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IN THE SUPREME COURT OF FLORIDA

HAROLD A. BLAKE

Appellant,

v. **Case No. SC12-2102**
L.T. No. CF02-05203A1-XX

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

References to the record on appeal from Blake's direct appeal will be designated as (R Vol. #/page #). References to the supplemental record will be designated as (SR/page #).

References to the instant post-conviction record on appeal will be designated as (PCR Vol. #/page #). The instant post-conviction record also includes defense exhibit 51 (PCR V21/3476-V32/5575), which is a composite exhibit containing excerpts from the separate direct appeal records in Blake's prior violent felony aggravator case (the first-degree murder of Kelvin Young in Lakeland) and Green's trial for first-degree murder in the Patel homicide case. Defense exhibit 51 contains a copy of the trial transcripts from (1) Blake's trial in June of 2004, for the murder of Kelvin Young in Lakeland (the prior violent felony aggravator, CF-02-6050) and (2) Richard Green's trial, held on November 29 - December 3, 2004, in the Patel case (CF04-004460), where Green was found guilty of first degree murder, attempted robbery with a firearm, and grand theft of a motor vehicle. The Lakeland record (LR) is included at PCR V21/3476-V26/4571 and the Green record (GR) is included at PCR V27/4626-V32/5573.

STATEMENT OF THE CASE AND FACTS

The State does not accept Blake's "Introduction" or "Statement of the Case," which is replete with argument and often incomplete.[1]

In *Blake v. State*, 972 So. 2d 839 (Fla. 2007), this Court summarized the trial facts and procedural history as follows:

> On the morning of August 12, 2002, Maheshkumar "Mike" Patel was shot and killed as he stood inside the glass doors of a convenience store, called Del's Go Mart, that he owned and operated in Winter Haven, Florida. The store's video surveillance camera partially captured the shooting. The cause of death was a gunshot wound to the chest.
>
> Witnesses testified that on August 12, 2002, at about 6 a.m., they heard a gunshot and saw a black male run and enter a light-colored car parked in front of the store. A detective found the car abandoned a little over a mile away. A K-9 tracked a scent from the car to a building in the Lake Deer Apartments. At the time, Teresa Jones was living in that complex with her children and her boyfriend, Richard Green.[FN1]
>
> FN1. Teresa Jones is not related to Demetrius Jones. To avoid confusion, we refer to both by their first names.
>
> At about 7:00 or 7:10 that morning, Richard Green, Kevin Key, and Blake came to Teresa's home. She took Key to a store and Blake to the Scottish Inn, where he was staying. On the way, they stopped by a light-colored car on the side of the road, and Blake removed two guns from it. Blake told Teresa he had shot someone. Blake took the

[1]For example, Blake argues that aside from Demetrius Jones' testimony and Teresa Jones' testimony and Blake's videotaped statement, "[n]o other witness placed Blake in the vehicle used in the crimes or at the scene." (Introduction, IB at 1). Blake fails to mention his own trial testimony, which repeatedly confirmed his presence both "in the vehicle" and "at the scene." (R V8/T943; 946; 948; 1007; 1016).

Blake also emphasizes that a pair of red shorts were obtained from Green, but fails to mention that they were recovered at 10:20 p.m., which was more than 16 hours after the shooting. (PCR V42/7281). At the post-conviction hearing, Green testified that, at the time of the crime, he was wearing either a "gray or black" [sweatshirt] and "dark clothing." (PCR V9/1535).

guns with him. Later the same day, Blake told Demetrius Jones that he, Green, and Key were attempting a robbery and someone was shot. Blake asked Demetrius to dispose of a gun, and Demetrius agreed to attempt to sell it. However, Blake did not give Demetrius the gun. At around 6 or 7 p.m. that night, Green gave Demetrius a 9 mm handgun and they attempted to sell it, but no one bought it. Later that night or early the next morning, Green threw the gun in a nearby lake.

On August 14, Detectives Louis Giampavolo and Ivan Navarro interviewed Richard Green. Green took the officers to the apartment where Blake was located, and Blake was arrested without incident. Blake began talking as soon as Giampavolo and Deputy Sheriff Kenneth Raczynski placed him in Giampavolo's car. Giampavolo read Blake his *Miranda*[FN2] rights on the way to the station. When they arrived, they placed Blake in an interview room with hidden audio and video equipment. They did not reread his *Miranda* rights or have him sign a waiver.

FN2. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Giampavolo and Raczynski interviewed Blake. Blake said he stole a vehicle and then met Green and an unknown black male. He initially said he sold the car and was not involved with the Patel shooting. Blake then said "all three of us will get charged," made a statement about the death penalty, and began to cry. He admitted that they went to the store to commit a robbery. Blake said he was in the backseat and had a 9 mm handgun and a .38 caliber revolver. All three of the men got out of the car. Blake had the 9 mm handgun. When Patel made a sudden movement and tried to lock the door, Blake shot him. Giampavolo then asked Blake to give an audiotaped statement. Blake did not agree to taping the statement, but said he would detail the events one more time. The officers decided to videotape the statement anyway.

As seen on the videotape, Blake said he stole a car and picked up Richard Green, who was with an unknown male. Green drove to the store. The men walked up to the door of the store. Blake carried a gun with his finger on the trigger. As they approached, Patel scared him and Blake shot him with the 9 mm handgun. Blake claimed that it was an accident, however—it was intended to be a warning shot. Blake acknowledged he had been treated well and that Giampavolo had read him his rights in the car.

Blake was indicted for first-degree murder, attempted armed robbery, and grand theft of an

> automobile. At trial, he testified in his own defense. He admitted that he stole the car, but claimed that when the trio arrived at the store, he stayed in the car and heard gunshots. He claimed the entire incident was against his will.
>
> The jury found Blake guilty of first-degree murder, attempted robbery (with a finding that he discharged a firearm resulting in death), and grand theft of a motor vehicle. . . .

Blake, 972 So. 2d at 840-42.

Blake raised three issues on direct appeal: (1) whether the trial court erred in denying the motion to suppress his *videotaped* statement, (2) whether the trial court was required to advise Blake of his right to self-representation and (3) whether his death sentence was proportionate. *Blake*, 972 So. 2d at 840. On December 13, 2007, this Court affirmed Blake's convictions for first-degree murder, attempted armed robbery, and grand theft of a motor vehicle, and sentence of death. *Blake*, 972 So. 2d at 850. The mandate issued on January 4, 2008. Blake filed a petition for writ of certiorari, which was denied on May 12, 2008. *Blake v. Florida*, 553 U.S. 1039 (2008).

On April 17, 2009, Blake filed a motion to vacate pursuant to Florida Rule of Criminal Procedure 3.851. (PCR V3/332-35). The State filed its Answer on June 12, 2009. (PCR V3/452-87). On January 4, 2010, Blake filed an amended Rule 3.851 motion, alleging twelve claims for relief. (PCR V5/718-822). The State filed a response to the Amended Rule 3.851 Motion on March 3, 2010. (PCR V6/958-88). Blake also filed a second amended motion to vacate on August 5, 2010; but the second amended motion did not materially

alter any of the claims previously raised in the amended motion to vacate. (See, Order at PCR V45/7605).

On June 29, 2010, the trial court entered an "Order on Case Management Conference," granting an evidentiary hearing on the following claims: Claim II - IAC/Guilt Phase; Claim III - *Brady*; Claim IV - IAC/Penalty Phase; Claim V (in part) - IAC/prosecutor comment; Claim VI (in part) - IAC/mental health expert and IAC/confession expert; Claim VIII – Newly Discovered Evidence (Witness' Recantation); and Claim X (in part) – IAC/penalty phase. (PCR 7/1099-1100). Five days of evidentiary hearings were conducted on March 28, 2011 - April 1, 2011. (PCR 8/1320 - 16/2730). Two additional days of evidentiary hearings were held on June 19-20, 2012. (PCR 41/6927 - 42/7275). In addition, the transcript of Teresa Jones' deposition, taken on January 6, 2012 in Pennsylvania (Def. Ex. 74) and "Transcript of Proceedings of Out of State Witness" (Teresa Jones), taken in Pennsylvania on June 11, 2012 (Def. Ex. 75) were before the trial court. The trial court summarized the pertinent post-conviction testimony[2] as follows:

> **Testimony of Cass Michael Castillo from Transcript Of Evidentiary Hearing, held on March 28, 2011, Volume 1, pages 13 - 104.**
>
> The Defense called Cass Michael Castillo, Esq., an assistant State attorney, as a witness. Mr. Castillo testified that there were three trials in this matter. The first ended in a hung jury, and the second one ended in a mistrial. The third trial ended in a conviction for

[2]The trial court granted a new penalty phase and the State is not cross-appealing that order. Therefore, the majority of the summarized testimony concerning the penalty phase will be omitted and designated as omitted.

first-degree murder. Mr. Castillo testified that there was a co-defendant, Richard Green, who was charged by a separate indictment. Mr. Green was convicted in December 2004. Mr. Castillo denied ever making an argument that Mr. Green was the trigger man. Mr. Castillo testified that Demetrius Jones had one or more cases of his own pending. Mr. Castillo testified that he was not prosecuting Mr. Jones. Mr. Castillo testified that he would assume Mr. Pickard was the prosecutor because a plea agreement was signed by Hardy Pickard. The plea form was signed by Mr. Pickard on 3/3/05. Mr. Castillo was shown a handwritten note that seemed to indicate Mr. Pickard told Randy Blankenship, the attorney for Demetrius Jones, that he couldn't go below the guidelines without input from Mr. Castillo. Defense counsel asked Mr. Castillo if he knew whether or not he was contacted to get input. Mr. Castillo responded, "No. I—I'm confident that I didn't. The only recollection I have of doing anything for Mr. Jones was, I think he got arrested for something or - - and I helped get him out of jail, is what I remember doing for Mr. Jones." (ER March VI/49). He testified that he did not know if the defense was aware of the pending cases against Mr. Jones at the time he testified in February 2005. Mr. Castillo was asked about Ms. Teresa Jones, who testified in February 2005. He said he had a memory that she had a case pending, but he did not know the specifics of her case. Mr. Castillo was shown a plea form signed by Ms. Jones on November 4, 2004. He testified that he was not involved in that prosecution and did not have anything to do with her plea. He testified that he was aware that a case was pending. Mr. Castillo was shown a Winter Haven Police Department narrative summary with a reference date of 12/9/2002. He agreed that the summary regarded a child abuse complaint against Teresa Jones. He testified that he was not aware of this information at the time he was prosecuting the case, and he testified that he did not threaten to take Ms. Jones' children away. Mr. Castillo was shown Defense exhibit Eight which is a "no bill" in Case No. CFO5- 1765-XX involving Demetrius Jones. The document is dated March 28, 2005. The guilty verdict in Mr. Blake's case was returned on February 25, 2005. Mr. Castillo testified that he did not know if charges were pending against Mr. Jones in Case No. CFO5-1765-XX at the time he testified in Mr. Blake's trial.

Testimony of Cass Castillo Esq., from Transcript Of Evidentiary Hearing, held on March 28, 2011, Volume II, pages 111 - 148.

Mr. Castillo testified that in Richard Green's case he did not argue inconsistently with what he argued in Mr. Blake's case. He agreed that he argued in Mr. Green's case that Mr. Blake fired the shot that killed Mr. Patel, and Mr. Green was a principal to that action.

Testimony of Hardy Pickard, Esq., from Transcript Of Evidentiary Hearing, held on March 28, 2011, Volume II, pages 148 — 188.

Hardy Pickard, Esq., was called as a witness by the defense. Mr. Pickard is now retired, but formerly he was an assistant state attorney. He testified that he was involved with prosecuting a potential witness in Mr. Blake's case, Teresa Jones. Mr. Pickard testified that he did not know whether or not he was aware that Ms. Jones would be a witness in Mr. Blake's trial at the time he made a plea offer to her dated November 4, 2004. Mr. Pickard testified that Ms. Jones, who had three co-defendants, got the most lenient deal, based on his reading of the police reports. Ms. Jones had been charged with robbery with a firearm. She entered a plea to petit theft. He testified that he had no communications with her or her attorney about her cooperation with the State. He testified that he was not aware that she was a witness in the Richard Green case. Mr. Pickard testified that he never was aware of a relationship between Teresa Jones and Mr. Green, and he did not know Ms. Jones had concerns about losing custody of her children as a result of the criminal case. Mr. Pickard was shown a plea offer directed to Demetrius Jones dated March 3, 2005. This was a few days after the February 25, 2005, guilty verdict in Mr. Blake's trial. Mr. Pickard testified that he did not remember Demetrius Jones.

On Cross examination, Mr. Pickard noted that the date Ms. Jones accepted the plea offer was on February 22, 2005. He testified regarding why she got a lenient plea offer. He said, "The reason that I gave Ms. Jones the plea offer I did is because I felt that we would get a directed verdict of not guilty if I had to take her case to trial. We had a very poor case against Ms. Jones. She simply was sitting in the car and was there." (EH March 28, 2011, VII/179).

Testimony of Richard Green from Transcript Of Evidentiary Hearing, held on March 28, 2011, Volume II, pages 189 - 244.

The defense called Richard Green as a witness. Mr. Green was a co-defendant of Mr. Blake. Mr. Green was

asked about the crime that took place on August 12, 2002. He testified that he and Mr. Blake were riding around in his sister's car in the early morning hours. He had picked Mr. Blake up at the Sky motel, and they stole a beige Oldsmobile from a location somewhere by the motel. They went back to the motel and dropped off the car belonging to Mr. Green's sister. They drove in the stolen car to the Boggy, which Mr. Green described as a drug area, where a couple of their friends Demetrius Jones and Kevin Key stayed. Mr. Green was driving, and he was smoking marijuana. He couldn't say if Mr. Blake was doing any drugs. They went to Demetruis [sic] Jones' house. Demetrius Jones and Kevin Key were at the house. All four of them sat around discussing wanting to steal some things. Mr. Blake, Mr. Key, and Mr. Green got in the car and drove around. Mr. Key was driving, but subsequently Mr. Green took over as the driver. Mr. Green said that he and Kevin Key had been doing crimes where they wait to see what time the owner arrives and rob him before he goes inside the business. They went over to Mr. Patel's store to see what time he comes to the business. They went to the front of Mr. Patel's business, and they could see that about half of the lights were on. This indicated to them that Mr. Patel wasn't all the way open yet, but he was already there. Mr. Green got out of the car, and he described what happened, "I walked up to the store or the door and Mr. Patel, he kind of like came to the door in a panic and then I panicked and then I fired a shot inside the business." (EH March 28, 2011, VII/200).

