71）.

Bogle also refers to her testimony regarding further events of the night but does not allege how it is inconsistent impeachment evidence or, as required to obtain relief, materially different. *Anderson v. State*, 822 So. 2d 1261, 1266 (Fla. 2002). Bogle merely makes the unsupported allegation that "there were additional details in her trial testimony that she did not provide to the grand jury; additions that were more incriminating of Mr. Bogle." Appellant's Brief at 59. Despite being given the opportunity to question Ms. Alfonso at the evidentiary hearing concerning her testimony at both proceedings, Bogle has not been able to produce any material exculpatory evidence withheld from counsel that undermines confidence in the outcome of this case.

Next, Bogle complains Phillip Alfonso failed to tell the grand jury that Bogle had inquired about the victim the night of the murder in addition to telling Alfonso about his accident. (DR 6/410-11) So, rather than the normal complaint that the grand jury was given evidence in support of the indictment that was not

presented at trial and later proved to be untrue, Bogle's contention is merely that the grand jury's indictment did not rely on the added information. This claim does not warrant relief. *See Anderson*, 574 So. 2d at 90-92 (rejecting claim where witness' trial testimony would have strengthened the possibility of an indictment because she admitted at trial to being an eyewitness to the murder.) At most, Bogle would have been able to ask Alfonso at trial why he had failed to mention to the grand jury that Bogle asked if Margaret was with him, which would have told the jury Bogle was indicted without this additional inculpatory information and highlighted the damaging testimony. Having been afforded an opportunity to present evidence in support of this claim, Bogle has simply failed to carry his burden.

Bogle also makes a general allegation that Detective Lingo's testimony as presented to the grand jury was not memorialized in notes or reports so the grand jury testimony "could have been used to impeach other witnesses as well as his own trial testimony." Appellant's Brief at 61. At trial, Detective Lingo's direct testimony focused solely on his work at the crime scene and the search and arrest of Brett Bogle. (DR 6/354-72) He did not give a general recap of the investigation as he did to the grand jury. Accordingly, none of the grand jury testimony would have been relevant to his trial testimony. Nor would it have been admissible as impeachment evidence because it was not the subject of his direct testimony. As

Bogle can point to no specific trial testimony that was "materially different", he is not entitled to relief. Bogle also makes a general unsupported allegation that Detective Lingo's grand jury testimony could have been used to impeach other witnesses, but does not explain how Detective Lingo's testimony would constitute impeachment of another witness. Nor does Bogle assert how differences in what happened at Katie Alfonso's house days before the crime would have undermined confidence in the outcome of the proceeding. Appellant's Brief at 60-61. The allegations based on the grand jury testimony were properly denied. The State also notes that Bogle's trial counsel, Douglas Roberts, testified the alleged inconsistencies in Ms. Alfonso's testimony were not valuable impeachment. (V89/5261-70) He was not questioned regarding the other alleged inconsistencies. However, in response to questioning regarding the collection of evidence and Alfonso regarding Bogle's appearance, he noted that he did not think anybody believed Mr. Alfonso and he had "enough impeachment" regarding the collection of evidence. Roberts further testified, it was not a good practice to jump on police officers and "[c]riticism of police officers doesn't go well with jurors." (V63/630-32, 660-61) Roberts was the trial attorney and his testimony on this point is illuminating. Roberts' testimony undercuts any assertion of materiality under *Brady*. The lower court properly denied relief. (V16/3093-94).

Bogle claims the State failed to disclose that Jeffrey Trapp was on probation

and violated his probation. Bogle claims the State failed to take any action. He asserts this information could have been used to impeach Trapp and demonstrate his "true" motive for testifying. Appellant's Brief at 61-62. However, as the lower court found, Bogle failed to prove this claim. Relief was properly denied. (V16/3131). Jeffrey Trapp testified at trial that he came into contact with Brett Bogle at the Red Gables Bar on September 12. (DR 6/374-375) Trapp did not notice any injuries or scratches to Bogle. (DR 6/378) Trapp stayed at the Red Gables only a few minutes, then took Bogle and two other people to another establishment, Club 41, which was about a half-mile away. (DR 6/375-76) It was between 10:00 and 11:00 when they arrived at Club 41. (DR 6/379) Trapp saw Margaret Torres there. (DR 6/376) She was drinking by herself. (DR 6/376, 379) A few minutes after they arrived at Club 41, Bogle approached Torres and had a conversation with her that lasted maybe two or three minutes, but Trapp could not hear what was being said over the music. (DR 6/377) A few minutes afterward, Bogle approached Trapp and told him that Torres was "real trash," and said he used to go with her sister. (DR 6/377) After approximately 45 minutes to an hour, Trapp left Club 41. (DR 6/377) Torres and Bogle were still there. (DR 6/378).

Bogle contended that Trapp was on probation and may have been subject to probation violation for frequenting the bar on the night in question and, accordingly, he alleged that a deal must have been struck with Trapp in exchange

for his testimony. Bogle was given an opportunity to prove this claim. He did not. At best, he presented evidence that Trapp had previously had instructions from his probation office during his community control sentence to not frequent bars, but there was no evidence that he was subject to those restrictions at the time of the crime. (V63/666) Moreover, even when he was subject to those restrictions, the result of that violation (which trial counsel was aware of nine months before trial) was that he was removed from community control. (V63/662-65) Ms. Cox testified she had no memory of Jeffrey Trapp or giving him any kind of a deal and Jeffrey Trapp was not called as a witness at the evidentiary hearing. (V62/478-79, 484-85) No one testified that he got a deal.

Trial counsel Roberts testified he regarded Trapp and everyone else at the bar as being pretty insignificant. (V63/616-17) Moreover, he testified in regard to Trapp's probation or potential violation "[t]his doesn't mean anything as far as my defense in this case." (V63/618-19)[26] Bogle has nothing beyond mere conjecture to support this claim. Accordingly, as Bogle has not carried his burden to prove that the State knowingly presented false or misleading testimony or withheld material exculpatory evidence, the claim was properly denied. The judgment of the lower court must be affirmed.

[26] Robert's testimony on this point clearly undercuts any materiality claim under *Brady*.

ISSUE III

BOGLE WAS NOT DENIED EFFECTIVE ASSISTANCE OF GUILT PHASE COUNSEL.

Bogle next claims he was denied the effective assistance of counsel at the guilt phase of his trial when counsel failed to adequately investigate and prepare his case and to challenge the State's case by failing to adequately challenge the State's forensic evidence and failing to present exculpatory witnesses, or adequately challenge the testimony of state witnesses. These claims were properly rejected by the trial court after a full and fair evidentiary hearing below.[27]

During the evidentiary hearing below, guilt phase counsel Roberts testified that by the time he handled Bogle's case he had previously represented several defendants charged with murder and that he had obtained an acquittal of one defendant where the State had been seeking the death penalty. (V63/651) Roberts testified that his overall strategy in defending Bogle was that he was not guilty and that the State was going to have trouble linking him to the crime. Roberts discarded a strategy of "putting on every witness in the world" which he characterized as "a slow plea of guilty before a jury." Roberts testified: "I just don't think it is an appropriate way to defend a case." (V63/651) He said this case was not about what Bogle knew so much as it was about what the State was offering as evidence. He

[27] When reviewing a trial court's ruling on an ineffectiveness claim, this Court defers to the trial court's findings on factual issues, but reviews the trial court's conclusions on the deficiency and prejudice prongs *de novo*. *Bruno v. State*, 807 So. 2d 55, 62 (Fla. 2001); *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

noted that, "[w]e had the police reports and we went over it and over it" and "[w]e just felt like they couldn't link him up and we wanted to stay away from any evidence or putting him on, for instance, and having him talk about the burglary and all that other stuff." (V63/652).

During the evidentiary hearing, Roberts repeatedly rebuffed collateral counsel's suggestions that if he'd had certain information he would have presented it, repeatedly stating that he didn't have to disprove the crime. He repeatedly stated that unless he had something substantial, he would not have presented evidence as he would lose closing rebuttal which he would never give up because he considered it to be a "very significant strategic" consideration. (V63/605, 607) Roberts also testified that, "All this other stuff that you are talking about is wonderful in these kind of hearings, but when you look at my theory of defense like you are talking about he fell down the ditch that wasn't the crux of the case by the government or myself." (V63/313) Roberts explained each and every decision made and the basis for these decisions.

Trial counsel clearly made reasonable strategic decisions in the course of representing Bogle. This Court recently reiterated the high deference given to such decisions in *Crain v. State*, 78 So. 3d 1025, 1036-37 (Fla. 2011), stating: "As we have routinely stated, 'strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's

decision was reasonable under the norms of professional conduct.'" (quoting *Patton v. State*, 878 So. 2d 368, 373 (Fla. 2004)(citing *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000)). Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. *See Strickland*, 466 U.S. at 689, 104 S. Ct. 2052 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight...."); *Cherry v. State*, 659 So. 2d 1069, 1073 (Fla. 1995)("The standard is not how present counsel would have proceeded, in hindsight...."). *Occhicone v. State*, 768 So. 2d 1037, 1047-48 (Fla. 2000).

In *Occhicone*, as in the instant case, all three defense attorneys testified extensively concerning their reasons for choosing to not present certain evidence and witnesses. All three attorneys testified that they "consciously chose not to present evidence during their case because they believed they had presented enough evidence to the jury through cross-examination, and they felt it was more important to have the first and last word with the jury during closing argument." *Id.* Based on the testimony which suggested a "carefully considered and planned defense," the trial court's ruling denying relief was affirmed. *Id.*

Similarly, as the following will show, Roberts was able to articulate a well-reasoned strategy for each of his decisions. That collateral counsel would have now chosen another course of action in hindsight does not satisfy a finding of

ineffective assistance of counsel under *Strickland*. *See Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight...."). With the ability to examine an already made record and with apparently unlimited time and resources, collateral counsel has not developed any significant evidence which counsel failed to uncover or present which would undermine confidence in the outcome of Bogle's trial. With this factual and legal background in mind, it is clear that collateral counsel is simply employing a looking glass exercise in hindsight of the type specifically condemned by the Court in *Strickland*.