Mr. Green testified that Mr. Key and Mr. Blake did not have any reason to know that he was going to attempt to commit a robbery when he got out of the car. He testified that as he was walking to the door he had adjusted his hoodie to hide the dreads. He had pulled the sweatshirt over his face. He said the sweatshirt was gray or black. He said he was wearing dark clothing, and he was the only one that got out of the car. He said he ran back to the car after the weapon was fired and left. He ditched the car, and he, Harold Blake, and Mr. Key went to his girlfriend Teresa's house. He asked Teresa to take Harold and Mr. Key home, and she left with Mr. Blake and Mr. Key in her car. He did not see Mr. Blake until later that evening. He testified that Mr. Blake did not shoot anyone that morning, and Mr. Blake did not have a firearm.

At some point, he talked to the police. At first, he told them he did not know anything about the crime. Later, he told them Mr. Blake was the person who

committed the crime. He said he did this to keep law enforcement off of him. He did not get arrested for the crime. In September of 2002, he got arrested for an armed bank robbery. He went to trial on that case, and he was found guilty. He got a sentence of life in prison. He was asked when he decided to admit that he was the shooter. He responded, "Years after being incarcerated I thought about it and realized somebody's life was on the line for something that they didn't do." (EH March 28, 2011, VII/209). He testified that he did not tell Teresa that he was the shooter, but he testified that he probably did tell her to tell the police that Mr. Blake had the gun. He was asked if he remembered doing that, and he answered, "Not really." (EH March 28, 2011, VII/209). In the months following the crime, he told Teresa to stick to whatever she was going to tell them. He testified that he did not know that she had told law enforcement that Mr. Blake had told her that he had shot someone. Mr. Green said that he was not telling the truth when he told police that Mr. Blake had picked him up that morning in a stolen car, and when he told police that Mr. Blake was the person that got out of the car and shot the victim.

On cross examination, Mr. Green was asked if his defense at his trial had been that Harold Blake had shot Mr. Patel, and he agreed that it was. He acknowledged that he got on the witness stand and said that he saw Mr. Blake go up to the door and shoot Mr. Patel. Mr. Green agreed that he was past appeal and postconviction motions as far as the murder and armed robbery were concerned.

Testimony of Gil Colon, Esq., from Transcript Of Evidentiary Hearing, held on March 28, 2011, Volume II, pages 244 — 267.

Mr. Gil Colon, Esq., was called as a witness by the defense. He testified that he was court appointed to represent Mr. Blake in two murder cases. Mr. McClain showed Mr. Colon a note from Debbie Mallory, who used to work for Mr. Colon. Mr. Colon agreed that the note indicated that he was appointed to represent Mr. Blake on additional cases as well as two capital cases. Mr. Colon was shown an order of appointment for Mr. Blake, dated November 12, 2002.

Mr. Colon testified that he believed the Lakeland case, a non-capital murder case, was tried first. He said he had no reason to dispute it if the record showed that there was a hung jury in February 2004, a mistrial in March 2004, and a trial and conviction in June of 2004. He testified that if the record showed there was a

guilty verdict returned in the capital case in February 25, 2005, he would not dispute it. He testified that he remembered there were co-defendants in the capital case. He remembered that there were three people in the vehicle but that two were charged. He was shown the record on appeal from Mr. Green showing Mr. Green went to trial from November 29 — December 3, 2004, and he agreed that this was consistent with his recall. He testified that he did not have an independent recollection of Mr. Green going to trial before his capital trial in the Patel case. He testified that at the time he was appointed to handle Mr. Blake's capital case, he had worked on four or five capital cases.

Testimony of Gil Colon, Esq., from Transcript Of Evidentiary Hearing, held on March 29, 2011, Volume III, pages 274 - 404.

Mr. Colon was shown the motion filed by his office asking for a second chair in Mr. Blake's capital case. Mr. Al Smith was appointed as the second chair in February 2003, before the trial in the Lakeland non-capital case. Mr. Colon testified that he did not know what the exact division of labor was in the capital case, but Mr. Smith's responsibility was the penalty phase, and his responsibility was the guilt phase. Mr. Colon testified that if a co-defendant was tried first his general practice would be to monitor the co-defendant's trial. He did not have a specific recollection of what was done with respect to monitoring Mr. Green's case.

Mr. Colon agrees that the record seems to indicate that the State advised him that no consideration was being given to Ms. Jones for her testimony. Mr. Colon testified that he did not recall what information had been given to him regarding her charges, but he would have to believe he was provided with some information. Mr. Colon testified that he did not remember Ms. Jones having kids and being concerned about custody of the kids. He agreed that to the extent she was afraid the State might take custody of her kids, he would want to be aware of this fact as a defense attorney.

Mr. Colon testified that he had no independent recollection of Demetrius Jones. Mr. Colon testified that he did not know if he was aware of the pendency of a VOP case against Mr. Jones at the time he testified in Mr. Blake's case. Mr. Colon was shown the plea agreement, dated March 3, 2005, signed by Mr. Pickard; and he agreed that it indicated the sentence was below guidelines. Mr. Colon was shown a "no bill", dated March 28, 2005, in a case involving Mr. Jones. This was after the February

28, 2005 verdict in Mr. Blake's case. Mr. Colon agreed that this was something that he would have wanted to consider. Mr. Colon was shown Defense Exhibit 12 which in [sic] a handwritten note referring to some red cotton shorts from Mr. Green. Mr. Colon was asked about the video showing the assailant at the store, and he testified that he did not remember if the video was in color or black and white. Mr. Colon testified that it would be very significant if the shorts on the video were red and Mr. Green was wearing red shorts but his client was wearing black or other colors.

Mr. Colon testified that he didn't recall whether he actually did an analysis on whether to call a false confession expert. Mr. Colon was shown a motion that he filed on February 28, 2005 for a mental health expert. The jury returned the guilty verdict on February 25, 2005. Mr. Colon was asked why he would not have filed the motion sooner. He answered; "The only thing I remember was that either we didn't see indications that we needed one, or that Mr. Blake did not want to be examined." (EH March 29, 2011, VIII/330). Mr. Colon was advised that the expert involved in the matter was Dr. Kremper, and that Dr. Kremper had been called by the State as a witness at a hearing for suppression of the confession. Mr. Colon was asked if he evaluated the matter in terms of a conflict. He responded, "I don't even remember that. I mean, I would like to think that if I were aware that he had been used by the State to evaluate my client as to an issue that may have been beneficial to the State, that I would not have retained the same expert to see if he would be beneficial to the Defense," (EH March 29, 2011, VIII/331). Mr. Colon testified that he did not have a memory of someone named Kevin Hall. Mr. Hall allegedly indicated he was present when Demetrius Jones was talking to Green and Key, when the subject of the robbery first came up, and Mr. Blake was not present. Mr. Colon testified that he did not have any recollection why he would not have called Mr. Hall as a witness. Mr. Colon was asked if he recalled who Marian Clay was, and he answered that he didn't recall who she was. Defense counsel said that Ms. Clay allegedly told Detective Harkins that Mr. Green told her Key was the shooter. Mr. Colon testified that he did not remember that. He said, "The only thing I do remember is there were different statements of who was there, who had shot, who wasn't there, that kind of thing." (ER March 29, 2011, VIII/334-335).

* * * [omitted re: IAC/penalty phase]

Testimony of Al Smith, Esq., from Transcript Of Evidentiary Hearing, held on March 29, 2011, Volume IV, pages 433 — 543.

Al Smith was called as a witness by the defense. He was appointed to represent Mr. Blake in February 2003. He was appointed to be the second chair. He agreed that he was basically the penalty phase lead attorney. He was aware that Mr. Colon had been appointed to handle other criminal cases for Mr. Blake, but his own representation was limited to the capital case and basically the penalty phase. He did not recall using an investigator on the case. He agreed that he was aware that a Lakeland homicide case had gone to trial prior to the trial that he was involved with. Mr. Smith was asked about Mr. Green, and he identified him as a codefendant. Mr. Green had been found guilty of the same charge, but he did not receive a death sentence. Mr. Smith said that from the State's standpoint, Mr. Green was not the shooter. He agreed that this made the fact that Mr. Green received a life sentence of limited value as a mitigating circumstance. Mr. Smith was asked if he was aware of statements made by Mr. Green to others that he was the shooter. Mr. Smith testified that he was not aware of this, and he agreed that he would have found a way to use this in the penalty phase. Mr. Smith was asked about Teresa Jones, and he said that she was Richard Green's girlfriend. He remembered a side bar that took place when she took the stand regarding a plea that she had taken. He and Mr. Colon talked to Assistant State Attorney Hardy Pickard. Mr. Pickard told them that he really had no case against her, and he had taken a plea to get rid of the case. He indicated to them that he had not promised her any benefit as result of her testimony in Mr. Blake's case.

Mr. Smith was shown the plea offer to Ms. Jones' which was dated November 4, 2004. He did not know the plea offer had been outstanding that period of time. He did not recall being provided any police reports related to the incident that gave rise to her plea offer.

On cross-examination, the State asked Mr. Smith about Defense Exhibit Eight which was a "no bill", dated March 28, 2005, regarding Demetrius Jones. This was before the April penalty phase in Mr. Blake's trial. Mr. Smith indicated that he had no knowledge of the "no bill." Mr. Smith was shown Defense Exhibit 9, a handwritten note regarding a potential VOP on Demetrius Jones. He testified that he had no recollection of knowing about an impending VOP, and this was something he thought might be significant as a defense attorney. Mr.

Smith was asked about Defense exhibit 12 which indicates red cotton shorts were taken from Mr. Green. Mr. Smith indicated that information about the color of the shorts taken from Mr. Green would have been helpful to him in supporting the issue of who the shooter was in light of the video taken at the store. Mr. Smith testified that he had no recollection of ever receiving information that Mr. Green had red shorts, or that anybody had said that Mr. Green had told them that he was the shooter. Mr. Smith was asked about Defense Exhibit 14 which was a statement from Kelly Govia. She had a conversation with Key in which Key indicated that "Plump" was the shooter. Mr. Smith testified that if he had known about this information he would have presented it at the penalty phase in some manner.

* * * [omitted re: IAC/penalty phase]

Mr. Smith testified that if he had any information that Mr. Green was the shooter he would have presented it. On cross examination, Mr. Smith was asked if he felt the need for an investigator in Mr. Blake's case. He answered, "No, sir." He was asked why not. He replied,

> Well, the particular issue in this case wasn't an issue of whether there has been a robbery, there wasn't an issue of whether there'd been a killing. We knew the location, we knew the circumstances surrounding who the alleged participants were, statements made by those parties was sufficient to corroborate what they were talking about was, in fact, the same incident. The lay witnesses that were indirectly or directly involved also were consistent with that. So there wasn't any need for me to go investigate, for example, a false photograph, or ID, or something like that. There wasn't — I didn't see any need or purpose of wasting money for something I didn't need to have.
> (EH March 29, 2011, VIV/516).

He agreed that basically Mr. Blake had confessed, and they sought to have that suppressed and were denied. He testified that he was aware that Mr. Green claimed that Mr. Blake shot Mr. Patel. He was asked what Mr. Blake told him. He said,

> Well, Mr. Blake said that, basically, that they were going to — they were riding around, that they had stolen a car, they were riding around and they were going to try to make a — get a robbery before the actual store

> opened up. But they were in the Jan-Phyl village area, and had actually gone by the convenience store, and apparently had gone in the back part where they thought that the parties would bring in money or whatever. There was a dog that was making a lot of noise, this is before 6:00 a.m. They left and went down to the fire station, which is about a half a mile away, and discussed everything. By the time they got back the store was already being opened, the person was already inside. That there was a point in time when he got out, went up to the door, he was startled, the gun went off, he ran. He didn't see anybody get hit, didn't see anything, it was a pure accident in the sense that he discharged the firearm because he was surprised at somebody who was standing near the door. He made no attempt to go in it, or anything like that.
> (EH March 29, 2011, VIV/517-518).

Mr. Smith agreed that Mr. Blake told him that he was the one that approached the door and the firearm went off. Mr. Blake did not tell Mr. Smith that Mr. Green was the shooter. Mr. Smith testified that he spent a lot of time investigating the case and preparing for trial. Mr. Smith testified that he had a lot of contact with Mr. Blake. Just in phone conversations, he noted 15 phone conversations.

* * * [omitted re: IAC/penalty phase]

Testimony of Al Smith, Esq., from Transcript Of Evidentiary Hearing, held on March 30, 2011, Volume V, pages 547 — 602.

On redirect, Mr. Smith testified that he was not able to pinpoint exactly when he had a conversation with Mr. Blake where Mr. Blake had told him that he was the shooter. He admitted that he had no notes regarding such a conversation. He was asked about Defense exhibit 14, a statement from Kelly Govia, indicating she had been told that "Plump" (Mr. Green) was the shooter. Mr. Smith indicated that he remembered having her statement in discovery, but he did not remember that part of the discovery. Mr. Smith was asked about some red shorts taken from Mr. Green on August 12. He testified that he was not aware of the red shorts. He testified that he recalled looking at a videotape of the assailant, but he did not recall if the assailant was wearing red shorts.

He testified that he would have presented evidence about the red shorts if he knew that was the color of pants the assailant was wearing. Mr. Smith was asked about his attempt to get Mr. Blake to understand the seriousness of the situation. . . .
* * * [omitted re: IAC/penalty phase}

Testimony of Dr. Barry M. Crown, from Transcript Of Evidentiary Hearing, held on March 30, 2011, Volume V, pages 607- 664.
* * * [omitted re: IAC/penalty phase]

Testimony of Doctor Crown from Transcript Of Evidentiary Hearing, held on March 30, 2011, Volume VI, pages 669 — 721.

Doctor Crown testified that if a person has organic brain damage a primary diagnosis of antisocial personality disorder would be inappropriate. Dr. Crown was asked about Mr. Blake's confession. Based on Mr. Blake's mental health functioning, Dr. Crown agreed that he was someone who would be susceptible to coercive tactics. He testified that Mr. Blake was easily led and directed based on his lack of intellectual efficiency.
* * * [omitted re: IAC/penalty phase]

Testimony of Doctor Richard Ofshe from Transcript Of Evidentiary Hearing, held on March 30, 2011, Volume VVI, pages 722 — 796.

Doctor Richard Ofshe was called as a witness by the defense. Doctor Ofshe is a social psychologist. His principle area of interest for the last 30 years has been police interrogation. He has an expertise in the influence used in police interrogation. Doctor Ofshe was asked about a false confession. He said, "A false confession is when someone confesses to having been responsible for committing a crime that they did not commit." (EH March 30, 2011, VVI/731).

Dr. Offshe testified that he was retained in Mr. Blake's case at least a couple of years ago. He was provided with materials relating to law enforcement's description of Mr. Blake's interrogation and Mr. Blake's description of the interrogation. He also saw the video of the interrogation and received a transcript of the interrogation. Additionally, he had the opportunity to see a video of the actual crime scene.

Dr. Offshe was asked about evidence ploys used against Mr. Blake. With regard to evidence ploys, Dr. Offshe said the following:

> Well, they certainly used evidence ploys to accomplish, in my judgment what they're typically intended to accomplish. The evidence ploys that were used were things like, we have your fingerprint on the car. We can make out your face in the video tape. And they also had the statement of Richard Green that they played for him in which he is identified as the shooter. (EH March VVI/754).

Dr. Offshe was asked if he identified any motivators in Mr. Blake's case used by law enforcement in their interrogation. He answered;

> Yes, well, here, in reviewing the police officers account of what happened during the interrogation, I don't find any discussion, I don't find them reporting what motivational tactics they used. Mr. Blake just confessed. Mr. Blake, on the other hand, has — offers an account of how he was motivated to confess. That is an account similar to accounts I have seen for 30 years. It is the classic threat that, if you don't confess you'll face the death penalty. Offer of intervention, we have friends in the State Attorney's Office. We'll help you. So, setting up the high and low outcomes, the suggestion that you need to say that this was an accident, which is very typically used because accident sounds like something that is excusable to many people. So the accident scenario is a very commonly used scenario that I've seen over and over again. According to Mr. Blake, that's the scenario that was used here.
> (ER March VVI/754-755).

Dr. Offshe mentioned multiple concerns regarding information obtained from Mr. Blake's confession that did not seem to match what the video at the store showed. Mr. Blake said all of the people in the car went up to the store, but the video only indicates one person went up the store. Mr. Blake did not know how many doors there were at the store. Mr. Blake allegedly reenacts the crime walking slowly to the door, while the person in the video appears to be sidestepping facing the store with a gun raised. Dr. Offshe was asked what conclusion he could draw from the information that he had the opportunity to review in Mr. Blake's case, and what opinion he would have given at the time of Mr. Blake's trial. He said,

> That the account of the interrogation tactics that were used, by Mr. Blake's account of the interrogation tactics that were used, are interrogation tactics that could precipitate a false confession. The failure of Mr. Blake's account to fit with the objectively knowable facts of the crime would be consistent with someone making up these pieces of information, and failing to know certain pieces of information, because the person was not in a position to directly observe it. In other words, the person wasn't there. I'm — it's not for me to ever draw conclusions as to whether it's a true or false confession. I'm simply pointing out these are indicia that should be looked at and considered. (ER March VVI/777).

Testimony of Kelly Govia from Transcript Of Evidentiary Hearing, held on March 31, 2011, Volume VII, pages 807 — 817.

The defense called Kelly Govia as a witness. In August 2002, she was living in Winter Haven with her mother, her three kids and her niece, Kara Poole. Ms. Poole had a boyfriend named Kelvin Key Harrington. He had the nickname of "Red Man". She overheard Kelvin talking outside her window to Vincent Shaw. She testified that she heard Mr. Key saying, They had went and did a robbery that morning and in the midst of that robbery that "Plump" had shot a guy, had shot someone in the store."(ER March VVII/811). Ms. Govia said this bothered her because a person had been shot. She talked to her son Micha Govia about her concern. He took her to a place to talk to Police officers about it. She said they took a taped statement from her. Later she got a paper in the mail to go to a deposition. She later talked on the phone with someone, and they said that she was not needed. She has no memory of who the paper was from. Nobody asked her about it again until a couple of weeks ago when she heard from Rosa Greenbaum.

Testimony of Dr. Shaun Agharkar from Transcript Of Evidentiary Hearing, held on March 31, 2011, Volume VII, pages 826 — 918.

* * * [omitted re: IAC/penalty phase]

Testimony of Stanchez Preston from Transcript Of Evidentiary Hearing, held on March 31, 2011, Volume VII,

pages 922 — 958.
* * * [omitted re: penalty phase (prior violent felony aggravator - Lakeland murder)]

Testimony of DeCarlos Brown from Transcript Of Evidentiary Hearing, held on March 31, 2011, Volume VIII, pages 999 — 1073.
* * * [omitted re: IAC/penalty phase]

Testimony of Vontrice Brown from Transcript Of Evidentiary Hearing, held on March 31, 2011, Volume VIII, pages 1111 — 1132.
* * * [omitted re: IAC/penalty phase]

Testimony of Vontrice Brown from Transcript Of Evidentiary Hearing, held on April 1, 2011, Volume IX, pages 1150 — 1214.

Ms. Brown said that when she testified at her brother's trial, she wanted to tell the jury that she believed her brother couldn't have committed the shooting. She was asked why she believed that. She said, "Because he didn't fit the description, he didn't have hair or dreads." (EH April 1, 2011, VIX/1152). She said that she tried to convey this to his attorneys but they acted like what she had to say didn't matter.
* * * [omitted re: IAC/penalty phase]

Testimony of James Kenneth Blake from Transcript Of Evidentiary Hearing, held on April 1, 2011, Volume IX, pages 1276 - 1391.
* * * [omitted re: penalty phase/prior violent felony aggravator - Lakeland murder]

Testimony of Sergeant Kenneth Raczynski from Transcript Of Evidentiary Hearing, held on June 19, 2012, Volume I, pages 20 -39.

The defense called Sergeant Kenneth Raczynski of Polk County Sheriffs Office as a witness. He brought some items of evidence with him. Item 1053 was a pair of red cotton shorts taken from Richard Green on August 12, 2002. He identified defense exhibit 63 as being a photograph of those red cotton shorts. Defense exhibit 63 was moved into evidence. Defense exhibit 64, a photograph of the evidence tag was also moved into evidence. Sergeant Racznyski also introduced Item 1103, which was a pair of blue plaid shorts from Harold Blake with a date of August 15, 2002, Item 1106 was a pair of dark blue slacks recovered from Harold Blake on August

15, 2002. Sergeant Racznski was asked about Exhibit 508 which is a sealed package containing multiple clothes identified as coming from a closet on August 14, 2002. Defense exhibit 21 was an FDLE case tracking form and Exhibit 508 was one of the items submitted to FDLE. There is a letter indicating number 508 includes a pair of red shorts belonging to Mr. Blake. In the sealed package there was a pair of pink pants and a pair of plaid shorts with some red in them. He was not sure what item was being referred to as the red shorts. He could not tell which pair of shorts was analyzed. On redirect examination, Detective Raczynki testified the tag on the evidence showed it had been returned by FDLE to the sheriff's department on April 7, 2005.

Testimony of Vanbossell Preston from Transcript Of Evidentiary Hearing, held on June 19, 2012, Volume I, pages 85 — 154.

* * * [omitted re: penalty phase/prior violent felony aggravator - Lakeland murder]

Testimony of Demetrius Jones from Transcript Of Evidentiary Hearing, held on June 19, 2012, Volume I., pages 158 — 187.

The defense called Demetrius Jones as a witness. He is currrently incarcerated at Columbia Correctional Institution. He testified in Mr. Blake's capital trial. He recalled talking to Rosa Greenbaum when he was in the county jail, and he agreed it might have been in April 2009. He recalled telling Ms. Greenbaum that Key had told him that Green was the shooter. Mr. Jones said that he told Ms. Greenbaum that Mr. Green took the guns in a backpack from the car used in the robbery. He said that Mr. Green tried to sell the guns. He said Mr. Green later told him that he had thrown a gun in the lake. He testified that he also remembered Mr. Green telling him about trying to use nail polish remover to remove fingerprints from the car doors. Mr. Jones said Green told him he wanted to speak to his cousin "Red Man" so he could tell him what to say. He said that "Red Man" was his cousin Kevin Key. He said Mr. Blake never told him anything. On cross-examination, Mr. Jones was asked if he remembered testifying that he saw Key, Blake and Green talking about going to do a robbery that hadn't happened yet. He said yes, but Mr. Blake wasn't there.

Testimony of William Mounts from Transcript Of Evidentiary Hearing, held on June 20, 2012, Volume II,

pages 204 — 212.

The defense called William Mounts as a witness. He met Mr. Blake at the Polk county jail in February 2004. He said that he did not know Mr. Blake before seeing him in jail, but he did know Richard Green. He said Mr. Green's nickname was "Plump". He said that Mr. Green came into their unit and attempted to speak to Mr. Blake. He said Mr. Blake refused to talk to Mr. Green. He said "Plump" kept pushing the issue. He was shown Defense Exhibit 37 which was a deposition he had given on this matter. He said his testimony had been truthful. Later, he got to speak to Green away from the other inmates. Mr. Green indicated to him that he was the shooter, and he was going to do the right thing.

Within the next year, Mr. Mounts was incarcerated in the same unit with Mr. Green again. This was after he gave a deposition. Mr. Mounts was asked what happened and he said,

> "He approached me and asked me why I gave this deposition. My reply to that was, I only told what you told me you was going to say anyway. You told me you was going to accept responsibility, you admitted to me and several other people that you was the trigger man, that you was the one that pulled the trigger. You know, you were in fear that Stacey was going to tell where the gun was at. And you know, I only told what you said you was going to tell anyway. You said you was going to do the right thing, so I did the right thing as well." (ER June 10, 2012, VII/210).

He said that conversation ended then, and he was attacked by Mr. Green and others later that night. He said the comment was made that that's what I get for running my mouth. He said had a skull fracture from this beating.

Testimony of Linda McDermott, Esq., from Transcript Of Evidentiary Hearing, held on June 20, 2012, Volume II, pages 215 — 240.

Linda McDermott, defense counsel for Mr. Blake in this matter, was called as a witness by co-counsel, Martin McClain. She said she was appointed to represent Mr. Blake in May 2009. She said Ms. Greenbaum worked for her as an investigator and had been working on the case before Ms. McDermott was appointed.

Ms[.] McDermott was shown defense exhibit 71, which she identified as a letter indicating records of Mr.

Blake's social security files had been destroyed on April 25, 2003. She said that they obtained the letter from the Social Security Administration. She said they obtained it because they were aware that Mr. Blake's mother had been obtaining Social Security payments on his behalf when he was under age 18. The date on the letter was November 6, 2009. Ms. McDermott said that Mr. Blake's mother had a stroke, and she was not available to testifiy [sic]. She also said that the defense's former investigator, Ms. Greenbaum, was not available to testify because of actions by the State Attorney's Office. (The State Attorney's Office began a criminal investigation and served Ms. Greenbaum with a subpoena which resulted in Ms. Greenbaum quitting the defense team and asserting her Fifth Amendment Rights). Ms. McDermott was allowed by the Court to give her understanding of what took place between Mr. Blake's mother and Ms. Greenbaum when Ms. Greenbaum talked to Mr. Blake's mother. Ms. McDermott testified; "My understanding was that in the interview between Mr. Blake's mother and Miss Greenbaum she had indicated that he had been receiving Social Security checks due to a mental disability. And then Ms. Greenbaum attempted to obtain that file from Social Security. And that was the letter that we received in response to that request." (EH June 20, 2012, VII/227).

Ms. McDermott identified Defense exhibit 74 as being a transcript of the deposition taken of Teresa Jones, also known as Teresa Dugazon, in Pennsylvania on January 5, 2012. She identified Defense exhibit 75 as being a transcript in a hearing that occurred in Pennsylvania on June 11, 2012, where Ms. Jones' gave testimony. It shows Ms. Jones was not ordered by the Court to come to Florida to testify.

The state objected to introducing Defense Exhibit 74 into evidence because it was not a motion to perpetuate testimony. The Court admitted Defense Exhibit 74 and Defense Exhibit 75 into evidence. The Court stated:

> "Very well, Um, I have had a chance to review, even last night, the transcript of the January the 6th, 2012 deposition, that was taken up in Pennsylvania of Miss Jones. And she was asked questions by both the State and the Defense, not only about her contact and her coming to Florida, and her contact with Mr. Aguero; but, also, she was asked questions about her prior testimony at the Grand Jury, and in depositions by both sides. And she gave sworn statements about what she recalled at the time. So, I think in the interest of

> justice and the fact that she is not coming here to give live testimony, I'm going to overrule the State's objection and admit 74. And, again, in 75 she appeared before the judge up in Pennsylvania, and she was asked what her present recollections were in regard to her prior testimony, and what her present recollections were. And so, again, I think I'm going to admit that as well."
> (ER June 20, 2012, VII/235).

Testimony of Sergeant Kenneth Raczynski from Transcript Of Evidentiary Hearing, held on June 20, 2012, Volume II, pages 272 — 292.