Bogle first alleges that counsel was ineffective for failing to present evidence of the automobile accident to explain scratches on his face and show that he was somehow incapable of murdering the victim. The trial court rejected these claims based an extensive analysis of the facts and evidence presented at trial and at the evidentiary hearing. (V16/3101-03). As the lower court noted, Bogle presented no evidence whatsoever that he was so injured that he would not have been physically able to commit the murder and sexual battery. In fact, Bogle's own expert, Dr. Edward Willey, conceded that there was no evidence of a fractured rib or even a real eye injury. (V65/898, 901-02) As noted by the trial court, based on the information Dr. Willey possessed, "he could not form an opinion as to whether Defendant's injury would have prevented him from committing the murder of Ms.

Torres." (V16/3102) Dr. Willey also conceded that the fresh scratches observed on Bogle's face after the crime could have been the result of some reopening or re-injury of a preexisting laceration.[28] (V65/895) Thus, Bogle clearly failed to prove the underlying facts in support of his ineffectiveness claim.

Bogle misleadingly asserts that "trial counsel failed to present any evidence of the accident to the jury." Appellant's Brief at 65. To the contrary, counsel was able to introduce the fact Bogle was injured in an auto accident shortly before the murder through examination of state witnesses. (DR 6/411; DR 7/435; 13/1237, 1248, 1254) As trial counsel noted, he did not need to put the evidence on because the fact of the prior accident was not contested and he was able to argue it to the jury without losing the opportunity to present opening and closing argument. (V63/623-24) Bogle has made no showing that this was not a reasonable strategic decision. *Occhicone*, 768 So. 2d at 1047-48. *See also Beasley v. State*, 18 So. 3d 473, 484 (Fla. 2009). Moreover, to establish ineffective assistance, Bogle must also demonstrate prejudice from counsel's alleged deficient performance. *Beasley*, 18 So. 3d at 484. There was simply no persuasive, much less compelling, evidence elicited during the postconviction hearing to establish that Bogle was incapable of

[28] Dr. Willey admitted that the science of attempting to precisely time wounds or injuries lacks scientific support because of the enormous personal variability in healing. (V65/896) Indeed, due to the enormous variability in healing among individuals it was difficult to come to any conclusion from the booking photographs which were taken some eleven days after the automobile accident. (V65/894-96).

committing the Torres murder. Additionally, as defense counsel noted, the fact of the accident was not disputed at trial as a number of witnesses testified about Bogle's accident. Specifically, the Alfonsos both noted that Bogle was showing them his scars from the car accident on the night of the murder. (DR 6/411; DR 7/435; DR 13/1237, 1248, 1254) Therefore, Bogle cannot establish prejudice, i.e., that there is a reasonable probability that, but for this deficiency, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068.

The trial court's order was well-reasoned and includes clear and supported credibility findings in favor of the State DNA experts over the testimony of Appellant's postconviction expert, Dr. Libby. The court recognized that Bogle's postconviction challenge to the DNA evidence was not credible. The lower court also credited the hair and fiber expert presented by the State over the expert offered by collateral counsel. (V16/3109-3114) On appeal, Bogle has not mentioned, much less attempted to overcome, the trial court's adverse credibility findings. Consequently, Bogle has completely failed to establish deficient performance by counsel's failure to challenge the hair, request a *Frye* hearing, or otherwise challenge the forensic evidence admitted at trial.

Trial counsel testified extensively about his preparation for the presentation of the forensic evidence. He stated that in his opinion Malone helped them because

he said the pubic hair was not forcibly removed and he also identified other hairs as unknown which supported their argument that this hair transfer was not from the time of the crime but, rather, was a result of the pants being taken from the communal washing machine at Katie Alfonso's. Moreover, trial counsel said that in 1992 the only expert around was Malone. They couldn't find anybody to refute Malone and he was not sure if they would have liked to-again with losing opening and closing. (V63/627-28).

Despite his assertion that evidence of the unreliability of hair comparison analysis was readily available in 1991, and being given the opportunity to produce such evidence at the hearing below, Bogle was unable to produce a single expert who would have been available at the time of the trial to challenge Malone's testimony that the hairs microscopically matched. (V67/1069-89) In fact, the only "evidence" he can point to is an ABA Journal Article, from *February of 1996*, that purports to cite studies challenging, in general, laboratory hair comparison results. Appellant's Brief at 69. Trial counsel cannot be faulted for failing to challenge agent Malone with this journal article and its citation to studies [hearsay] *as it was not in existence at the time of trial*. Obviously, trial counsel's conduct must be evaluated by the standards and forensic techniques existing at the time of trial, not the time of the postconviction hearing some ten years after the trial. *See Taylor v. State*, 62 So. 3d 1101, 1111 (Fla. 2011)(noting that counsel cannot be held

deficient for failing to anticipate changes in the law or refinements in scientific knowledge which occur subsequent to trial).

Accordingly, collateral counsel failed to establish deficient performance of trial counsel for failing to do what collateral counsel could not do—establish that Agent Malone overstated the value of microscopic hair analysis. In a credibility finding which has been ignored by collateral counsel on appeal, the lower court found that collateral counsel's postconviction expert on hair analysis, Dr. Terry Melton, was not as credible as the one offered by the State, Steven Robertson, a recognized expert in microscopic hair comparison. *See Parker v. State*, 3 So. 3d 974, 980 (Fla. 2009)(noting that "this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses...." (citing *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997)). Robertson testified that Agent Malone drew fair conclusions regarding his microscopic comparison of the hair in question. (V88/5197) Bogle failed to prove that Malone's work product in this case was "shoddy" and that the bench notes "contained, critical, exculpatory information." Appellant's Brief at 70. And, as noted, trial counsel had a reasonable and innocent explanation for the hair evidence at trial. No deficiency in counsel's performance can be discerned from this record.

Similarly, with regard to the failure to request a *Frye* hearing to challenge DNA evidence, it is not enough to suggest that counsel should have sought such a

hearing if Bogle cannot establish that it would have been successful. To hold otherwise would amount to requiring counsel to conduct little more than an academic exercise. Bogle bears the burden of demonstrating that the result of the DNA testing admitted at trial was actually incorrect in some material way. He needed to prove that rather than being able to say that DNA matched someone with Bogle's profile, which included at that time approximately 12.5 percent of the Caucasian profiles in the database, no number would have been appropriate or that a materially different number would have been appropriate. *See generally Reed v. State*, 875 So. 2d 415, 425, 427 (Fla. 2004)(in rejecting IAC claims for failing to present experts on forensic issues this Court upheld the finding that trial counsel's consultation with independent forensic experts would not have changed the outcome based upon testimony presented by postconviction experts which failed to show the fingerprint and serological evidence presented at trial was either incorrect or unreliable). Bogle completely failed to establish any persuasive or even compelling challenge to the DNA evidence was available to trial counsel.

The only expert Bogle presented on this claim was Dr. Randall Libby who testified concerning the RFLP testing. Dr. Libby could not point to a single case where he had ever been successful in aiding the exclusion of DNA evidence and could not say that in this case that Agent Deadman testified falsely or misled the

jury.[29] (V67/1220-21, 1226-27) And, as the trial court credited the testimony of the State experts as to the reliability of the DNA testing and results, Bogle's claim is utterly meritless. Consequently, Bogle fails to establish that a *Frye* challenge to the DNA results in this case would have been successful.

Indeed, far from casting any doubt upon Bogle's DNA test results, the postconviction evidence in this case substantially strengthened the State's case. While Bogle attempts in his brief to conflate various minor points or contradictions surrounding the periphery of the State's case, he ignores the fact that upon retesting with STR technology the statistical numbers establishing Bogle's identity as the person who left the semen in the murdered victim and on her panties have gone up considerably. Bencivenga and Dr. Tracey both testified that the frequency of occurrence of that particular profile is approximately 1 in 45 quadrillion Caucasians, 1 in 8.1 quintillion African-Americans, and 1 in 81 quadrillion Southeastern Hispanics.[30] (V75/1568, V81/1920, 1927). Consequently, the

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[29] The State also notes that while it seems moot in light of the subsequent testing, contrary to the suggestion by Bogle that Deadman's testimony at trial misled the jury on how many tests were done, a review of his trial testimony reflects that he told the jury about the results of the multiple tests and the reasons why he conducted the tests in the manner he did. In other words, he gave them the information Bogle is now asserting was withheld. (DR 7/456-67).

[30] Even assuming, *arguendo*, that a *Frye* challenge at the time of trial would have had some merit, Bogle would not be entitled to the windfall of a new trial in this case. As explained by the Eleventh Circuit Court of Appeals in *Allen v. Sec'y, Fla. Dept. of Corr.*, 611 F.3d 740, 754 (11th Cir. 2010):

> The *Fretwell* decision requires that Allen must show not only that he could have successfully challenged PCR DNA testing in 1993, but also that the basis of the challenge

evidence establishing Bogle as the victim's murderer has gone up exponentially since the time of trial. [Bogle denied having intercourse with the victim and given the threats Bogle made to the victim and their undeniable acrimony at the time of the murder, any claim of consensual sex is legally and factually untenable]. Based on these increased statistics, Bogle has completely failed to carry his burden to undermine confidence in the outcome of his trial. Consequently, no relief is warranted on this claim. *See Crain v. State*, 78 So. 3d 1025, 1038 (Fla. 2011)(rejecting claim of ineffective assistance for failing to challenge the State's DNA evidence in part where the "postconviction record does not disclose any definitive evidence of invalid or even questionable DNA test results, and therefore Crain has failed to demonstrate prejudice."); *Reed*, 875 So. 2d at 425.

Next Bogle claims trial counsel was ineffective for failing to present Everett Smith as a witness. This claim was not presented in the postconviction motion. The court noted that it was improper for collateral counsel to make a claim for relief which has not been properly pled or even mentioned in any of Bogle's

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> would be recognized as valid under current law. He cannot do that. While PCR DNA testing was novel at the time of Allen's trial, *see Murray v. State*, 692 So.2d 157, 163-64 (Fla.1997), the Florida Supreme Court has since determined that it clears the *Frye* hurdle. *See Zack v. State*, 911 So.2d 1190, 1198 n.3 (Fla.2005) ("[T]he PCR method of DNA testing is now generally accepted by the scientific community and is not subjected to *Frye* testing."); *see also Wilson v. Sirmons*, 536 F.3d 1064, 1102 (10th Cir. 2008)(collecting cases in support of the proposition that "[n]umerous federal and state courts as well as scientific investigators have found that PCR DNA analysis is reliable"). Because of those legal developments, Allen cannot establish *Strickland*-type prejudice from his counsel's failure to request a *Frye* hearing.

(citing *Fretwell*).

postconviction motions. (V16/3104, fn. 17) The court nonetheless addressed the merits of the claim below. Although the court addressed the merits, this claim should be procedurally barred on appeal. *See Hamilton v. State,* 875 So. 2d 586, 593, n. 4 (Fla. 2004)(finding a "specific claim" . . ."not raised in Hamilton's postconviction motion" was procedurally barred on appeal)(citing *Thompson v. State*, 759 So. 2d 650, 668 n. 12 (Fla. 2000)(finding a claim procedurally barred because it was not alleged in the postconviction motion filed in the trial court)). In any case, it is clear that defense counsel cannot be considered deficient for failing to present Smith as a witness. (V16/3104-05).

Smith, far from providing exculpatory evidence, provided largely damaging testimony; testifying that after he dropped the victim and Bogle off, he heard arguing coming from the trailer, and then witnessed Bogle kicking out Alfonso-Tucker's screen door. (V64/718-19) The manner in which Bogle left the trailer led Smith to believe the girls would call the police. When Smith expressed this concern to Bogle, Bogle told Smith not to worry because he had pulled the phone cord out of the wall. Bogle also admitted that he obtained fifty dollars from inside the trailer.

Collateral counsel incorrectly asserts that "Smith contradicted almost all of Alfonso's testimony concerning the events on September 1, 1991." Appellant's Brief at 73. To the contrary, aside from the incriminating facts related by Smith,

Smith did not really contradict much of Alfonso's testimony as Smith admitted that during the day they were all drinking and he was not paying attention to, or may not have been aware of, all of the conversations between Bogle, Torres and Alfonso. (V64/725-29) Further, he admitted he was driving while "buzzed" and the music was likely on in his car. (V64/730) Finally, as Bogle and the two girls left the car and walked to the trailer, Smith admitted: "I didn't hear nothing but I couldn't say if they were talking or not." (V64/731) The court's finding that very little of the State's evidence was contradicted by Smith has ample support in the record. Moreover, given the incriminating details contained in Smith's testimony, a reasonable attorney would certainly hesitate to call Smith as a witness,[31] particularly since counsel's stated strategy was to retain first and last closing argument unless he had something significant to present. Smith did not offer any material or powerful impeachment evidence, and, indeed, may well have harmed Bogle's defense. Consequently, counsel cannot be considered ineffective in failing to present Smith to testify at trial.

Bogle next argues that counsel failed to present the deposition testimony of Roger Kelly who claimed he saw Ms. Torres arguing with Guy Douglas at Club 41 on the evening of the crime. Bogle suggests that even though Kelly was dead at the

[31] Smith admitted he moved to Ohio shortly after the murders and was not sure if he talked to defense attorneys or prosecutors about potentially testifying in the murder trial.

time of the trial, counsel should have tried to get in the deposition testimony. Bogle, however, has failed to establish that this deposition would have been admissible for any reason in Bogle's trial. *See Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992)(A deposition that is taken pursuant to Rule 3.220 is only admissible for purposes of impeachment and not as substantive evidence.); *Dufour v. State*, 69 So. 3d 235, 255 (Fla. 2011)(reminding "attorneys and judges that the rules of evidence must be applied before the substance of any document may be admitted for consideration by the trier of fact."). Clearly, the deposition was not admissible as substantive evidence as the trial court recognized in rejecting this claim below. *See* V16/3104. ("Because Defendant's trial counsel could not legally introduce Mr. Kelly's deposition as substantive evidence, his performance was not deficient for failing to do so."). Nor has Bogle established that it was admissible for possible impeachment, since he failed to mention, much less actually attempt to impeach, any trial witness during the postconviction hearing with this deposition. This claim is patently without merit.

Perhaps recognizing that the rules of evidence do not support his position, Bogle appeals to due process in an effort to overcome the significant evidentiary hurdle presented by the hearsay rule. However, a defendant "does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400,

410, 108 S. Ct. 646 (1988). In this case, the deposition does not possess sufficient indicia of trustworthiness to warrant its admission and Smith's deposition testimony hardly presents the significant type of exculpatory information addressed by the Court in *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038 (1973). *See McWatters v. State*, 36 So. 3d 613, 639 fn. 8 (Fla. 2010)(recognizing the limited nature of the *Chambers* ruling and that the excluded statements appeared to fit within a traditional declaration against interest hearsay exception and possessed sufficient indicia of reliability to warrant admission); *Marek v. State*, 14 So. 3d 985, 995 (Fla. 2009)(same). *See also Sharpe v. Bell*, 593 F.3d 372, 384 (4th Cir. 2010)(recognizing that *Chambers* does not condone the wholesale disregard of the hearsay rule and that it was limited to a very narrow set of facts where the defendant possessed evidence to show that a "third party confessed in writing, orally confessed to three different people, and was available to testify at trial.").

In addition to being inadmissible, defense counsel also rejected the contention that he would have put this evidence on. At the hearing when asked about presenting the deposition, he stated that he had no intention of trying to present the deposition of Roger Kelly.[32] (V63/605) Again, this was a reasonable

[32] In the deposition, Roger Kelly is decidedly vague about the details of that night and does not even know what the name of the short man the girl he only knows by the nickname "Maggie" is arguing with in the front of the club by a dumpster. (V19/3598-3602) Kelly also observed Bogle follow outside maybe ten or fifteen minutes later before Kelly left the parking lot of the club. (V19/3601).

strategic decision that is virtually unchallengeable. *Occhicone*. Even if it was deficient, since Bogle cannot establish prejudice, no relief is warranted.

Finally, Bogle claims counsel should have more effectively challenged the testimony of Phillip and Tammy Alfonso and Jeffrey Trapp. The lower court denied both of these contentions finding a failure of proof and counsel's performance did not constitute ineffective assistance of counsel. (V16/3106-08).

With regard to the Alfonsos, Bogle suggests that counsel failed to adequately explore the potential for bias the Alfonsos had against Bogle by virtue of their relationship with their niece and because they had been drinking. Of course, collateral counsel did not present either of the Alfonsos to actually establish what information counsel could have obtained that was not before the jury; he merely speculates that trial counsel could have done more. This is clearly insufficient to meet Bogle's burden of establishing ineffective assistance,. *See Spencer v. State*, 842 So. 2d 52, 63 (Fla. 2003)(rejecting an ineffectiveness claim where collateral counsel failed to call the witness who defendant claimed should have been impeached more effectively noting that reversible error cannot be predicated on "conjecture.")(citing *Sullivan v. State*, 303 So. 2d 632, 635 (Fla. 1974)), and the trial court rejected it as such. (V16/3107).

Moreover, the record shows that both Phillip Alfonso and Tammy Alfonso told the jury at the outset that Katie Alfonso and Margaret Torres were their nieces.

(DR 6/406-07; DR 7/430-31) Defense counsel also questioned whether or not Phillip Alfonso had a negative view of Bogle because the times he had met him were not under pleasant circumstances. Phillip agreed that he had broken up an argument Bogle had at Alfonso's mother's house and that Katie had told him about some of her and Bogle's arguments. He also questioned Phillip about how much he had been drinking and what he was able to see and hear. (DR 6/417-19) Defense counsel also questioned Tammy Alfonso about her knowledge of Brett Bogle based on information she had obtained from her nieces and her close relationship with them. (DR 7/440) Postconviction counsel has not shown that any substantial or material impeachment of the Alfonsos was available, but not pursued, which could possibly have undermined confidence in the outcome of his trial. Accordingly, this claim was properly rejected by the trial court below.

Similarly, with regard to Jeffrey Trapp, Bogle asserts that counsel should have impeached him with his prior convictions and explored his testimony that Bogle spoke to Ms. Torres whereas the Alfonsos said he did not. First, with regard to the contradiction in the testimony, the Alfonsos said they did not see Bogle speak to Torres but they also said Torres was already at the bar when they got there at eleven thirty, twelve o'clock. (DR 6/409; DR 7/433) Trapp said that he drove Bogle to Club 41 and when they arrived about ten or eleven, Trapp saw Margaret Torres drinking by herself. A few minutes later, Bogle approached her and they

had a conversation. (DR 6/375-79) This testimony is not inconsistent. Neither is Trapp's statement that he saw Torres sitting at the bar alone. Again, she was already there when the Alfonsos arrived and then she came over to join them. Bogle has failed to show that any of Trapp's trial testimony was subject to material or significant impeachment but for counsel's allegedly deficient performance. Nor, did he prove any resulting prejudice.