The state called Sergeant Kenneth Raczynski of the Polk County Sheriff's office as a witness. He was the lead investigator in the shooting of Mr. Patel in 2002. He first became aware of Mr. Blake's involvement based on a fingerprint found on a stolen vehicle. On August 14, 2002, Richard Green gave some other detectives a statement detailing Mr. Blake's involvement. He said Demetrius Jones contacted law enforcement saying where the gun could be located. He interviewed Mr. Jones, and Mr. Jones told him that he observed Richard Green throw the gun into a lake. Mr. Jones told him the magazine separated from the gun when it was thrown. Sergeant Raczynski said that he never talked to Richard Green. He said that Mr. Green did give a statement to law enforcement about the homicide of Mr. Patel. In that statement, Mr. Green indicated Harold Blake shot Mr. Patel. He interviewed Mr. Blake, and Mr. Blake told him he was involved in the robbery at Dell's Go Shop, and he fired the shot that killed Mr. Patel. When the gun was recovered on August 21, 2002, he did not know that the gun might have been use in a homicide that occurred earlier in Lakeland. He ended up working with Detective Grice of the Lakeland Police Department when both of them realized Mr. Blake was a suspect in both of their cases.

On redirect, Sergeant Raczynski said that Terrell Smith took them to where Mr. Green allegedly threw a gun in Lake Bonine [sic]. They did not find the gun for which they were looking. Instead, they found a Stern Rueger 44 caliber revolver. Five days later, when Demetrius Jones showed them where a gun had been thrown in Lake Bonine [sic], they found a nine millimeter. That was the murder weapon and the gun used in the murder of Kelvin Young. The nine millimeter that was found did not have a magazine in it.

Testimony of William Sites, Esq., from Transcript Of Evidentiary Hearing, held on June 20, 2012, Volume II, pages 292 — 302.

Attorney William Sites was called as a witness by the State. He represented Teresa Jones in a criminal case being prosecuted by Hardy Pickard. He engaged in plea discussions with Mr. Pickard. Ms. Jones entered into a plea. He testified that during the plea discussions nothing was brought up about a homicide case that had to do with Mr. Blake. He said the case he worked on for Ms. Jones involved an armed robbery. Ms. Jones's defense was that her involvement was minimal. She was driving a car when she was directed to follow a car and pull in beside it where a robbery occurred. She pled to misdemeanor petit theft. He did not remember representing her again after the plea.

Testimony of Cass Castillo, Esq., from Transcript Of Evidentiary Hearing, held on June 20, 2012, Volume II, pages 302 - 320.

Assistant State Attorney Cass Castillo was called as a witness by the State. He handled the prosecution of Mr. Blake for the murders of Kelvin Young and Mr. Patel. He became familiar with Vanbossell Preston, who he said testified in the Kelvin Young case. He testified that he did not tell Mr. Preston that if he cooperated with the prosecution he would get off scot-free on some charges that were pending. His recollection was that Mr. Preston had some charges pending. He was shown Defense Exhibit Ten which was a felony plea form involving a plea agreement with Vanbossell Preston. Mr. Castillo said that his signature was on the form. He said that as part of the plea agreement Mr. Preston agreed to appear and testify truthfully in future court proceedings. Mr. Castillo said that he signed the agreement on December 15, 2003. Mr. Castillo said that he did not think Mr. Preston had cases pending when Mr. Blake's trial on Kelvin Young came about. Mr. Castillo testified that he used the murder of Kelvin Young as an aggravating factor in the Patel Homicide trial. He testified that he never promised Mr. Preston that he would get off of probation as long as he testified.

(PCR V45/7606-7640).

The additional facts specifically relating to the due process post-conviction claim (Issue I) will be addressed within Issue I of

the instant brief. On August 31, 2012, the trial court denied post-conviction relief on the guilt phase, but granted a new penalty phase. (PCR V45/7600-99). The State did not cross-appeal the order granting a new penalty phase and this Court has stayed the new penalty phase pending the outcome of this appeal. See, *Maharaj v. State*, 778 So. 2d 944, 948 (Fla. 2000).

SUMMARY OF THE ARGUMENT

Blake was afforded seven days of evidentiary hearings and the defense presented testimony from 31 witnesses in post-conviction. Blake was provided with meaningful access to the courts and judicial proceedings below and his comprehensive post-conviction proceedings comported "with fundamental fairness."

The trial court correctly denied Blake's post-conviction claims (based on *Strickland*, *Brady*, newly discovered evidence/witness recantation and *Ake v. Oklahoma*). The trial court applied the appropriate legal standards and set forth detailed factual findings which are supported by competent, substantial evidence. Inasmuch as no procedural or substantive errors have been shown with regard to the factual findings or the trial court's application of the relevant legal principles, no relief is warranted and this Court should affirm the trial court's order denying post-conviction relief.

ARGUMENT

ISSUE I

THE DUE PROCESS POST-CONVICTION CLAIM

Due Process in Post-Conviction

Both this Court and the United States Supreme Court have recognized that due process protection is greatly reduced following a conviction and that only reasonable access to the courts is required. *Kokal v. State*, 901 So. 2d 766, 778 (Fla. 2005) ("all that due process requires is that the defendant be provided meaningful access to the judicial process"); *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987) (post-conviction relief procedures are constitutional if they "compor[t] with fundamental fairness"); See also, *District Attorney's Office for the Third Judicial District v. Osborne,* 557 U.S. 52, 69 (2009). Blake was provided with meaningful access to the courts and judicial proceedings below and his comprehensive post-conviction proceedings comported "with fundamental fairness."

The Post-Conviction Proceedings Below

Seven days of evidentiary hearings were held in this post-conviction case. Of the 34 witnesses[3] who testified in post-

[3]The following witnesses testified:
March 28, 2011: Cass Castillo, Esquire; Hardy Pickard, Esquire; Richard Green; and Gil Colon, Esquire.
March 29, 2011: Gil Colon, Esquire (continued); Travell Jones; and Al Smith, Esquire.
March 30, 2011: Al Smith, Esquire (continued); Barry Crown, Ph.D; and Richard Ofshe, Ph.D.
March 31, 2011: William Mitchell; Kelly Govia; Patrick Colston;

conviction, the defense called 31 of them. Blake's evidentiary hearing was scheduled for five consecutive days. It began on Monday, March 28, 2011, and was expected to conclude by Friday, April 1, 2011. However, on Friday, April 1, 2011, the trial court announced:

> We ran out of time. We scheduled this for one week, and it is ten minutes after four on Friday, and I have to say that I tried to move it along as best I could. But we simply ran out of time. Do you have an estimate between you all as to if we need a day or half day, two days.
>
> (PCR V16/2724).

Thus, by April 1, 2011, the majority of Blake's post-conviction case had already been presented and only a couple of additional days remained. Blake's investigator, Rosa Greenbaum, interviewed Teresa Jones in Pennsylvania on March 20, 2011 (the week before the evidentiary hearing commenced). Greenbaum did not obtain a taped statement or affidavit from Teresa Jones. Instead, on August 23, 2011, Greenbaum submitted her own affidavit, describing what Teresa purportedly told Greenbaum five months earlier.

Shaun Agharkar, M.D.; Susan Leverett; Stanchez Preston; Monica Underwood; DeCarlos Brown, Marlon Mizelle; Pamela Wynter; Shenard Dumas; and Vontrice Brown.
April 1, 2011: Patrick Colston (recalled); Vontrice Brown (continued); Vontricia Mays; Priscilla Hatcher; and James Blake.
June 19, 2012: Tyrone Summerall; Sergeant Kenneth Raczynski; Gil Colon (recalled); Terrell Smith; Vanbossell Preston; and Demetrius Jones.
June 20, 2012: William Mounts; Dan Ashton; Linda McDermott, Esquire; Detective Brad Grice; William Sites, Esquire; Cass Castillo (recalled); Chuck Zeller and Linda McDermott (recalled).

When ASA Aguero telephoned Teresa in Pennsylvania and informed her of Greenbaum's allegations, Teresa responded with the expletive, "bull---t." (PCR V40/6869; V37/6537). At her deposition in Pennsylvania, Teresa reiterated that "everything" [Greenbaum] said was "bull---t." (PCR V40/6794; V43/7328; 7329).

Greenbaum's affidavit was filed in the trial court on August 23, 2011. (PCR V37/6396-6399). The next day, the State issued a subpoena for Greenbaum to appear before the grand jury on September 8, 2011. See, § 905.185, Florida Statutes. On September 7, 2011, the prosecutor agreed to withdraw the subpoena during the pendency of the post-conviction proceedings below. (PCR V37/6441; V38/6529; 6531). In light of the State withdrawing the subpoena for that time period, the defense also moved to withdraw the defense-filed pleadings regarding the motion to quash the subpoena for that time period. (PCR V37/6438-6441).

On September 21, 2011, the defense requested a continuance and informed the trial court that Greenbaum would refuse to testify, would invoke the Fifth Amendment, and would no longer work as an investigator on Blake's post-conviction case. (PCR V38/6461; 6473). The trial court granted the continuance and stated "not attributing bad faith." (PCR V38/6490).

Eventually, the balance of the evidentiary hearing was held on June 19 and 20, 2012. In other words, fourteen months after the conclusion of the five-day evidentiary hearing, and nine months after the subpoena to Greenbaum was withdrawn, the final two days

of post-conviction testimony were held in this case. During the interim time period, on November 22, 2011, the trial court ruled that the defense could depose Teresa Jones concerning her communication with the State, obtain any notes, memorandum, e-mails or records in her possession concerning her communications with the State; and following her deposition, the defendant could re-visit his request to depose ASA Aguero and request for disclosure of discovery from the State concerning ASA Aguero's communications with Teresa Jones. (PCR V38/6595). During the deposition of Teresa Jones in Pennsylvania in January of 2012, defense counsel did not ask her about any notes, memorandum, e-mails or records in her possession concerning her communications with the State.

On June 18, 2012, the trial court denied Blake's motion for discovery, motion for sanctions and motion to disqualify the SAO and ASA Aguero. (PCR V40/6900-6901). Although the trial court found the prosecutor's actions "were intended to drive" Greenbaum from the witness stand, a conclusion which the State has steadfastly denied, the trial court also found that it did not result in actual prejudice to the defense because:

> The Court granted a continuance of the evidentiary hearing on 21 September so the defense could retain a new investigator. The evidentiary hearing was reset to resume in late December 2011, and then continued to resume on 19 June 2012. This has permitted a nine month delay for a new investigator to become familiar with the case and establish rapport with the witnesses. The Court can find no actual prejudice as it relates to GREENBAUM.
>
> (PCR 40/6900).

In denying the defense motions for discovery and sanctions and to disqualify the SAO and ASA Aguero, the trial court also reviewed Teresa's deposition and specifically found that "she has not been driven from the witness stand by threats of prosecution." (PCR V40/6901). The trial court's order stated, in pertinent part:

> 5. The Court authorized a discovery deposition of JONES to be taken to determine facts surrounding her alleged change in testimony and refusal to testify. **This deposition conducted on 06 January 2012 does not demonstrate actual prejudice based on prosecutorial misconduct. She did not testify that she was threatened or intimidated by ASA Aguero. She testified that he read the affidavit of GREENBAUM to her over the telephone and she disputed the statement attributed to her about seeing guns in Blake's possession and statements by Blake about shooting someone. In fact, she deposed (pg. 18) that the man she talked to on the telephone identified himself and did not give her much information, but did tell her to cooperate with the defense. . . .**
>
> * * *
>
> **It appears that JONES certainly has no interest in personally appearing at a hearing in Florida, but the Court finds that she has not been driven from the witness stand by threats of prosecution.** It is charitable for the Court to find that her many sworn statements of the course of ten years have been inconsistent.
>
> 6. The defense seeks to depose the prosecutor assigned to handle the post-conviction hearing, ASA John Agouero about his contacts with JONES, to discover his e-mails and telephone messages about contacts with JONES, and to disqualify him and the entire office from handling the post-CONVICTION HEARING. There is no evidentiary basis justifying these requests.
>
> (PCR V40/6901).

Argument

Relying on the hearsay statements from Greenbaum, Blake alleges that when Greenbaum interviewed Teresa Jones [Dugazon] in

Pennsylvania, Teresa "admitted that her testimony regarding seeing Blake retrieve guns from the abandoned car was false"[4] and that "Blake did not make any inculpatory statements about shooting someone." (Initial Brief at 33-34). As previously noted, at her deposition in Pennsylvania, Teresa acknowledged that she'd described Greenbaum's claims as "bull---t." (PCR V40/6794; V43/7328; 7329). Teresa reiterated that Greenbaum's affidavit [about Teresa allegedly recanting her trial testimony] was a lie. (PCR V40/6794; 6908, 6910-6911; V43/7328-7329). The bottom line, as Teresa explained to the Court in Pennsylvania, was that she has "nothing to help Blake out." (PCR V40/6909-6911; 6922-6923). The Pennsylvania Court ruled that a certificate of materiality should not issue based on the testimony of Teresa Jones "which confirms her testimony given at the time of trial and in a subsequent deposition according to the witness, and the witness has testified under oath that the affidavit of Investigator Greenbaum to the contrary is not true, *that she never withdrew statements or testimony that she had given at trial and if she were called to testify would testify in conformity with her testimony at trial*." (PCR V40/6924; V43/7373) (e.s.).

Blake argues that the trial court erred in denying his post-

[4]Teresa told the grand jury that she saw Blake take the guns out of the car. At trial, Teresa testified that she told the truth to the grand jury (R V8/864) and that what she told the grand jury - about seeing Blake take the guns out of the car - was true. (R V8/867; 872). During her 2012 deposition, Teresa maintained that Blake was the one who got the sweater and gun out of the car. (PCR V43/7341).

conviction motions (1) to disqualify ASA Aguero and the State Attorney's Office for the Tenth Judicial Circuit, (2) for sanctions and (3) for discovery of ASA Aguero. Blake claims that he is "entitled" to a new trial.[5] (IB at 37; 43). For the following reasons, none of Blake's post-conviction complaints, individually or cumulatively, warrant relief.