As for impeaching Trapp with his prior record, Bogle fails to even assert how pointing out that Trapp had a prior conviction would have affected the outcome of this trial. *See Duckett v. State*, 918 So. 2d 224, 234 (Fla. 2005), Roberts testified that he regarded Mr. Trapp's information and or testimony as being the same as everybody else that was in the bar -- pretty insignificant. (V63/616). More importantly, the lower court specifically found that the value of Trapp's testimony was minimal as Trapp's only probative testimony at trial, that he saw Bogle and the victim speak on the night of the murder, that Bogle then told Trapp she was 'real trash,' and that when he saw Bogle he was clean and did not have any apparent injuries, was confirmed by other witnesses at the bar. (V16/3108) Accordingly, Bogle has failed to show that counsel's performance was deficient or that he was prejudiced.[33] *See Lamarca v. State*, 931 So. 2d 838, 851 (Fla.

[33] In addition, Bogle criticizes the trial court for failing to find that Trapp violated the conditions of his probation or community control by visiting an establishment which sold alcohol. While it

2006)(rejecting allegation of ineffective counsel where the defendant failed to show that the outcome of trial would have been different if defense counsel had impeached a state witness by his prior crime).

ISSUE IV

THE TRIAL COURT PROPERLY REJECTED BOGLE'S CLAIM THAT NEWLY DISCOVERED EVIDENCE WOULD PROBABLY PRODUCE AN ACQUITTAL ON RETRIAL.

In his fourth claim, Bogle reargues that the DNA analysis of the victim's fingernail scrapings constitutes newly discovered evidence entitling him to relief. Bogle contends that Y-STR DNA testing on the victim's fingernails revealing two unknown male DNA profiles establishes that "two male individuals did in fact leave some genetic material beneath Torres' fingernails on the night she was killed." This statement is pure wishful thinking and is not supported by the evidence.

In rejecting Bogle's newly discovered evidence claim, the postconviction court properly applied the standard set forth by this Court in *Jones v. State,* 709 So. 2d 512 (Fla. 1998). (V16/3120-21) As the court noted, "[n]ewly discovered evidence satisfies the second prong of the test if it 'weakens the case against [the

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is true Bogle was on probation at the time of the murder, the conditions of his probation did not prohibit him from visiting establishments that served intoxicants. It was only the conditions of his "three months" of community control which limited Trapp's ability to visit any establishment that served alcohol. As his community control expired several months prior to the murder, this condition was no longer in effect. (V18/3528-30; Defense Exhibit 22). Consequently, the trial court correctly found that Bogle failed to present any evidence that on September 12, 1991, the night of the murder, there was a violation of his probation or community control.

defendant] so as to give rise to a reasonable doubt as to his culpability.'" (V16/3121)(quoting *Jones*, 709 So. 2d at 526). In determining whether the evidence requires a new trial, the court must "consider all newly discovered evidence which would be admissible" and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991).

The postconviction court found that the DNA results from the victim's fingernail scrapings obtained following Bogle's trial constituted newly discovered evidence, but after extensively analyzing all of the admissible evidence, the court found that Bogle failed to establish that the evidence was of "such a nature that it would probably produce an acquittal on retrial." The court noted the following evidence weighed against the newly discovered fingernail scrapings:

> • Ms. Alfonso-Tucker's testimony that she forced Defendant to move-out of her residence because he and Ms. Torres constantly bickered; that less than two weeks prior to the murder Defendant was so angry at Ms. Torres that he busted their screened-in porch; and that when Ms. Torres attempted to call 911, he grabbed her, injuring her wrist. (*See* TT, pages 266-273.) Subsequently, Defendant told Ms. Alfonso-Tucker that if Ms. Torres pressed charges, she would not live to tell about it. (*See* TT, pages 277-279.)
> • Testimony of multiple witnesses that they saw Defendant earlier in the night of the murder and that he appeared clean and did not have noticeable scratches on his face. (*See* TT, pages 378, 411-412, and 435-436.) Phillip Alfonso's ("Mr. Alfonso"), Ms. Torres' uncle, testimony that Ms. Torres left the club at approximately 1 to 1:15 a.m. and that Defendant left three to five minutes later. (*See* TT, pages 412-413.) Mr. Alfonso did not see Ms. Torres again that night; however, when he and his wife were leaving at

approximately 2 a.m. they saw Defendant and instead of being clean and uninjured, he now was dirty, his crotch appeared wet, and he had scratches on his forehead. (*See* Trial Testimony, pages 412-413 and 435-437.)

• Detective Larry Lingo's ("Detective Lingo") testimony that on the night following the murder he located Defendant at Mr. Douglas' residence hiding in the shower. Defendant was clothed and the pants that Defendant was wearing the previous night were wet and in the bottom of the shower. Detective Lingo called an ID technician to photograph and remove the pants. (*See* TT, pages 358-362.) Detective Lingo testified that Defendant appeared to have fresh scratches on his face. (*See* Trial Testimony, pages 362-364.)

• FBI Agent Michael Malone's ("Agent Malone") testimony that one of the hairs collected from the pants that Defendant wore on the night of the murder was microscopically consistent with Margaret Torres' pubic hair.

* * *

Each of the pieces of newly discovered evidence submitted by Defendant is relevant; however, neither exonerates him. The testimony of Ms. Turley is exculpatory only to the extent it is circumstantial evidence that Mr. Douglas "may" have been involved. It does not prove Defendant's innocence. Furthermore, the absence of Defendant's DNA beneath Ms. Torres' fingernails is relevant to counter the State's argument that Defendant's "fresh" scratches were the result of Ms. Torres scratching Defendant during a struggle. However, the tests do not mean the State's witnesses "testified falsely" as Defendant claims in his written Closing Argument. A struggle with Ms. Torres could have reopened the facial scratches that he suffered during the car accident even if not the direct result of "scratching."

* * *

Clearly, the evidence presented at trial is very strong that Ms. Torres' murder occurred during a sexual assault. Therefore evidence that Defendant's DNA profile was the sole match to the semen found on the vaginal swabs and on Ms. Torres' underwear is highly relevant and highly prejudicial to Defendant, especially when one considers that Defendant denied to law enforcement having sexual relations of any sort with Ms. Torres on the night of her death. (*See* 11/30/2009 EH, pages 18 and 77.)

After considering all admissible evidence, including the newly discovered evidence of guilt, the Court finds that the newly discovered evidence presented by Defendant is not of such a nature that it would probably produce an acquittal on retrial. Consequently, Defendant's newly

discovered evidence claim is denied.
(V16/3122-25)

As the trial court properly found when rejecting Bogle's newly discovered evidence claim, the DNA results from the victim's fingernails are not the clarion evidence that Bogle would have this Court believe. Undermining his argument that it "proves" that Ms. Torres was attacked by two males on the night of the murder and that Bogle was not one of them is the fact that the predominate DNA found in the fingernail scrapings was female. (V81/1958-60) Dr. Tracey opined that under these circumstances if blood was part of the material tested then the blood would have had to have come from the female. (V81/1959-60) This is consistent with the evidence presented at trial that the victim was found face down in a pool of her own blood.[34] (DR 5/212).

The laboratory was only able to discern the presence of male DNA after submitting the sample for the more sensitive Y-STR testing which eliminates the female DNA. Thus, the male DNA from the fingernails was such a minute amount that it does not establish evidence it was left there by Ms. Torres' assailant. This DNA could have been picked up by the victim at anytime. *See People v. Spagnola*, 2009 WL 2382670, *7 (Mich. App. 2009)(both primary and secondary transfer of

[34] At trial, Robert Grispino examined fingernail clippings from Margaret Torres. (DR 6/393-94) He found no blood on the left fingernails, but did find blood on the right fingernails; however, there was not enough for him to determine whether it was human. (DR 6/394) The medical examiner, Dr. Adams, testified that there was no blood found in the victim's body because it had drained out into the ground through the wound in the head. (DR 5/226).

DNA were possible via numerous different vectors, including sweat, hair, saliva and skin cells); *State v. Freeman*, 2008 WL 142299, *5 (Mo. App. S.D. 2008)(One can transfer one's own DNA by shaking hands or touching someone else, i.e., skin-to-skin transfer). Dr. Tracey further explained that he could not say that Bogle's DNA was not present; it was just not found at a level that was detected by the tests done at Reliagene Cellmark. (V81/1942-43) Bogle has offered nothing more than mere speculation that this evidence establishes the presence of two male "assailants." *Spencer v. State*, 842 So. 2d 52, 63 (Fla. 2003)(stating that reversible error cannot be predicated on conjecture). As previously noted, it proves nothing more than at some point in time, the victim, who had been in a crowded bar all night, was in contact with two other males. Unlike the presence of semen from the sexual attack, there is nothing to establish that the trace of male DNA in the fingernail scrapings was left by an assailant on the night of the murder or had any relevance to the crime[35]. However, the evidence that surely was left by Ms. Torres' assailant during this rape murder was the semen that was recovered from the victim's vaginal swabbings and her panties – and that semen belonged to Appellant. At no time has Bogle ever offered a reasonable hypothesis of innocence that would explain the presence of his semen. When he was arrested and

[35] Notably, when asked, Guy Douglas *volunteered* his DNA for comparison. He was excluded as the source of the semen found within the victim. (V85/1982).

questioned by Detective Lingo, he denied everything; he did admit he was in the bar, but he denied everything else. (DR 6/372) At the evidentiary hearing Bogle presented testimony from Patricia Bowmen that she gave Bogle a ride home from Club 41. (V68/1145) Bogle offered no evidence that he had consensual sex with the victim; in fact, when questioned by the police he specifically denied it. In light of the irrefutable evidence that Torres and Bogle hated each other, even Bogle has not reached so far as to suggest that they had consensual sex.[36] (DR 5/256-57, 264-67, 271, 275-79).