Disqualification

There is nothing improper about the State conducting an investigation into allegations of criminal acts. See, § 27.03 and § 27.04, Florida Statutes. Blake asserts that the subpoena to Greenbaum meant that the State launched an investigation into Blake's entire "defense team." (Initial Brief at 38). Blake's accusation is rank speculation which was denied by ASA Aguero below. (PCR V37/6538; V40/6867-6869). Further, the timing of the subpoena, the day after Greenbaum filed her affidavit,

[5]Blake asked the court below to either grant him a new trial or require the State to provide Greenbaum and Teresa Jones with immunity. The defense and the court may not compel the State Attorney to grant immunity to a witness. The State Attorney's Office is a distinct constitutional arm of state government. See, Art. V § 17, Fla. Const. Florida adheres to a "strict separation of powers doctrine" that includes the "State's broad, underlying prosecutorial discretion." *State v. Cotton*, 769 So. 2d 345 (Fla. 2000). The charge decision and any decision to grant or not grant immunity is within the exclusive province of the State Attorney's Office, not the judiciary, and "any judicial attempt to interfere with the decision whether and how to prosecute violates the executive component of the state attorney's office." See, *Office of State Attorney v. Parrotino*, 628 So. 2d 1097, 1099 n. 2 (Fla. 1993); *Fountaine v. State*, 460 So. 2d 553, 555 (Fla. 2d DCA 1984) (noting that the authority to grant immunity historically lies with the state and not the court, citing *State v. Harris*, 425 So. 2d 118 (Fla. 3d DCA 1982) (collecting cases).

substantiates that it was Greenbaum's affidavit, alone, that was interjected as a collateral matter into this post-conviction proceeding.

Disqualification is proper only where actual prejudice can be demonstrated. In *McWatters v. State*, 36 So. 3d 613, 636 (Fla. 2010), this Court reiterated:

> . . . **Actual prejudice is 'something more than the mere appearance of impropriety.' Disqualification of a state attorney is appropriate 'only to prevent the accused from suffering prejudice that he otherwise would not bear.'"** *Farina v. State*, 680 So.2d 392, 395–96 (Fla. 1996) (citations omitted) (quoting *Meggs v. McClure*, 538 So.2d 518, 519–20 (Fla. 1st DCA 1989)). A ruling on a motion to disqualify is reviewed for abuse of discretion. *Id*. at 395.

See also, *Huggins v. State*, 889 So. 2d 743, 768 (Fla. 2004).[6] Just as the defense was free to contact Teresa Jones in post-conviction, it was, and remains, entirely proper for the State to contact trial witness Teresa Jones, particularly in light of Blake's allegation that Teresa purportedly recanted pertinent portions of her trial testimony.

Blake has argued that the State should have waited until after

[6]*In Huggins*, 889 So. 2d at 768, fn. 13, this Court noted the following limited exception and stated, "[o]n a case-by-case basis, specific or actual prejudice will not be required where the appearance of impropriety is strong. For example, this Court has held that a pretrial motion to disqualify a prosecutor who previously defended the defendant in any criminal matter that involved or likely involved confidential communications with the same client should be granted. See, *Reaves v. State*, 574 So. 2d 105, 107 (Fla. 1991). . ."

the conclusion of the post-conviction evidentiary hearing to subpoena Greenbaum. That became the status of the case anyway by virtue of the State withdrawing the subpoena in post-conviction. Moreover, as the trial court noted, it "permitted a nine month delay for a new investigator to become familiar with the case and establish rapport with the witnesses. The Court can find no actual prejudice as it relates to GREENBAUM." (PCR 40/6900).

Greenbaum's circumstances were directly attributable to her own affidavit – it was not created by the State Attorney's Office or ASA Aguero. The trial court granted a remedy to the defense - a lengthy continuance – to accommodate the substitution of another investigator. Further, Greenbaum did not have any first-hand knowledge of the crime or Blake's jury trial; any information Greenbaum heard from others was pure hearsay.

Although Greenbaum did not testify (assuming she could testify to pure hearsay), the trial court nevertheless addressed the hearsay allegations in Greenbaum's affidavit. The "loss" of an investigator who allegedly had rapport with a few remaining witnesses, could introduce the witnesses to defense counsel, and assist counsel in preparing for a hearing – a hearing that was continued for nine months to accommodate the substitution of another investigator - failed to meet the high standard of "actual prejudice." Furthermore, the fact that Blake alleged that ASA Aguero had become a potential witness was an insufficient basis for disqualification. See, *Roberts v. State*, 840 So. 2d 962, 970 (Fla.

2002) (finding no merit to claim that the ASA should have been disqualified from serving as both prosecutor and witness). Moreover, in court and in pleadings filed below, ASA Aguero disclosed his telephone contacts with Teresa Jones and the content of those calls. (PCR V38/6535; 6537; 6570; V40/6869).

Sanctions

Again, this Court has held that, in post-conviction proceedings, "all that due process requires is that the defendant be provided meaningful access to the judicial process." *Kokal*, 901 So. 2d at 778; See also, *Osborne*, 129 S. Ct. at 2320 (noting whether consideration of Osborne's claim within the framework of the State's procedures for post-conviction relief "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or "transgresses any recognized principle of fundamental fairness in operation").

The trial court specifically found that Teresa Jones "has not been driven from the witness stand by threats of prosecution." (PCR V40/6901). That finding is supported by competent, substantial evidence, including Teresa's deposition in Pennsylvania, Teresa's testimony before the Pennsylvania court and the Pennsylvania court's findings in denying the certificate of materiality.

Blake's cited cases all relate to trial proceedings, not to any claim of alleged impropriety in post-conviction. For example, in *Berger v. United States,* 295 U.S. 78, 84 (1935), the federal prosecutor, *at trial*, misstated the facts in his cross-examination

of witnesses; suggested that statements had been made to him personally out of court, without offering any proof on those statements; pretended to understand that a witness had said something which he had not said and persistently cross-examined the witness upon that basis; assumed prejudicial facts not in evidence; and bullied and argued with witnesses at trial. In *Webb v. Texas*, 409 U.S. 95 (1972), the defendant was prevented from his only witness's testimony *at trial*. In *Webb*, the trial judge told the witness:

> Now you have been called down as a witness in this case by the Defendant. It is the Court's duty to admonish you that you don't have to testify, that anything you say can and will be used against you. If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the liklihood [sic] is that you would get convicted of perjury and that it would be stacked onto what you have already got, so that is the matter you have got to make up your mind on. If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve. It will also be held against you in the penitentiary when you're up for parole and the Court wants you to thoroughly understand the chances you're taking by getting on that witness stand under oath. You may tell the truth and if you do, that is all right, but if you lie you can get into real trouble. The court wants you to know that. You don't owe anybody anything to testify and it must be done freely and voluntarily and with the thorough understanding that you know the hazard you are taking.

Webb, 409 U.S. at 95-96. *Webb* indicated that it would have been permissible for the Judge to provide the witness a simple Fifth Amendment-type warning, but "the judge did not stop at warning the witness of his right to refuse to testify and of the necessity to

tell the truth." *Webb*, 409 U.S. at 97 [7]

In *Hendrix v. State*, 82 So. 3d 1040 (Fla. 4th DCA 2011), the issue on appeal was whether the prosecutor's statement (that he intended to charge Hendrix's witness if the witness testified like he did in a prior statement), violated Hendrix's due process right to present a defense *at trial*. Blake argues that, "[i]n *Hendrix*, the Court held that petitioner was entitled to a new trial, at which the State would either provide the witness who had been intimidated with immunity, or the defendant would be acquitted." (Initial Brief at 41-42). This is a misleading representation of the decision in *Hendrix.* Although *Hendrix* did hold that the defendant was entitled to a new trial; *Hendrix* NEVER mentioned anything akin to providing "the witness who had been intimidated with immunity, or the defendant would be acquitted."

Similarly, *United States v. Morrison*, 535 F.2d 223, 228 (3d Cir. 1976), is also another *trial* case. In *Morrison*, the Court held

[7]In *Hill v. State*, 847 So. 2d 518, 521 (Fla. 5th DCA 2003), the judge admonished a recanting victim-witness when she took the witness stand in a post-conviction evidentiary hearing. The court also asked the victim whether she wanted to go forward with the hearing or talk to an attorney and she responded that she wanted to talk to an attorney. Subsequently, the victim-witness invoked her Fifth Amendment privilege, and the defendant had no evidence to present to support his post-conviction motion, which was denied. *Hill* was affirmed in part, and remanded for further proceedings, but the Fifth DCA also noted, "[T]he court informed the victim in a neutral and objective manner of her potential for perjury charges. A judge may advise a witness of his or her rights when the witness is potentially exposing himself or herself to criminal liability such as perjury." *Hill*, 847 So. 2d at 522.

that "[w]here the Government has prevented the defendant's witness from testifying freely *before the jury*, it cannot be held that the jury would not have believed the testimony or that the error is harmless." (e.s.) And, *Lee v. State*, 324 So. 2d 694, 698 (Fla. 1st DCA 1976) is another *trial* case.

Discovery

As previously noted, ASA Aguero addressed the matter of his telephone contact with Jones below, both in open court and in pleadings filed below. In response to Blake's claim of alleged recantation by Teresa Jones and suggestion that a certificate of materiality should issue for Teresa Jones, ASA Aguero telephoned Teresa Jones in Pennsylvania. ASA Aguero informed the trial court and the defense that when Teresa was asked about Blake's claim of alleged recantation of her trial testimony, Teresa denied telling Greenbaum anything different than what Jones testified to at trial. When Greenbaum's affidavit was filed with the trial court, ASA Aguero once again telephoned Teresa Jones. Upon being advised of the contents of paragraphs #4 and #5 in Greenbaum's affidavit, Teresa interjected "bull---t" and declared that she never made the statements that Rosa Greenbaum's affidavit claimed that she [Jones] had made. (PCR V38/6535; 6537; 6570; V40/6869). Blake was not entitled to any additional work product or confidential material generated during this post-conviction litigation, including ASA Aguero's notes, memorandum, e-mail or recordings. See, *Evans v. State,* 995 So. 2d 933, 941 (Fla. 2008) (correspondence by assistant

state attorney, containing mental impressions about the claims raised in defendant's post-conviction motion, was exempt from disclosure as attorney work product in post-conviction proceedings); *Kearse v. State*, 969 So. 2d 976 (Fla. 2007) (same) (receded from on other grounds, *Wyatt v. State*, 71 So. 2d 86, 100 (Fla. 2011)).

Blake was provided with meaningful access to the courts and judicial proceedings below and his comprehensive post-conviction proceedings comported "with fundamental fairness."[8]

ISSUE II

THE IAC/GUILT PHASE CLAIM

Next, Blake argues that the trial court erred in denying his claim of ineffective assistance of counsel at the guilt phase. (Initial Brief at 43-75). For the following reasons, the trial court's order denying Blake's IAC/guilt phase claim should be affirmed.

Standards of Review

In *State v. Fitzpatrick*, 2013 WL 3214428 (Fla. 2013), this Court recently summarized the *Strickland* standards as follows:

> . . . Ineffective assistance of counsel claims are evaluated in accordance with the United States Supreme Court's decision in *Strickland*. We recently described what a defendant must establish to succeed on a claim that trial counsel was ineffective:

[8]Blake also criticizes ASA Aguero for seeking a capias for Vanbossell Preston in post-conviction. However, Vanbossell testified at the Lakeland (Young) homicide trial and Preston's statement to Detective Grice was presented via Detective Grice at the penalty phase of the Patel homicide trial.

[T]he test when assessing the actions of trial counsel is not how, in hindsight, present counsel would have proceeded. See *Cherry v. State*, 659 So.2d 1069, 1073 (Fla. 1995). On the contrary, a claim for ineffective assistance of trial counsel must satisfy two criteria. First, counsel's performance must be shown to be deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance in this context means that counsel's performance fell below the standard guaranteed by the Sixth Amendment. *Id.* When examining counsel's performance, an objective standard of reasonableness applies, *id.* at 688, 104 S.Ct. 2052 and great deference is given to counsel's performance. *Id.* at 689, 104 S.Ct. 2052. The defendant bears the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). This Court has made clear that "[s]trategic decisions do not constitute ineffective assistance of counsel." See *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000). There is a strong presumption that trial counsel's performance was not ineffective. See *Strickland*, 466 U.S. at 669, 104 S.Ct. 2052.

Second, the deficient performance must have prejudiced the defendant, ultimately depriving the defendant of a fair trial with a reliable result. [*Id.* at] 689, 104 S.Ct. 2052. A defendant must do more than speculate that an error affected the outcome. *Id.* at 693, 104 S.Ct. 2052. Prejudice is met only if there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052. Both deficient performance and prejudice must be shown. *Id.*

Bradley v. State, 33 So.3d 664, 671–72 (Fla. 2010)

(parallel citations omitted). Because *Strickland* requires that a defendant establish both deficiency and prejudice, an appellate court evaluating a claim of ineffectiveness is not required to issue a specific ruling on one component of the test when it is evident that the other component is not satisfied. See *Mungin v. State*, 932 So.2d 986, 996 (Fla. 2006).

Furthermore, this Court examines ineffective assistance claims under a mixed standard of review because the performance and prejudice prongs of *Strickland* present mixed questions of both law and fact. *Bradley*, 33 So.3d at 672. Postconviction courts hold a superior vantage point with respect to questions of fact, evidentiary weight, and observations of the demeanor and credibility of witnesses. See *Cox v. State*, 966 So.2d 337, 357–58 (Fla. 2007). As a result, this Court defers to the postconviction court's factual findings so long as those findings are supported by competent, substantial evidence. See *Bradley*, 33 So.3d at 672. However, we review the postconviction court's legal conclusions *de novo*. *Id.*

The Circuit Court's Order

In denying Blake's IAC/guilt phase claim after an evidentiary hearing, the trial court entered a fact-specific and detailed written order which stated, in pertinent part:

The Defendant alleges that his trial counsel filed only one substantive motion prior to trial, a motion to suppress. This motion was filed in response to a pro se Motion to Suppress filed by the Defendant. The Defendant alleges that trial counsel did not file any motions regarding change of venue, the jury selection process, the limitations or admissibility of evidence or argument, or on the death penalty.