Appellant erroneously argues that the postconviction court applied the wrong legal standard and ignored evidence presented by Bogle at the

[36] Collateral counsel asserts that this evidence of the animosity between Bogle and the victim was "severely impeached" by the postconviction testimony of Everett Smith. Bogle claims that Smith's testimony "disproves" much of Katie Alfonso's trial testimony regarding an incident on September 1, 1991. This assertion is clearly erroneous as Smith's testimony arguably supported Alfonso's trial testimony regarding the incident. Smith testified that on this date, he drank two cases of beer with Bogle, Alfonso, and the victim, during the afternoon. When he dropped them off at Alfonso's trailer, Smith waited in the car and was unable to hear anything that was being said between Bogle and the victim. Eventually, he heard loud argument from inside the trailer and when Bogle left the trailer, he kicked out the screen door. Smith was concerned that the women would call the police so he asked Bogle if that was a possibility, and Bogle replied that it was not because he had pulled the phone out of the wall. Bogle also told Smith that he got $50 while inside. (V64/709-33) This evidence obviously was consistent with Katie Alfonso's trial testimony regarding the incident. *See Bogle v. State*, 655 So. 2d 1103, 1105 (Fla. 1995)("The following week, Bogle, Alfonso, the victim, and another person went out together and things seemed to be going better. During the outing, however, Bogle and the victim began to argue again. Subsequently, Alfonso and the victim refused to allow Bogle into Alfonso's house. Bogle then broke through the screen door of Alfonso's house, grabbed Alfonso's neck to push her out of the way, grabbed the victim's arm to remove the telephone from her hand as she tried to call 911, pulled the telephones out of the kitchen and bedroom, and took clothing from the house. As he left the house, Bogle told the victim that she would not live to tell about it if she called the police and pressed charges.").

postconviction proceedings. To the contrary, the court properly analyzed *all* of the evidence, including the newly discovered evidence of Bogle's guilt, and concluded that the newly discovered DNA fingernail evidence presented by Bogle "is not of such a nature that it would probably produce an acquittal on retrial." (V16/3125) Collateral counsel also erroneously asserts that the new STR DNA evidence establishing Bogle's guilt would have been inadmissible due to alleged issues concerning the chain of custody and maintenance of the evidence. However, Bogle has not offered any compelling evidence or legal argument in support of his speculative allegation that there was tampering with DNA results from the victim's vaginal swabs or panties. *See Overton v. State*, 976 So. 2d 536, 552-53 (Fla. 2007)(stating that even if the chain of custody was broken, there was not sufficient evidence to establish a probability of tampering which would support exclusion of the evidence). Collateral counsel's assertion that the DNA evidence would be inadmissible based on Dr. Libby's opinion is also unavailing as the postconviction court properly made a credibility determination regarding this expert witness' testimony and concluded that Bogle's expert, Dr. Libby, was not as credible as the State's FDLE DNA analyst, Patricia Bencivenga. (V16/3122).

Because the postconviction court properly applied the *Jones* newly discovered evidence standard and evaluated all of the evidence and concluded that Bogle failed to establish that the newly discovered evidence would probably

produce an acquittal on retrial, this Court should affirm the court's denial of this claim. *See Johnston v. State*, 27 So. 3d 11, 18-20 (Fla. 2010)(noting that court properly applied the *Jones* newly discovered evidence standard and determined that there was no reasonable probability that the newly discovered evidence would produce an acquittal or lesser sentence when the court considered all of the available admissible evidence, including newly discovered DNA evidence, matching the defendant's DNA to DNA found in the victim's fingernail clippings).

ISSUE V

BOGLE'S ASSISTANT PUBLIC DEFENDERS DID NOT HAVE CONFLICTS OF INTEREST WHILE REPRESENTING BOGLE THAT WOULD NECESSITATE THEIR RECUSAL.

Bogle next claims that his Public Defenders had conflicts of interest that should have caused their recusal from his case. He contends that the Hillsborough County Public Defender's Office represented Guy Douglas at the same time that Bogle was being prosecuted and that the Office previously represented the victim, Margaret Torres, as well as prosecution witness Jeffrey Trapp. This claim lacks any merit. The Public Defenders assigned to represent Bogle did not personally represent any of these individuals and were unaware that the Public Defender's Office had represented any of these individuals. Consequently, this claim lacks any merit.

The trial court rejected this claim below, stating in part:

When a defendant is represented by the Public Defender's Office and his

trial counsel is unaware that his office previously represented a witness in the case, there is no actual conflict of interest. *Mungin v. State*, 932 So. 2d 986, 1000-1002 (Fla. 2006)(holding that because the defendant's public defender was unaware that his office had represented a State witness both during and prior to defendant's trial, there was no actual conflict of interest).

At the evidentiary hearing, Mr. Roberts testified that at the time of Defendant's trial the Public Defender's Office had a system in place to check for conflicts and if they were representing a significant witness in the case, they would withdraw from one of the cases. (*See* 06/10/2008 EH, pages 223-224.) He testified that he did not recall knowing that his office was representing Mr. Douglas and that he was unaware that his office had previously represented the victim. (*See* 06/10/2008 EH, pages 244-245.) Furthermore, he specifically testified that he does not ever remember looking at a different case's file for information the entire time he was employed at the Public Defender's Office. (*See* 06/08/20 10 EH, page 260.)

Paul Firmani ("Mr. Firmani"), who was second chair to Mr. Roberts in the instant case, testified that he was unaware that his office was representing Mr. Douglas and if he knew, he "absolutely" would have explored the matter in terms of a conflict of interest. (*See* 06/13/2008 EH, pages 909-911.)

When questioned both Mr. Roberts and Mr. Firmani testified that they had no recollection of the Public Defender's Office representing the victim or the State's witnesses in the instant case and both testified that if they knew, they would have explored to determine if there was an actual conflict of interest. (*See* 06/10/2008 EH, pages 223-224, 244-250, 259-260, and 06/13/2008 EH, pages 909-911.) Mr. Roberts also testified that he never recalls looking into another file for information. Consequently, the Court finds that Defendant has failed to show that there was an actual conflict of interest. *See Mungin*, 932 So. 2d at 1000-1002.

Furthermore, the Court finds that Defendant failed to present any evidence during the hearing showing that Mr. Roberts' and Mr. Firmani's representation of him was adversely affected in any way by the Public Defender's Office's representation of others involved in this case.

(V16/3118-19).

Guilt phase counsel Roberts and penalty phase counsel, the Honorable Paul

Firmani, both testified that they were not aware that the Office of the Public Defender had represented any of the individuals named by Bogle in his amended motion. Under these identical circumstances, this Court in *Mungin v. State*, 932 So. 2d 986, 1000-02 (Fla. 2006), held that relief should be denied.

Like the situation in *Mungin*, Bogle has not only failed to show an actual conflict in that neither counsel was aware of the other representation, but also, he has failed to demonstrate that the conflict adversely affected their representation of Bogle. This claim was properly rejected by the trial court below. *See McCrae v. State*, 510 So. 2d 874, 877 (Fla. 1987)("Because appellant's counsel was not aware of the situation [representation of a state witness by another public defender at the time of trial], he cannot be charged with any deficiency for not taking some kind of action concerning the matter.").

Bogle suggests that the failure to impeach Trapp with his prior conviction may have been the result of a conflict of interest, but, counsel testified, without any contradiction, that he was simply unaware of Trapp's criminal history and the Public Defender's prior representation of him.[37] Bogle's argument is exactly the type of speculative allegation of conflict which this Court has now repeatedly rejected as insufficient to impugn a criminal conviction. *See Hunter v. State*, 817

[37] A large Public Defender's Office such as Hillsborough County has literally thousands of current and former clients.

So. 2d 786, 793 (Fla. 2002); *McCrae*, 510 So. 2d at 877; and *Mungin*, *supra*.

Similarly, Bogle's speculative, unsupported, and, inflammatory suggestion that counsel failed to attack the murder victim's "reputation" and citing as support an off-hand comment by trial counsel at a side-bar regarding the victim's supposed propensity to go out and get drunk and "having sex with people" is legally and factually untenable. Appellant's Brief at 89. That another Public Defender may have represented Torres in an unrelated matter years prior to the murder in this case does not suggest, much less establish, that defense counsel was operating under conflicting loyalties at the time of trial. Further, as found by the trial court below, postconviction counsel failed to present any evidence during the evidentiary hearing to support their claim that trial counsel was ineffective for failing to attack Torres' character. (V16/3108) This conflict of interest allegation is frivolous.[38]

Finally, as this Court recognized in *Mungin*, even if an actual conflict did exist, a defendant still bears the burden of demonstrating the conflict adversely affected counsel's representation. Where, as here, counsel's cross-examination of the witnesses was thorough and, in light of the fact that Appellant has presented no evidence that counsel knew of the Public Defender's prior representation,

[38] Similarly, Bogle's trial attorneys were not aware that Douglas had been or was represented by the Public Defender's Office on unrelated charges at the time of trial. Moreover, it is clear that Douglas was not listed by any party as a witness and trial counsel possessed no evidence to link Douglas to the victim's murder at the time of trial.

Appellant cannot establish that the alleged conflict prevented adequate cross-examination. *Mungin,,* 932 So. 2d at 1001-02. This claim was properly denied.

ISSUE VI

THE POSTCONVICTION COURT PROPERLY DENIED BOGLE'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL.

Bogle claims that his penalty phase counsel was ineffective at his second penalty phase proceeding for failing to challenge the aggravating factors relating to the September 1, 1991 events, for "mishandling" the mental health mitigation evidence, and for failing to adequately investigate and present mitigation evidence. After conducting an evidentiary hearing on Bogle's allegations, the trial court issued a comprehensive order denying the claim and found that penalty phase counsel was not ineffective. (V16/3132-43) Competent, substantial evidence supports the court's factual findings and the court properly applied the applicable law set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), and found that Bogle failed to carry his burden of establishing deficient performance and prejudice.

In order for a defendant to prevail on a claim of ineffective assistance of counsel pursuant to the United States Supreme Court's decision in *Strickland*, a defendant must establish two general components.

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear,

> substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). When addressing the prejudice prong of a claim directed at penalty phase counsel's performance, the defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Cherry v. State*, 781 So. 2d 1040, 1048 (Fla. 2000). Bogle's burden of establishing deficient performance is especially difficult in the instant case because he was represented by experienced counsel.[39] *See generally Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000)("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.").

When reviewing a trial court's ruling on an ineffectiveness claim, this Court defers to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prongs *de novo*. *Bruno v. State*, 807 So. 2d 55, 62 (Fla. 2001). In this case, the lower court properly identified the applicable law in analyzing Appellant's claim, correctly applied this

[39] Bogle was represented at his second penalty phase proceeding by Assistant Public Defender Paul Firmani, who testified regarding his extensive experience in criminal trials, including handling numerous penalty phase proceedings prior to Bogle's case. (V88/5143-45).

law to the facts as presented in the trial and postconviction proceedings, and concluded that Bogle was not entitled to postconviction relief.

In the instant case, Bogle received two penalty phase proceedings where he was represented by then Assistant Public Defender Paul Firmani. The first was conducted on October 2, 1992. (DR 9/631-DR 10/878) The jury recommended death by a vote of 7 to 5. After a motion for a new penalty phase was granted based on improper rebuttal argument, a second penalty phase was held on February 8-10, 1993. (DR 11/953-DR15/1638) After the State presented the same witnesses who testified during the original guilt phase, the defense presented the testimony from a mental health expert and numerous family members and friends. (DR 14/1391-DR 15/1544).

Dr. Arturo G. Gonzalez, a psychiatrist, testified that he had read various depositions, police reports, and testimony from members of Bogle's family prior to his examination of Bogle. (DR 14/1395-1396, 1405) Dr. Gonzalez testified that Bogle was raised in a "very, very dysfunctional family;" the most dysfunctional family Dr. Gonzalez had ever seen. (DR 14/1397) The father introduced his children to drugs at an early age, and had them smoking "pot" when they were five, six, seven, eight years old. (DR 14/1397) The father had a picture taken of himself surrounded by his children when they were all "stoned," because he thought that that was funny. It was shown to the jury. (DR 3/309; DR 14/1397-98).

Dr. Gonzalez, testified that the children were subjected to both psychological and brutal physical abuse. Their father was always putting them down, telling them that they were not good, they were worthless. He would repeatedly hit them with belts as many as twenty-five times. (DR 14/1400) Dr. Gonzalez termed the brutalization "more than just child abuse," and found it "incredible." (DR 14/1402).

Dr. Gonzalez explained to the jury that after Bogle was "turned onto" drugs by his father, he became addicted to pot, cocaine and alcohol. (DR 14/1401) Dr. Gonzalez testified concerning the long-term effects that alcohol and drugs can have on a person's capacity to make rational decisions or restrain himself: that in an acute intoxication phase, one's capacity to think and reason is diminished. He opined that diminished capacity would affect one's ability to comport oneself with the law, depending upon the degree of intoxication, and would affect one's ability to have relationships with other human beings. It would also affect a person's ability to restrain himself in an argument; one would be more irritable and prone to lose one's temper. (DR 14/1401-02).

Dr. Gonzalez determined that Bogle had a number of beers on the night in question, at least six, and perhaps as many as twelve. (DR 14/1402-04, 1422) Because Bogle was under the influence of alcohol at the time of the homicide, he was under "some type of influence of emotional mental disturbance." (DR

14/1403, 1427) With regard to whether Bogle's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was impaired, Dr. Gonzalez initially testified that "that would be difficult to tell because it would depend upon the degree of intoxication at the precise time of the crime and that date," and Dr. Gonzalez did not "have that data," but he did approximate that Bogle had 10-12 beers that night. (DR 14/1403-04) Dr. Gonzalez concluded that because of his upbringing and the alcohol he consumed, Bogle's ability to conform his conduct to the requirements of law was impaired to some extent. (DR 14/1427) Although Dr. Gonzalez did not find Bogle incompetent to stand trial, and did not find him to have been insane at the time of the offense, Bogle did have a borderline personality disorder, as well as a substance abuse problem, which is a psychiatric disorder. (DR 14/1396-97, 1406-09).

Raye Brown, Bogle's great aunt, testified that Bogle's father was a "very violent man" who treated his four children "very badly. He beat them; he kicked them; he talked to them like they were dogs and [Brown] observed it." (DR 14/1432-33, 1438) The "children were beat for no apparent reason. If one child had done something wrong, they all got it or like one had to confess about the other one." (DR 14/1434) Brown testified concerning an incident that she said Bogle witnessed when he was about a year old where his father hit Cheryl, Brett's sister, so hard that her head hit the back of the breakfast nook. (DR 14/1435) This

"terrified" Brown, because she "thought he was going to kill her." (DR 14/1435-36) There was an occasion where Brown's husband talked to Mr. Bogle "about beating the children and the way that he did not pay attention to them." (DR 14/1438) Bogle resented the admonition and "got violent" with Brown's husband and "jumped on" him. (DR 14/1436-38).

Richaye Brown, Bogle's second cousin, described Bogle's upbringing as "[s]cary, violent." (DR 14/1441) When Bogle was three or four years old, and his sister, Cheryl, was six or seven, Brown said that Bogle's father saw two black handprints on the white walls by the front door and lined his four children up, wanting to know who put the handprints on the wall. If the children did not own up to who did it, he was going to beat all of them. The three boys pointed to Cheryl, and her father started beating her head on the wall where the handprints were. (DR 14/1442).

Martha Fairbrother testified that she had known the Bogle family since 1970 or 1971. (DR 14/1444) She described Brett Bogle's upbringing as "very violent, abusive." (DR 14/1445) If one of the children did not admit fault for something that happened, they were all punished. (DR 14/1445) William Bogle, the father, had mood swings that were affected by his drinking and whether things were going right for him. (DR 14/1445-46) Besides alcohol, the elder Bogle used marijuana and, possibly cocaine, when his children were in the house. (DR 14/1446-47, 1455-

57) Fairbrother described an incident that occurred when Brett's mother was in the hospital, and William Bogle was taking care of the children at night. (DR 14/1448) The children had taken a train set from the attic and put it together. (DR 14/1448) William Bogle did not like that, so he beat Bobby with his fist and a belt in the presence of the other children. (DR 14/1448) When William Bogle corrected the children, they were never allowed to explain their actions, they were just punished, usually with a belt or stick. (DR 14/1448-49) Fairbrother had even seen Bogle hold a tire iron over the children's heads and threaten them with it. If Appellant did something wrong, he owned up to it, and, in front of his father, tried to act as though it did not matter how his father treated him. (DR 14/1449-50).

Mary Shrader testified at the penalty phase that she considered Brett Bogle to be a good friend. (DR 14/1459) Bogle used to work with Shrader's husband at Tampa Roofing Company. (DR 14/1459) When they met about two years previously, Bogle was using his check and pawning his tools to buy crack cocaine. (DR 14/1460). He was "flirtatious and funny and conversational," but was not responsible at all. (DR 14/1463) Shrader's husband helped Bogle get away from that situation. (DR 14/1460-64) Bogle was still working at Tampa Roofing when he met Katie Alfonso at Starky's. (DR 14/1461-62) He met her on a Friday night and "went straight with her from the bar to her mobile home." (DR 14/1462) Bogle called Shrader's husband the next night and said, "I've met this woman and I think

it might work out, she's older." (DR 14/1462) Bogle and Shrader's husband were involved in a car accident early in the morning on Friday, September 6, 1991, as they were on the way to work. (DR 14/1465, 1471) Shrader's husband was driving when a woman coming from the opposite direction on Highway 41 did not stop at a stop light and turned right in front of them, hitting and crushing the front of the car in which Bogle was a passenger, and causing it to hit a telephone pole. (DR 14/1465) Bogle's head and face went into the windshield. (DR 14/1465-66) Shrader saw Bogle at the hospital, where they were "taking glass particles out of his face and eyes and stitches." (DR 14/1471-72) He had three cracked ribs, and a broken rib that punctured his lung and necessitated a tube being put into the side of his chest. He was crying out in excruciating pain. (DR 14/1471-72, 1475) Bogle received a monetary settlement as a result of the car accident, and when the Shraders were without transportation, Bogle gave them money from the settlement so that they could buy a car. (DR 14/1477-78) And after his arrest for the instant homicide, while he was in the Hillsborough County Jail, Bogle gave the Shraders money so that they could enjoy their anniversary. (DR 14/1478-79).

Cheryl Lynn Bogle, Appellant's sister, described their father as "very abusive" toward the children and their mother. There was "[a] lot of verbal abuse; a lot of physical abuse; [the children] would get beatings instead of spankings." (DR 15/1505-06). At first, William Bogle used a belt to administer the beatings; as

the children grew older, he used his fist. (DR 15/1506). The abuse that their mother suffered at the hands of their father in Appellant's presence was "almost a daily thing." (DR 15/1511) Their father would come home drunk and curse their mother and physically abuse her. (DR 15/1511) William Bogle also abused drugs and alcohol in the household in front of the children, and introduced Appellant to marijuana when he was about nine or ten years old, and to cocaine when he was less than sixteen. (DR 15/1506-07).