Although, the Defendant alleges his counsel did not file any motions related to venue, jury selection, limitations or admissibility of evidence or argument, or on the death penalty, he did not show at the evidentiary hearing how counsel was deficient in not filing such motions or how the Defendant was prejudiced by the failure of his attorneys to file such additional motions.

The Defendant alleges that trial counsel requested an investigator to assist the defense. However, after

the Court granted their motion, the defense did not retain an investigator to work on the Defendant's case. The Defendant alleges that the contact defense counsel had with witnesses occurred over the telephone and most of the conversations were very short. The Defendant alleges that trial counsel failed to conduct an independent investigation and failed to depose several critical witnesses.

Claim II of the Defendant's Motion is best addressed in four sub-parts. The Court will discuss each of these sub-parts one at a time.

1. **Failure to Present Exculpatory Evidence through Cross-Examination and the Presentation of Witnesses and to Challenge State Witnesses**.

The Defendant alleges that Trial counsel failed to utilize evidence at hand and failed to develop other evidence that was available. The defense alleges that in his statement to Detective Raczyski [sic], Kevin Hall said that Mr. Blake was not present when he heard Green and Key discussing a robbery. Mr. Hall said he never saw Mr. Blake on August 11 or 12. The Defense alleges that trial counsel never spoke to Mr. Hall. Mr. Hall would have been available to testify that Jones was lying about Mr. Blake being present when the robbery was discussed, which would have refuted the State's theory that Mr. Blake was aware of the robbery plot. At the evidentiary hearing, the defense did not call Kevin Hall as a witness, and the Court does not have a sufficient basis to assess the importance of his probable testimony or his credibility.

The Defendant alleges that trial counsel made no inquiry into the fact that Demetrius Jones was listed as a suspect in the homicide. Defense counsel alleges trial counsel did not effectively question Mr. Jones about his criminal background or the dealings he had with law enforcement for beneficial treatment on the various matters he was involved with. Although, it could be argued that trial counsel may have been able to more strongly present an argument that Mr. Jones was receiving more benefit for his testimony that he indicated in his trial testimony had counsel more thoroughly looked at Mr. Jones charges and criminal history, a review of the trial transcript shows that Mr. Jones admitted at trial that he had pending criminal charges and was not going to be sentenced until after he testified. He admitted that he had no guarantees, but he was hoping for lenient treatment. He admitted he had outstanding warrants in

August 2002, but he was not arrested on them due to the cooperation he was giving. He was also released on a Violation of Probation.

The Defendant alleges that counsel failed to bring out the unreliability of Demetrius Jones' testimony at trial based on the version of events he gave to law enforcement on August 20. The Defendant alleges that Demetrius Jones told law enforcement in his August 20th statement that Green was looking for Key on August 20, 2002, so he could instruct Key to tell the police that Key was the driver on August 12. The Defendant asserts that there was no need for Green to do this if he was telling the truth. In this same statement, Jones contradicted his testimony when he told law enforcement that Key and Green were plotting the robbery and Mr. Blake was not present. The Defendant also alleges that Jones initially told law enforcement that Green and Key went to get Mr. Blake and woke him up. When they brought Mr. Blake back, he still did not want to be involved in a robbery. Jones told law enforcement his opinion was that Green was trying to shift all of the blame to Blake and Key.

At Mr. Blake's trial, Mr. Jones testified that he knew Mr. Green and had met Mr. Blake through Richard Green. He testified that Mr. Green's nickname was "Plump". He testified that he was talking with Richard Green, Mr. Blake, and Kevin Key ("Red Man") at his home early in the morning on August 12, 2002. Mr. Blake, Green, and Key had arrived at his home between 3:00 a.m, and 4:00 am. in an older model four door car. Mr. Blake was driving. Mr. Green was in the passenger seat in front and Kevin Key was in the back. The back passenger window of the car was broken out. There was broken glass on the back seat of the car. He saw two guns in the car. One of the guns was a 38 caliber revolver and the other gun was a 9 mm. Mr. Green had the revolver in the front of his hoodie sweater and the 9 mm was on the front seat. He had previously seen Green and Blake with the guns. Mr. Jones said they were supposed to go to Lakeland and rob people who sold drugs. He said that Mr. Blake asked him to go with them, but he did not do so after talking with Kevin Key about it. Kevin Key, Green, and Blake left in the car. Mr. Green was driving, Mr. Blake was in the front passenger seat, and Kevin Key was in the back of the car.

Mr. Jones testified that he ran in to Mr. Blake later in the day, and Mr. Blake was acting nervous. He said that Mr. Blake told him they were trying to do a robbery. Mr. Blake told him that someone got shot. He

asked him to help him get rid of a gun. Mr. Blake did not have the gun with him. He told Mr. Blake that he would try to sell it to some Jamaican people. He also had contact with Richard Green later in that day. Mr. Green had a 9 mm gun. They tried to sell it to some Jamaicans, but they were unsuccessful. Later that night possibly on the 13th he went with Mr. Green in Teresa Jones' car to a lake. Mr. Green threw the gun into the lake, and it separated into two pieces as it flew through the air.

On cross-examination, Mr. Jones was confronted with a statement by defense counsel that he had given to Detective Raczynski on August 20, 2002, concerning what occurred during the early morning hours of August 12. In his statement, Jones told law enforcement that he, Richard Green and "Red Man" were talking about doing a robbery. In the statement he said that they tried to call Mr. Blake. When Mr. Jones testified that it was Mr. Blake's idea to do a robbery, defense counsel once again showed Mr. Jones the August 12 statement, and Mr. Jones agreed that what the statement said was correct. On further cross-examination, Mr. Jones seemed to be saying that Mr. Blake suggested robbing people with some weed, then he said he didn't feel like it, and then he wanted to go rob someone.

The Court notes that a review of the trial transcript indicates that defense counsel extensively questioned Mr. Jones about the statement he gave to Detective Racynski. [sic] Defense counsel thoroughly questioned Mr. Jones about his assertion at trial that Mr. Blake was the one that suggested that they rob somebody. Mr. Jones' testimony about who was involved in the plans to commit a robbery was confusing.

At the evidentiary hearing, Demetrius Jones said that he remembered telling Ms. Greenbaum that Key had told him that Green was the shooter. Mr. Jones said that he told Ms. Greenbaum that Mr. Green took the guns in a backpack from the car. He said that Mr. Green tried to sell the guns. He said Mr. Green later told him that he had thrown a gun in the lake. Mr. Jones said Green told him he wanted to speak to his cousin Kevin Key so he could tell him what to say. He said Mr. Blake never told him anything. On cross-examination, Mr. Jones was asked if he remembered testifying that he saw Key, Blake and Green talking about going to do a robbery that hadn't happened yet. He said yes, but Mr. Blake wasn't there. He said he did not remember testifying that Mr. Blake was there at that point in time. He testified that Green was

the first person who told him something happened. Mr. Jones was asked about the trial transcript which indicated that around noon or 1 o'clock he saw Mr. Blake in Winter Haven. Mr. Blake was looking nervous, and he testified at the trial that Mr. Blake said somebody got shot. Mr. Jone's [sic] said he did not remember saying that. He agreed he probably did say that at the trial. At this point in time, he did not remember Mr. Blake saying that.

The Court finds that Mr. Jones's testimony at the evidentiary hearing was not credible. Although somewhat confusing, his testimony at trial regarding Mr. Blake's involvement in the robbery, and his explanation regarding what Mr. Blake told him later on the day of the robbery, were more credible than what he said at the evidentiary hearing. The Court does not find that counsel's performance fell below an objective standard of reasonableness with respect to addressing the testimony provided by Mr. Jones at the trial.

The Defendant also alleges that if trial counsel had investigated Teresa Jones he could have totally diminished the impact of her testimony. She was Green's girlfriend, and she told individuals that law enforcement threatened to take her kids unless she said what they wanted her to say. Ms. Jones was being investigated in December 2002 for child abuse, but the investigation was closed shortly after it commenced. The Defendant alleges that Ms. Jones in 2002 was telling those around her that Green was the shooter in the Patel homicide. Green also told others that he was instructing Jones how to testify. The Defendant alleges that trial counsel conducted no investigation into Ms. Jones and was caught off guard when the State revealed that Jones had pending charges throughout much of the prosecution of Mr. Blake. The Defendant alleges that trial counsel failed to adequately challenge the testimony of Teresa Jones.

Prior to beginning his direct examination of Teresa Jones, ASA Cass Castillo advised the Court and the defense that it had come to his attention that Ms. Jones had a pending robbery charged. He testified that he did not know she had been arrested and had pending charges. Defense counsel said that they were unaware of Ms. Jones arrest. Defense Counsel Gil Colon asked to voir dire Ms. Jones before doing any cross-examination of her. Her testimony was bifurcated to give the defense a chance to look into the situation.

During her testimony at the trial, Ms. Jones frequently had to review testimony she gave at the grand jury to refresh her memory. During her direct examination at Mr. Blake's trial, Teresa Jones testified that she was living with her boyfriend Richard Green and her children at Lake Deer Apartments in August 2002. Around 7:00 am in the morning on August 12, Richard Green, Mr. Blake, and someone known as "Red Man" arrived at her apartment. She drove them to a light colored car that was parked on the side of the road. The car was running, and one of the men got out of the car and got something out of the parked car. She could not remember which man got out of the car. **Ms. Jones had to have her memory refreshed by looking at her grand jury transcript. After doing so, she agreed that she told the grand jury that Mr. Blake had told her to go to the car on the side of the road. Mr. Blake had gotten out of the car and retrieved, two guns from the car parked on the side of the road. Ms. Jones testified that when they were in the car, Mr. Blake told her that he had shot someone that day. She said this after having her memory refreshed again with the grand jury transcript. Ms. Jones was asked if she was afraid at one time of Mr. Blake or his family, and she said that she was a little bit afraid. She agreed that this was why she hesitated telling the grand jury that Mr. Blake had removed the guns from the car on the side of the road.**

She testified that she dropped off "Red Man" at a convenience store and dropped off Mr. Blake at the Scottish Inn where he was staying. She then took Richard Green back to her apartment and took her kids to school. Police were at her apartment when she returned. She talked to police and told them that Mr. Blake and another person had come to her apartment that morning, but she did not give them Richard Green's name. She gave the police a statement later that day and said that most of it was truthful, but some of it wasn't. She gave another statement on August 14. She testified that she told Richard Green that he needed to go talk to the police and tell them what was going on or she would tell them that all of them came to the house.

Prior to cross-examining Ms. Jones, counsel for the defense met with ASA Hardy Pickard who had made the plea agreement with Ms. Jones. At the trial, Mr. Colon said "Now, we — both Mr. Smith and I spoke with Mr. Pickard. We are satisfied with his responses as to the reasons for the negotiated plea in that case. Nonetheless, I believe

it's fair game to cross-examine her on the fact that she was charged with a crime similar to this crime and that she entered a plea to a much lesser offense without suggesting that it was based on any promises of testimony. It just shows the type of behavior that she's engaged in as related to all the participants in this case."

On cross-examination, she testified that she did not know whether it was Mr. Green or Mr. Blake who took her to the light colored car on the side of the road. She admitted that at that time she had been together with Mr. Green for a while and cared for him. Kevin Key was also in the car when they drove to the light colored car. Ms. Jones indicated that some of her testimony at the trial was based on things she had heard but not seen herself. **When Ms. Jones was asked at a prior hearing whether she had seen Mr. Blake take guns out of the car she answered "no."**

Ms. Jones was asked about her grand jury testimony where she had said that she had seen Mr. Blake take guns out of the car. Ms. Jones testified that what she said at the grand jury was true. Ms. Jones testified at the trial that she had been convicted of a crime involving dishonesty twice, and she had been convicted of a felony once. Ms. Jones also testified that on September 11, 2004 she was charged with armed robbery with a firearm, and her case was resolved two days ago with a plea to the lesser charge of Petit Theft. She said this was because she was innocent. Defense counsel also established during cross-examination that Teresa Jones had a prior drug charge, and she was placed on probation in 2002 for a period of three years.

Ms. Jones did not testify at the evidentiary hearing. The defense asserted that Ms. Jones has changed her testimony from the time of Mr. Blake's trial. The Court authorized a discovery deposition of Ms. Jones to be taken to determine facts surrounding her alleged change in testimony and refusal to testify. This deposition was conducted on 06 January 2012. In the deposition Ms. Jones testified that she "can't remember him [Blake] telling me he shot somebody" (pg. 20). Upon direct inquiry by Attorney McClain (pg.23) when asked if "Blake never told you he shot somebody" she replied "No." When asked if she recognized that in a prior deposition she said she did not remember whether Blake had any guns the morning of the murder, Ms. Jones replied "Yes" (pg.

24), indicating that she had previously made that sworn statement. Later in the deposition (pg. 28) Ms. Jones said she remembers Blake retrieving a sweater and gun from a car that morning. This deposition was admitted into evidence at the evidentiary hearing.

Ms. Jones statements over the course of the years have been inconsistent. Ms. Jones had to be reminded at Mr. Blake's trial what she had told the grand jury. At the trial, Ms. Jones said that Mr. Blake had told her that he shot somebody. At the trial, she testified that Mr. Blake retrieved a sweater and a gun from a car. She also testified that Mr. Blake retrieved a gun and a sweater from a car at the deposition that she gave on 06 January 2012.

The Court finds that the most credible testimony given by Ms. Jones was given at Mr. Blake's trial as refreshed by her grand jury testimony. At the trial, Ms. Jones was questioned by trial counsel about her inconsistent statements. The Court does not find that counsel's performance fell below an objective standard of reasonableness with regard to investigating Teresa Jones and questioning Ms. Jones about her inconsistent statements at the trial.