Charles Robert "Bobby" Bogle, Appellant's oldest brother, testified that Appellant was about five or six years old when his father first administered alcohol or drugs to Appellant. (DR 15/1517-18) When Appellant was about thirteen, his father gave him cocaine. (DR 15/1518) Appellant also abused alcohol as a child when he was growing up; his father would give it to him. (DR 15/1521) Their father would whip the Bogle children whenever they did anything wrong, even something minor. (DR 15/1519-20) William Bogle would use a belt, or his fists, or "whatever happened to be laying around at the time." (DR 15/1520) Appellant witnessed violence between his father and his mother, which occurred "pretty often." (DR 15/1520-21).

Dola Bogle, Appellant's mother, testified that she became aware of the drug and alcohol abuse he underwent at the hands of his father after the children were grown. (DR 15/1525-26) Of Dola Bogle's four children, the only one who was not

in jail or prison was Brett's fraternal twin brother, Brian, who was a Marine sergeant stationed in Okinawa. (DR 15/1528-29, 1534) She testified that when Brett was 18 months old he drank some pine oil cleaner which went into his lungs, and he was in the hospital for seven days with chemical pneumonia. Brett had hernia surgery at the age of three. He was hyperactive, for which he was placed on Ritalin for over a year, and "was constantly getting banged, hurt; sutures." (DR 15/1529) Brett's father first moved out of the house when Brett was around nine or ten. The Bogles got back together for awhile, but the father left them again when Brett was 16. (DR 15/1530) The first time they separated, William Bogle would tell the children that they were the reason he was not there; he loved their mother, and it was all their fault because they were so bad. (DR 15/1530-31) Throughout their childhood their father constantly told the children that they were no good, they were worthless. (DR 15/1531).

She testified that William Bogle would administer beatings to Brett "[w]henever the mood struck him." It was "a fairly often occurrence" for all the children. The discipline would not be appropriate; William Bogle "would completely lose it, like he didn't know when to stop... [I]t was just like he went wild." (DR 15/1531) William Bogle would have mood swings as a result of alcohol and drugs. The family never knew when he walked in the room if he was going to be okay or if he was going to be violent, and they had to really watch what

they said and did for fear of setting him off. (DR 15/1532) When his cocaine abuse became worse, William Bogle started accusing his wife of sexual misconduct. She was not allowed to be anywhere by herself. (DR 15/1533) One morning at 2:00 as Dola lay in bed, she heard something click at her head, and her husband said, "If you don't tell me what you've been doing, I'm going to blow your fucking brains out." (DR 15/1533-34) She told him, "I'm not going to lie, even to the point that it costs me my life. So, if that's what you must do, here, you pull the trigger." Bogle then backed off, and Dola left the house. (DR 15/1534) She told the jury that she finally got her husband to go to a psychiatrist, where he was diagnosed as "schizophrenic induced by cocaine." (DR 15/1532) The Bogle children were not allowed to associate with other children, because as William Bogle's drug use got worse, he did not want anyone to know about it, except the people he did drugs with. (DR 15/1535-36) Dola and the children were all "like prisoners." (DR 15/1536) When Dola tried to intervene in the discipline of her children, her husband would "turn on" her in a "rage," and she "would get the brunt of it." (DR 15/1532) When Appellant left home, it was not of his own accord; his father literally threw him out of the house (DR 15/1530).

When Dola saw her son at the hospital the day after the car accident, it was very painful for him to breathe. Brett left the hospital as soon as they got his collapsed lung to where it would stay inflated. (DR 15/1537) Dola Bogle

concluded her testimony by reading a letter from Appellant's twin brother, Brian, which discussed the circumstances under which the children grew up. (DR 15/l540-44).

After hearing this testimony, the jury recommended death by a vote of 10 to 2. (DR 2/234; DR 15/1633) The trial judge subsequently sentenced Bogle to death, finding four aggravating circumstances: (1) previous conviction of a violent felony (burglary with force on Alfonso and the victim two weeks before the murder); (2) the murder was committed while engaged in the commission of a sexual battery; (3) the murder was committed for the purpose of avoiding arrest; and (4) the murder was heinous, atrocious, or cruel (HAC). In mitigation, the trial judge gave some weight to the statutory factor of impaired capacity but stated that substantial impairment had not been proven; gave substantial weight to Bogle's family background; little weight to his alcohol and drug abuse; gave some weight to his good conduct during trial; gave some, but not a great deal, of weight to his kindness to others; and gave no weight to his involvement in an automobile accident. Bogle also received consecutive sentences of life in prison for the burglary with assault or battery conviction and five years in prison for the retaliation against a witness conviction. (DR 2/252-63; DR 15/1649-51) This Court affirmed these findings on direct appeal. *Bogle v. State*, 655 So. 2d 1103, 1108-10 (Fla. 1995).

Despite this extensive presentation of mitigating evidence, Bogle urged in his postconviction proceedings that an "abundance" of statutory and nonstatutory mitigation was available but not presented due to trial counsel's alleged ineffectiveness. Bogle argues that trial counsel failed to provide Dr. Gonzalez with sufficient background materials or request that psychological testing be performed, and had counsel investigated further, he could have presented a compelling picture of mitigation that would have led the jury to recommend a life sentence. Bogle also argues that trial counsel failed to "challenge" the aggravating factors relating to Bogle's prior conviction for the violent felony of burglary with assault or battery on Katie Alfonso and the victim two weeks before the murder.[40]

Bogle's trial counsel retained Dr. Robert Berland, a psychologist, and Dr. Arturo Gonzalez, a psychiatrist, but only Dr. Gonzalez was called at the penalty phase. (V88/5120, 5148-52) Dr. Gonzalez testified at the penalty phase that he had reviewed extensive materials provided to him by the defense including three

[40] Bogle's argument regarding this sub-claim relies entirely on the testimony of Everett Smith. As previously noted, however, Smith's testimony did not rebut this incident. As the postconviction court noted, "[w]hile Mr. Smith's account of the events on September 1, 1991, differ from that of Ms. Alfonso-Tucker's slightly, he admits that he was not part of every conversation and that he never entered her residence. Furthermore, his testimony does not actually challenge Ms. Alfonso-Tucker's testimony regarding whether a burglary took place, only regarding minute details of that day." (V16/3104-05) Additionally, collateral counsel's assertion that Smith's testimony would have been relevant in the penalty phase to rebut these aggravators is without merit as the jury convicted Bogle of the prior violent felony and Smith's testimony would not have rebutted the avoid arrest aggravator in any fashion. Thus, this sub-claim is without merit.

hundred plus pages of depositions of various state witnesses, police reports and testimony from members of the family. (DR 14/1395-96) Dr. Gonzalez further testified that, based on his examination of Bogle, he found that Bogle suffered from a borderline personality disorder and that this disorder can cause him to be impulsive. Dr. Gonzalez admitted that psychological testing could be administered to demonstrate the presence of such an illness, but he did not believe such testing was necessary in Bogle's case.[41] (DR 14/1409).

Trial counsel Paul Firmani testified that even though he did not have any notes or recollection of whether Dr. Gonzalez or Dr. Berland specifically spoke with the Appellant's family members, it would have been his practice at the time to have provided his experts with all of the mitigating information from family members he had available. (V88/5151) Bogle presented no evidence that Dr. Gonzalez was not given the necessary information or that he did not have sufficient information to make a diagnosis. Based on this evidence, the postconviction court properly concluded that Bogle had failed to establish that trial counsel performed deficiently by failing to provide this information to Dr. Gonzalez. (V16/3137-38).

Additionally, the substance of the evidence presented at the evidentiary hearing in mitigation was cumulative to that presented at the penalty phase. Both

[41] Trial counsel testified that his recollection was that Dr. Berland administered the MMPI to Bogle, but counsel could not recall exactly why he did not present Dr. Berland except that he generally would not have him testify unless it would be helpful. (V88/5159, 5170).

proceedings presented the same picture of Bogle in mitigation. At the postconviction hearing, collateral counsel presented many of the same witnesses who testified at the original penalty phase to testify about Bogle's dysfunctional childhood.[42] Bogle also presented Dr. Faye Sultan to testify concerning Bogle's mental condition. Notably, Dr. Sultan was unable to testify to anything significant that Dr. Gonzalez may have missed. She merely opined that Bogle had "deep rooted psychological problems . . . and a high degree of severity of alcohol and drug abuse" and that Bogle demonstrated a "high degree of impulsivity and a very, very strong need for acceptance." (V66/937) As the postconviction testimony was cumulative to the testimony presented at the penalty phase, Bogle failed to establish that trial counsel performed deficiently or that he was prejudiced as a result. *See Troy v. State*, 57 So. 3d 828, 835 (Fla. 2011)(holding that "a defendant's claim that he was denied effective assistance of counsel because of counsel's failure to present mitigation evidence will not be sustained where the jury was aware of most aspects of the mitigation evidence that the defendant claims should have been presented."); *Van Poyck v. State*, 694 So. 2d 686, 692-93 (Fla. 1997)(rejecting ineffective assistance of penalty phase counsel claim for failing to

[42] Appellant argues that trial counsel was ineffective for failing to call Brian Bogle as a live witness, but trial counsel's recollection was that Brain Bogle could not make it to the trial as he was stationed in Japan at the time and a letter was "the next best thing." (V16/3140; V88/5156-57) In rejecting this aspect of Bogle's claim, the postconviction court found that Brian Bogle's testimony was cumulative to the information contained in the letter he wrote which his mother read to the jury and also cumulative to information provided by other witnesses. (V16/3140-41).

present evidence of defendant's life history because the jury was aware of most aspects of the defendant's life).

In *Stewart v. State*, 37 So. 3d 243, 258 (Fla. 2010), this Court rejected a similar claim stating,

> [. . .] None of these details changed the previously established impression of Stewart's childhood and mental health.
>
> Because the evidence that Stewart argues should have been presented is cumulative, Stewart has demonstrated neither deficiency nor prejudice. For example, in *Lynch*, this Court determined that counsel was not deficient for choosing to present mitigating evidence concerning the defendant's childhood through a mental health expert and the defendant himself, rather than calling numerous lay witnesses. This Court explained: "The testimony with regard to Lynch's personal history and background merely corroborated or slightly expanded upon penalty-phase testimony, and this Court has held that 'even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence.'" 2 So.3d at 71 (quoting *Darling*, 966 So.2d at 377). Likewise, in *Darling*, this Court rejected a claim that counsel was deficient for failing to present mitigating evidence where the evidentiary-hearing testimony generally was "only a more detailed presentation" of the mitigation previously presented. 966 So.2d at 377. This Court reasoned:
>
> > Although Darling further asserts that trial counsel was also ineffective for failing to present the testimony of Darling's father, Carlton, during the penalty phase, as noted by the trial court, the substance of Carlton's testimony was actually presented through other witnesses during the penalty phase. Dr. Hercov and Darling's mother and sister testified during the penalty phase with regard to the abuse Darling suffered at the hands of Carlton. Although as an afterthought Carlton provided a more detailed account with regard to the abuse, this Court has held that even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence. *See Gudinas v. State*, 816 So.2d 1095, 1106 (Fla. 2002); *Sweet v. State*, 810 So.2d 854, 863-64 (Fla. 2002). Therefore, trial counsel was not ineffective for failing to call Carlton as a witness during the penalty phase to present evidence which was

generally presented by others.

> *Id.* Similarly, in this case the mental health experts and lay witnesses who testified during the penalty phase conveyed the substance, though perhaps not all of the details, of the proposed mitigating circumstances to the penalty phase jury. Thus, trial counsel was not ineffective.

Stewart v. State, 37 So. 3d 243, 258 (Fla. 2010).

As the postconviction court properly found when denying Appellant's claim, trial counsel did not perform deficiently by providing his qualified mental health experts with all relevant information and by relying on their professional expertise. The court noted that "[e]ach piece of information that Defendant claims that Mr. Firmani should have disclosed to Dr. Gonzalez was testimony that Mr. Firmani elicited during direct examination of Defendant's family and friends during the penalty phase." (V16/3137) Thus, the court correctly found that Bogle failed to identify both deficient performance and prejudice. The evidence Bogle presented at the postconviction proceedings was merely repetitive to the information already considered by the jury and the trial court. Accordingly, this Court should affirm the lower court's denial of the instant claim.

CLAIM VII

CLAIM OF PROSECUTORIAL MISCONDUCT WAS PROPERLY DENIED AS PROCEDURALLY BARRED AND MERITLESS AND DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO COMMENTS ON THE EVIDENCE THAT WERE PROPER AND/OR NOT PREJUDICIAL.

This identical claim was also presented in the habeas petition as an

ineffective assistance of appellate counsel claim and is addressed at length in the State's response to the petition. Relevant to the claim as presented in the instant proceeding, the underlying claim of prosecutor misconduct is procedurally barred as it is a direct appeal issue, and was properly denied as such by the lower court. *Dennis v. State*, 2012 WL 6619282, 11 (Fla. 2012); *Spencer v. State*, 842 So. 2d 52 (Fla. 2003).

Further, as the State's response to the state habeas petition shows, it is also without merit. Accordingly, trial counsel cannot be deemed ineffective for failing to object. *Valentine v. State*, 98 So. 3d 44, 55 (Fla. 2012)("counsel cannot be deemed ineffective for failing to object to a fair comment which is based on the evidence presented during the trial. *Spann v. State*, 985 So. 2d 1059, 1068 (Fla. 2008)(citing *Mungin v. State*, 932 So. 2d 986, 997 (Fla. 2006))").

Appellant challenges three comments made by the prosecutor. First, he asserts that there was an improper bolstering of a State witness because the State referred to the FBI as the Greatest Crime Laboratory in the World and that the Hillsborough County Sheriff's Office (HCSO) "did a very thorough investigation and followed every lead." Here, Appellant's theory of the case was that the State conducted an incomplete investigation and charged him because he was a convenient suspect. To support this theory, Appellant repeatedly elicited testimony on cross-examination regarding the impounding of a piece of the Beverage Barn

siding that appeared to have a faint palm print on it even though there was no evidence showing that the print had been placed on the siding at the time of the crime and the crime scene was a distance from the siding. (DR 5/200-02, 249, 251-53; DR 6/342-43, 368). He also elicited testimony about additional evidence that had been sent to the FBI lab for testing even though most of the other testing did not produce results and the results that were produced were never shown to have any connection with the crimes. (DR 5/247-48; DR 6/320-28, 369-70, 402-03) During his closing, Appellant used this evidence to argue that the police had conducted a sloppy investigation because it did not thoroughly test all of the evidence. (DR 8/575, 578-87). As such, the State's comments about conducting a thorough investigation properly responded to Appellant's theory and did not constitute fundamental error. *Braddy v. State*, 2012 WL 5514368, *18 (Fla. 2012). Thus, trial counsel was not ineffective for failing to object when the State was merely responding to argument that he had presented. *Valentine v. State*, 98 So. 3d 44, 58 (Fla. 2012). The claim was properly denied.

Similarly, the State's brief reference to the FBI lab as the "greatest crime laboratory in the world" was responsive to the defense case. One of the themes Appellant presented in support of his theory about the sloppy investigation was that additional testing of the evidence was possible but that such testing was either not conducted or the results were not presented to the jury. (DR 8/575, 578-82,

585) Since the FBI lab was the lab that did the testing in this case, commenting that it was the world's best crime lab also supported Appellant's assertion that additional testing was possible. Since the comment could be viewed as supporting Appellant's argument, it cannot be said that that counsel's failure to object deprived Appellant of a fair trial.

Next, Appellant asserts that the State's comment regarding why he would have asked the Alfonsos for a ride after killing Ms. Torres was improper. However, again, the comment was merely a response to a defense theory. Since the comment was phrased as a response to Bogle's theory, and was supported by the evidence, counsel was not ineffective for failing to object. The evidence showed that the victim and Appellant intensely disliked each other and that Appellant had repeatedly threatened her. (DR 5/264-67, 270-72, 275, 277) Yet, Appellant approached the victim at the bar to speak to her. (DR 6/376) He likewise approached the victim's aunt and uncle whom he barely knew and was not on friendly terms with. (DR 6/407, 410-11, 417; DR 7/431, 433-34) Since the State's comment that he was not behaving normally is consistent with this evidence and was responsive to Appellant's theory, it was not improper and did not constitute ineffective assistance of counsel. *Braddy*, 2012 WL 5514368 at *19; *Mann v. State*, 603 So. 2d 1141, 1143 (Fla. 1992); *Valentine*, 98 So. 3d at 58. The claim was properly denied.

Finally, while Appellant asserts that the comment regarding the finding of Ms. Torres' pubic hair on his pants was improper and not based on the evidence, this is not true. Crime Scene Technician Ron Cashwell testified that he found and impounded the pants in question in the bathtub in which Appellant was hiding at the time of his arrest and that pubic hair was visible on the pants when he did so. (DR 6/346-47) Det. Larry Lingo testified that he retrieved these pants from the property room, opened the zipper area of the pants and retrieved what he believed to be hairs from the areas of the pants accessible from that area. (DR 6/356-67) Contrary to Appellant's assertion that Det. Lingo did not collect those hairs, Det. Lingo testified that he did collect the hairs and place them in an envelope that he sealed and sent to the FBI, which was admitted as State's Exhibit 13. (DR 6/366) Agt. Michael Malone, a hair and fiber expert, testified that he received State's Exhibit 13, opened the envelope, took the hairs out and mounted them on slides. (DR 6/302-16) He averred that most of the hair fragments from the envelope were so small that no analysis of them was possible. However, he was able to match the one full hair from the envelope to Ms. Torres' pubic hair. (DR 6/317-18).

Given the totality of this evidence, it was reasonable for the State to conclude that the hair that Tech. Cashwell was able to determine was a pubic hair based on a cursory view, that Det. Lingo collected in a search that involved only opening the zipper area of the pants, and that Agent Malone stated was the only

hair that was more than a small fragment was found in the crotch area of the pants and was the same hair that Agent Malone identified as belonging to Ms. Torres. Thus, it was a proper comment on the evidence. *Griffin*, 866 So. 2d 1, 16 (Fla. 2003); *see also Braddy*, 2012 WL 5514368 at *19 (comment not supported by direct testimony of a single witness not improper where cumulative evidence supported the inference the State drew). Appellant's suggestion that it misstates the record because a single witness did not testify to all the facts in the comment is meritless, particularly as Appellant misstates the record by claiming that Det. Lingo did not collect the hair. Since the comment was not improper, counsel cannot be deemed ineffective for failing to make the meritless objection and no deficient performance or prejudice has been shown. *Valentine*, 98 So. 3d at 58. The lower court properly denied the claim, (V11/2136-37) The summary denial of relief by the lower court was supported by the files and records and conclusively showed that Appellant was not entitled to relief. *Valle v. State*, 705 So. 2d 1331, 1333 (Fla. 1997). Accordingly, this Court should affirm.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the convictions and sentences entered below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email electronically to Linda McDermott, Esquire, McClain & McDermott, P.A., 20301 Grande Oak Blvd., Suite 118-61, Estero, Florida 33928, lindammcdermott@msn.com, this 8th day of April, 2013.

CERTIFICATE OF FONT COMPLIANCE

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

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