The Defendant alleges Counsel could have shown that the State's evidence against Mr. Blake was riddled with inconsistencies and that several witnesses had credibility problems. Counsel could have shown that Green planned the robbery and shot Mr. Patel. Donovan Steverson testified that he saw a black man with braids get into the backseat of a car. A short time later he heard a shot and saw the same man run and get into the back of the car. On cross-examination counsel failed to emphasize the fact that the man Steverson saw running to the car had braids. The Defendant emphasizes that this was very important because Green and Key had braids and Mr. Blake was bald. Trisha Alderman also said that she saw a man with a gun getting in the back of the car on the passenger side who did not have a bald head. Denard Keaton said the person getting into the back of the car wasn't tall or thin but was about 5'6" or 5'7". In his August 14 statement Green said he was riding in the back seat. Green was about 5'6" or 5'7" and wore dreads. Mr. Blake was bald and about 5'9".

The Court does not find that counsel's representation fell below an objective standard of reasonableness with respect to not emphasizing or

pointing out that the descriptions given by Donavan Steverson, Trisha Alderman, and Denard Kenton, regarding the hair or height of the people they described, seemed to point at somebody other than Mr. Blake.

The Defendant alleges that Kelly Govia told Detective Harkins that she eavesdropped on a conversation between Key and another person where Key stated that there were four people in the car and he had participated in an attempted robbery. Key said things did not go as planned and "Plump" pulled the trigger. Govia was willing and available to testify but she was never spoken to by trial counsel. At the evidentiary hearing, Ms. Govia testified that she had overheard Kelvin Key Harrington talk about a robbery and say that "Plump" had shot someone.

The Defendant alleges that another witness not spoken to by defense counsel was Angela Parker. On the morning of August 12, 2002, Parker heard Green talking to Teresa Jones. Green said that the victim was shot in the arm. It didn't look to him like the victim was shot anywhere that could kill him. Parker was called as a witness during Green's trial. The Defendant alleges that based on Green's statement it is logical to assume he was the shooter because witnesses who observed the shooting testified that only one individual was seen approaching and running from the store. Ms. Parker was not called as a witness at the evidentiary hearing.

The Defendant also alleges that Marion Clay told Detective Harkins that Green told her Key was the shooter. Neither Marion Clay, nor Detective Harkins were deposed by trial counsel. Neither Marion Clay, nor Detective Harkins were called as witnesses at the evidentiary hearing. The Court does not have a sufficient basis to assess the importance of their testimony or their credibility.

The Court agrees that the testimony of Kelly Govia, Angela Parker, and Marion Clay would arguably have been of some help to the defense in arguing that somebody other than Mr. Blake was the shooter. However, the Court does not find that counsel's performance fell below an objective standard of reasonableness in not deposing or calling these witnesses at the trial. Additionally, the Court finds that even should counsel's performance be considered deficient in this regard, there is no reasonable possibility that but for such deficiency the result of the proceedings would have been different.

2. Failure To Obtain Expert Assistance And Challenge the State's Case

The Defendant alleges that trial counsel failed to retain any experts or challenge the State's forensic evidence when conducting cross-examination. Mr. Blake's videotaped confession was an important part of his prosecution. Counsel for the Defendant filed a motion to suppress Mr. Blake's statements and admissions to law enforcement arguing that they were made involuntarily and in violation of Miranda v. Arizona, 384 U.S. 436 (1966). The Court entered an "Order Denying Motion To Suppress Statement of Accused", following an evidentiary hearing.

On his videotaped confession, Mr. Blake indicates that it was "Plump's" idea to go to the store, and he had it all planned out. He says that all of us went toward the door of the store. He says that he kept his finger on the trigger of his gun as he approached the door. He admits that he is the person that shot Mr. Patel, and he claims it was an accident. He claims Mr. Patel scared him, and his gun went off. The Defendant admits that he was read his Miranda Rights and he has not been threatened of mistreated. He says that he burned the clothes that he was wearing. On the videotape of his confession, Mr. Blake gets up and re-enacts approaching the door.

The Defendant alleges that to be properly prepared counsel should have consulted with an expert on false confessions. The officers failed to tape the entire confession. Mr. Blake seems to be reciting events not based on what he personally witnessed and experienced. Mr. Blake could not describe what the door of the store looked like. Mr. Blake could not describe the clothes he had been wearing. He could not say which door had been shot through. Mr. Blake was unable to tell law enforcement anything they did not already know. Although trial counsel urged the jury to disregard Mr. Blake's statement because it was not freely and voluntarily made and was a false confession, trial counsel did not elaborate on why the statement should be disregarded. The defense alleges that trial counsel failed to consult Dr. Ofshe or another expert in false confessions to explain why the Defendant's confession bore the indicia of a false confession. Counsel failed to present any testimony from a qualified mental health expert about Mr. Blake's mental illnesses, emotional problems, brain damage or susceptibility to coercion.

At the evidentiary hearing, counsel for the defense called Doctor Richard Ofshe, a social psychologist as a witness for the defense. Doctor Ofshe's principle area of interest for the last 30 years has been police interrogation. He has an expertise in the influence used in police interrogation. Doctor Offshe was provided with materials relating to law enforcement's description of Mr. Blake's interrogation, and Mr. Blake's description of the interrogation. He saw a video of the interrogation, received a transcript of the interrogation, and he had the opportunity to see a video of the actual crime scene. Dr. Offshe testified that he did not actually interview Mr. Blake. Doctor Offshe utilized the word fit when talking about interpretation of a confession. He said; "Fit is simply a comparison between those statements made by the suspect that are capable of objective evaluation with the objectively knowable facts of the crime." (EH March VVI/761).

Dr. Offshe was asked about Mr. Blake's statement that all of them got out of the car at the store in relationship to what is observable on the videotape at the store. The videotape only shows one person outside the store, and Dr. Offshe agreed that this was an example of something that did not fit. Another example of something that did not fit was that Mr. Blake could not answer how many doors there were at the store. Doctor Offshe agreed that some of what Mr. Blake said in his confession seemed to fit. He also indicated that some of the information about what Mr. Blake said could come from contamination by information received from law enforcement or some other source.

Dr. Offshe was asked what conclusion he could draw from the information that he had the opportunity to review in Mr. Blake's case, and what opinion he would have given at the time of Mr. Blake's trial. He said, "That the account of the interrogation tactics that were used, by Mr. Blake's account of the interrogation tactics that were used, are interrogation tactics that could precipitate a false confession. The failure of Mr. Blake's account to fit with the objectively knowable facts of the crime would be consistent with someone making up these pieces of information, and failing to know certain pieces of information, because the person was not in a position to directly observe it. In other words, the person wasn't there. **I'm — it's not for me to ever draw conclusions as to whether it's a true or false confession. I'm simply pointing out these are indicia**

that should be looked at and considered." (EH March VVI/777).

At Mr. Blake's trial, defense counsel, Gil Colon, argued that Mr. Blake's confession was a false confession. He was asked at the evidentiary hearing if thought an expert was needed to make that argument. Gil Colon testified at the evidentiary hearing that, "... I don't believe — I didn't believe that then or now, that I needed an expert to make that argument. (EH March VIII/362). The Court agrees with Attorney Colon's belief.

The Court does not find that counsel was deficient in not hiring an expert to testify about false confessions. The matter of a false confession was argued by counsel at the trial. Dr. Offshe admitted he could not give any opinion of whether or not Mr. Blake's confession was a false confession. The Florida Supreme Court in Derrick v. State, 983 So. 2d 443 (Fla. 2008), affirmed the summary denial of a similar claim involving failure to call an expert in false confessions.

The defense argues that counsel presented no testimony from a qualified mental health expert regarding Mr. Blake's emotional problems, brain damage, or susceptibility to coercion. At the evidentiary hearing, the defense called Neuropsychologist Dr. Barry M. Crown, as a witness. Dr. Crown gave his opinion that Mr. Blake has organic brain damage. Dr. Crown was asked about Mr. Blake's confession. Based on Mr. Blake's mental health functioning, Dr. Crown agreed that he was someone who would be susceptible to coercive tactics. He testified that Mr. Blake was easily led and directed based on his lack of intellectual efficiency. The defense also called Dr. Shaun Angahar, a psychiatrist, as a witness at the evidentiary hearing. Dr. Angahar found the Defendant to have three major mental illnesses. He said one was post-traumatic stress disorder, one was major depressive disorder, and one was panic disorder. He was asked if he though Mr. Blake's mental health issues could have an impact on his being able to give a statement of what happened at the interrogation. He responded, "Well, you know, again, I think of him as a traumatized, brain damaged person, you know. And so he might he [sic] be more likely to agree with things. Sure it's possible, could he be led? Sure. That happens all the time with folks who have those kinds of conditions. You know, I can't say definitively what happened here obviously." (ER March VVII/858).

Although, Dr. Crown, thought Mr. Blake would be susceptible to coercive tactics, and Dr. Angahar though [sic] is was possible he could be led, the Court does not find that the Defendant has supported a claim that Mr. Blake's confession was the result of coercive tactics. The Court does not find counsel was ineffective in not retaining or consulting an expert on mental health, such as Dr. Crown, in regard to argument concerning the voluntary nature of the Defendant's confession.

The Defendant also alleges his counsel was ineffective with regard to evidence presented at the trial by FDLE analyst Ted Berman that found glass fragments on Mr. Blake's clothing which matched glass fragments from the Oldsmobile. The Defendant argues counsel did not subject the evidence to a Frye inquiry, or cross-examine Mr. Berman about the analysis. Additionally, counsel did not give any guidance to the jury on how to weigh this evidence.

The Court does not find counsel's performance fell below an objective standard of reasonableness with regard to the evidence presented by Ted Berman regarding the glass fragments, or that there was any resulting prejudice. Both at trial and in his videotaped statement, Mr. Blake admitted that he stole the Oldsmobile, and testimony of other witnesses placed him in and around the stolen Oldsmobile.

3. Failure To Adequately Prepare Mr. Blake for testimony.

The Defendant alleges that trial counsels' decision to put Mr. Blake on the stand was made without adequate deliberation and without preparation of Mr. Blake. In his Motion, the Defendant alleges he received no preparation or instruction on testifying and his mental or emotional state made it impossible to testify in a coherent manner. **Mr. Blake did not testify at the evidentiary hearing and trial counsel was not asked at the evidentiary hearing about an alleged failure to properly prepare Mr. Blake to testify. The Court finds this sub-claim was abandoned, and the Defendant has not supported a claim that counsel was deficient with regard to this sub-claim.**

4. Failure To Challenge the Inconsistent Theories of the Crimes.

The Defendant alleges that the State used inconsistent theories in Mr. Blake's trial and the trial of his co-defendant, Richard Green, and this violated Mr.

> Blake's right to due process. The Defendant alleges that counsel attempted to implicate Green for the murder of Mr. Patel to a greater extent in his trial than in Mr. Blake's trial. The Defendant alleges that in Mr. Blake's trial the prosecutor argued that Teresa Jones' shifting testimony was based on fear of Mr. Blake's family, while arguing in Mr. Green's trial that Ms. Jones had no fear of Mr. Blake or his family. **The Court finds the State has consistently argued that both Mr. Blake and Mr. Green were accountable for the crimes of first degree murder, attempted armed robbery, and grand theft; and both men were found guilty of these crimes in separate trials. The court does not find any deficiency by counsel with regard to this sub-claim.**
>
> **The Court does not find that the Defendant has proven that counsel's performance fell below an objective standard of reasonableness with respect to the claims and sub-claims argued in Ground II of his postconviction Motion. Additionally, the Court finds that even if it counsel could be considered to have performed deficiently with regard to the claims and sub-claims in Ground II, there is no reasonable possibility that the results of the trial would have been different but for this deficiency. The Court finds that the videotaped statement given by the Defendant, the videotape from the store, the testimony of witnesses and evidence presented at his trial, and other evidence presented clearly show Mr. Blake's participation in a robbery that resulted in the first degree murder of Mr. Patel. Mr. Blake would clearly have been found guilty of these crimes whether he was the shooter or considered a principal in these crimes. The Court finds no reasonable basis to conclude Mr. Blake would not have been convicted of these crimes but for some deficiency of his counsel with regard to their preparation for the Guilt Phase of his trial.** Claim II of the Defendant's Motion is denied.
>
> (PCR V45/7645-61) (e.s.).

Argument

The trial court's factual findings are supported by competent, substantial evidence and none of the IAC sub-claims, individually or collectively, warrant post-conviction relief.

Alleged Failure to Present Exculpatory Evidence through Cross-Examination and Presentation of Witnesses and Challenge State Witnesses

Blake argues that his trial counsel failed to adequately challenge the testimony of two of the trial witnesses - Teresa Jones and Demetrius Jones - and further point to Richard Green, one of Blake's partners with dreads,[9] as the "shooter."

Teresa Jones: Before Teresa Jones testified at Blake's trial, the trial prosecutor, ASA Cass Castillo, informed the trial court and the defense, on the record, that it had come to his attention that Teresa Jones had been arrested and had a pending robbery charge in a case where several people also were charged. The testimony of Teresa Jones was bifurcated to allow the defense the opportunity to interview Teresa Jones, gather any records, if needed, look at the affidavit, and investigate any conversation Teresa Jones' lawyer may have had with the prosecutor on her own criminal case. (R V6/591-592).

At Blake's trial, Teresa Jones testified that she was living at Lake Deer Apartments in August 2002 with her children and her boyfriend, Richard Green. (R V6/593). On August 12, 2002 Green arrived at Teresa's apartment around 7:00 a.m., with Blake and "another boy," who was known as "Red Man." Teresa thought "Red Man"

[9]The fact that Blake was bald and that Green had dreads was repeatedly highlighted by the defense at Blake's trial. Demetrius testified that Blake was bald and had been bald in August of 2002. (R V6/658). In August of 2002, Key ("Red Man") had dreads and Green had short dreads. (R V7/666; 683). Teresa also testified that "Red Man" had dreads and Green had short dreads. (R V8/861).

was around 18 years old. (R V6/595-596). Teresa took the three men to a car that was parked along the side of the road. (R V6/599).[10] The car was running. (R V6/601). At trial, Teresa Jones frequently had to review her prior grand jury testimony to refresh her recollection. Teresa testified that one of the men got out of her car and went to the car on the side of the road, but Teresa was "not sure" which one it was. (R V6/602-603). Teresa "could not remember" which one of the men took something out of the parked car. Teresa admitted that she'd told the detectives that Blake was the one who took the two guns from the vehicle. (R V6/604). Teresa also admitted that she previously told the grand jury that Blake was the one who told her to go to the parked car, Blake was the one who got out of her car, and Blake was the one who took two guns out of the car and wrapped then in a shirt or sweater. (R V6/604; 608). Blake told Teresa that he'dshot someone. (R V6/607). Both guns looked the same. (R V6/605). Teresa didn't think much about the guns, because everybody from where she was toted guns. (R V6/608).

[10]Blake also faults trial counsel for not utilizing Teresa Jones' testimony at Richard Green's trial. The Green record (GR) is also included in defense exhibit 51 at PCR V27/4626-V32/5573. Green arrived at her apartment around 7:00 a.m. Harold Blake and another man, in his early 20s, were with Green. (GR V3/419). Blake asked her to give him a ride and she agreed. (GR V3, R420). She did not remember Green accompanying her. (GR V3/421-422). Not far from the apartment, Blake had Jones stop at a car, which appeared to be broken down; Blake removed a sweater from inside the car. (GR V3/425-426; 429). Inside of the sweater, Jones saw two guns, one brown and the other gray. (GR V3/428). Afterwards, Teresa dropped off the other man and then drove Blake to a motel, where Blake got out and took the sweater-wrapped guns with him. (GR V3/429).

Teresa also acknowledged that while they were driving to the car, Blake said something about shooting someone. (R V6/607).

When asked if she was afraid of Blake or his family, Teresa replied "Not no more, no." (R V6/605). At one time, Teresa was a little afraid; thus, she hesitated telling the grand jury that Blake had removed the guns from the car. An unknown person called her house repeatedly and called her a snitch. (R V6/605; 615). She didn't think the police could protect her. (R V6/615). Teresa dropped off "Red Man" at a store and took Blake to the Scottish Inn. (R V6/598; 608). Teresa took Green back to her apartment and left Green at her apartment while she took her kids to school. (R V6/609-610). When she returned home, the police were at her apartment complex. (R V6/610).

Teresa did not go into her apartment and talk to Green; she stayed outside and watched the police. Teresa spoke with one of the officers. (R V6/612). The officer said that someone had been killed. (R V6/613). Teresa said that some men had come to her apartment that morning, Blake and another person, but she did not give them Richard Green's name. (R V6/613). Teresa told Green that he needed to go to the police or she would tell the police he had been at her house. (R V6/615). Teresa gave a taped statement later that day; some of her statement was true and some was not. (R V6/614). Two days later, on August 14, Teresa gave another taped statement to law enforcement. (R V6/613). On that date, Teresa Jones told them that Green was involved. (R V6/616). Before the

cross-examination of Teresa Jones commenced, ASA Castillo noted that defense counsel had spoken with ASA Hardy Pickard, who informed the defense that the disposition was not related to her testimony in Blake's case.[11] In addition, ASA Castillo explained that he previously had not been aware of the pendency of the disposition in Teresa Jones' case, he had not discussed Teresa Jones' case with ASA Hardy Pickard, and whatever [plea] decision was made by ASA Pickard was "made on his own. (R V8/848). Defense counsel Colon added:

> [MR. COLON]: Now, we – both Mr. Smith and I spoke with Mr. Pickard. We are satisfied with his responses as to the reasons for the negotiated plea in that case.
>
> Nonetheless, I believe it's fair game to cross-examine her on the fact that she was charged with a crime similar to this crime and that she entered a plea to a much lesser offense without suggesting that it was based on any promises of testimony...(R V8/849).

On cross-examination, Teresa testified that she didn't know who took her to the light-colored car — it could have been Green or Blake. (R V8/859). Teresa admitted that she had cared for Green and they had been together for a while. (R V8/860). "Red Man" was with them when they went to the car. (R V8/862). Teresa admitted that some of what she testified to was information that she had been told, but had not seen. (R V8/863). At a prior hearing, when Teresa was asked about seeing Blake take guns out of the car, her answers

[11]The post-conviction testimony of retired ASA Hardy Pickard and of Bill Sites, Teresa Jones' attorney at the time of her plea, is addressed in further detail in claim III, the *Brady* claim.

were "no." (R V8/866). Teresa testified that her testimony to the grand jury was true. (R V8/867; 873; 888). Teresa had a prior felony conviction and two convictions for crimes of dishonesty. (R V8/869). In addition, at the conclusion of cross-examination of Teresa Jones, defense counsel Colon established not only that Teresa had been convicted of a felony, and twice convicted of crimes involving dishonesty, but

> Q As a matter of fact, just recently here on September 11th of this past year, 2004, you, yourself, were *charged with armed robbery with a firearm*; isn't that true?
>
> A Yes.
>
> Q And that case was resolved just two days ago, this Wednesday, by a plea to a charge of a lesser included offense of petit theft; isn't that true?
>
> A Yes. Because I was innocent, yes.
>
> (R V8/869-870).

On re-cross, defense counsel further established that Teresa Jones' prior drug charge was May 22, 2002 and she was placed on probation for three years. (R V8/887). At Blake's trial, the jury knew that Teresa (1) had not been forthcoming and truthful to law enforcement, (2) tried to protect Green by not revealing his name, (3) was evasive and "forgetful" at trial, (4) often had to be shown her grand jury testimony, (5) had run afoul of the law herself, (6) had a prior felony conviction and two prior convictions for crimes involving dishonesty, and (7) her felony armed robbery charge was resolved by a plea to petit theft just two days earlier.

Blake assumes that some undisclosed "deal" existed because whatever disposition Teresa Jones received was, in collateral counsel's opinion, less than what she deserved. This unsupported hypothesis is nothing but rank speculation, which is insufficient to support a claim for post-conviction relief. See, *Floyd v. State*, 18 So. 3d 432, 451-52 (Fla. 2009) (rejecting IAC and *Brady* claim where there had been no evidence that a *nolle prosequi* of a domestic violence charge against the boyfriend of a State witness was in any way related to Floyd's criminal case). In addition, Blake's claim is refuted by the record. ASA Castillo and ASA Hardy Pickard and Bill Sites, Teresa Jones' attorney, uniformly confirmed that the disposition in Teresa Jones' unrelated case had nothing to do with her testimony at Blake's trial. See, *Lamarca v. State*, 931 So. 2d 838, 852-53 (Fla. 2006) (rejecting *Brady/Giglio* claims based on witness receiving a downward departure sentence where there was no evidence that the sentence was promised in advance or given in exchange for the witness' trial testimony). As detailed above, Blake has failed to demonstrate any deficiency of counsel and resulting prejudice. It cannot be said that Blake's conviction resulted from a breakdown in the adversary process that rendered the verdict unreliable. See, *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Demetrius Jones: At Blake's trial, Demetrius Jones[12] [Meechi] testified that he knew Richard Green, whose nickname is "Plump." (R V6/629). Demetrius met Blake through Richard Green. (R V6/630-631). At trial, Demetrius testified that in the early morning of August 12th, he was at his home, talking with Green, Blake and Kevin Key ("Red Man," who is Demetrius' cousin). (R V6/632). Green, Blake and Key arrived between 3:00 and 4:00 a.m., in an older model, light-colored car.[13] The back window of the car was broken out -- Blake was driving, Green was in the front, and Key was in the back seat. (R V6/634-636). Demetrius saw two guns in the car - a .38 revolver and .9mm. (R V6/637). Green had the revolver and the .9mm was on the front seat. (R V6/637). Green had the gun in the front pocket of his hoodie sweater. (R V6/638). Demetrius previously had seen both Green and Blake with these guns. (R V6/638).

According to Demetrius, they were supposed to go to Lakeland and rob people who sold drugs; Blake was the one who suggested that Demetrius go with them. (R V6/638-39; 673; 685). On cross-examination, defense counsel confronted Demetrius with his prior

[12]Some of Demetrius Jones' prior statements were recanted in post-conviction. The trial court found Demetrius Jones' post-conviction recantation not credible. See, Issue 4, "newly discovered" evidence claim.

[13]At Blake's trial, the State presented evidence that the Oldsmobile was processed for fingerprints. (R V6/556). Latent print examiner Patty Newton testified that she compared the prints lifted from the Oldsmobile and found that one print taken from the left rear window matched Richard Green. (R V7/814). Blake's prints were found on the right front window. (R V7/815). Demetrius' prints were found on the right rear exterior door of the Oldsmobile. (R V7/821).

sworn statement to Detective Raczynski on August 20, 2002. (R V7/667-668). Demetrius had told law enforcement that Demetrius, Red Man and Plump (Green) were the only ones who were present during the conversation about the robbery plan and they tried to call Blake for about an hour, but couldn't get an answer. (R V7/668; 672). Demetrius testified, "I'm sorry, you're right. It was – I was confused. You're right." (R V7/672). When Demetrius indicated that Blake was the one who suggested that they rob somebody (R V7/673), defense counsel again had Demetrius review his prior statement. (R V7/673-674). Demetrius ultimately agreed with defense counsel's summary of Demetrius' confusing description of the sequence of events as [Blake] "says let's go rob, then he says I don't feel like it, and then he says let's go rob." (R V7/683).

Demetrius touched the car while it was at his house, but did not get inside the car. (R V6/639-640). Demetrius decided not to go along, and Green, Key and Blake left. Green was driving, Blake was in the front passenger seat and Key was in the back seat. (R V6/640). Later that morning, around 7:00 a.m., Demetrius got into a fight with his girlfriend and the police were called. (R V6/641). While the deputy was at his house, Demetrius heard a broadcast over the police radio about something happening at Lake Deer Apartments. (R V6/642). Demetrius knew that Green lived in Lake Deer. (R V6/642). Around 9:30 a.m., Demetrius went to Lake Deer Apartments; the police had blocked access to the apartments. (R V6/643). Demetrius did not see Green, but he did see Teresa talking to the

police. (R V6/644). Around noon or 1:00 p.m. that same day, Demetrius saw Blake; Blake was acting nervous, like something had happened. (R V6/645-646). Blake wouldn't say where Green and Red Man were, but did say that something had happened. (R V6/646). Blake told him that they were trying "to do" somebody and someone got shot. (R V6/647). Blake said they were trying to do a robbery. (R V6/647). Blake asked Demetrius to get rid of a gun. (R V6/647). Blake did not give the gun to him, but Demetrius agreed to try to sell it to some Jamaicans. (R V6/648).

That night, around 6:30 or 7:00 p.m., Demetrius saw Green in the "Boggy," an area known for drug sales. (R V6/648-649). Green was with Teresa Jones. (R V6/649). According to Demetrius, Green wanted to tell him what happened and gave him a gun, a chrome .9mm. (R V6/650). Demetrius and Green tried to sell the gun to some Jamaicans, but had no luck. (R V6/651). Demetrius gave the gun back to Green. (R V6/652) Demetrius testified that either later that night or the next day, he went to a nearby lake with Green. (R V6/653). Green threw a gun into the water. (R V6/654).

At trial, Demetrius admitted that he had pending criminal charges and that he was not to be sentenced until after his testimony. Although he had no guarantees, Demetrius was hoping that his testimony would result in lenient treatment. (R V6/656). Demetrius also admitted that he had outstanding warrants in August of 2002, but he was not arrested on them due to his cooperation. (R V6/658). Demetrius was also released on a VOP. (R V6/660).

Blake claims that trial counsel should have done more to point to Green as the possible "shooter."[14] To the extent Blake arguably attempts to raise a claim of sufficiency of the evidence, it is procedurally barred. On direct appeal, this Court found competent, substantial evidence to support Blake's first-degree felony murder conviction. *Blake,* 972 So. 2d 839, 850. At trial, the State consistently argued that Blake could be found guilty of first degree murder as a principal. (R V9/1164-1166). The jury was also instructed, "To prove the crime of first-degree felony murder, the State must prove the following three elements beyond a reasonable doubt: Number one, Maheskumar Patel is dead; number two, the death occurred as a consequence of and while Harold A. Blake was attempting to commit a robbery; number three, Harold A. Blake was the person who actually killed Maheshkumar Patel *or Maheskumar Patel was killed by a person other than Harold A. Blake but both Harold A. Blake and the other person who killed Maheskumar Patel were principals in the commission of the attempted robbery*." (R V10/1246-1247).

Blake failed to demonstrate any deficiency of counsel and resulting prejudice. Blake cannot show that the identity of the triggerman was material to his conviction. See, *Mendoza v. State*, 87 So. 3d 644, 655 (Fla. 2011) (where defendant was convicted of

[14]Blake faults trial counsel for not presenting out-of-court statements from witnesses repeating what they'd allegedly heard from Green or Key, etc. Blake has not shown that blatant hearsay/double hearsay would have been admissible at trial.

first-degree felony murder, the identity of the shooter was not material, citing *Lowe v. State*, 2 So. 3d 21, 30-31 (Fla. 2008). Indeed, Blake does not dispute that Green also was convicted of first-degree murder at his separate trial and the identity of the triggerman likewise was immaterial to Green's conviction.

Failure to Obtain Expert Assistance and Challenge the State's Case

In this IAC sub-claim, Blake faults trial counsel for not retaining an "expert on false confessions" and a mental health expert "to discuss the ramifications of Mr. Blake's mental status during the interrogation."[15] (IB at 64; 68-69).

The "false confession" expert claim: At the time of trial, the defense filed a motion to suppress Blake's statements and admissions to law enforcement as allegedly involuntary and taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Edwards v. Arizona*, 451 U.S. 477 (1981). (R V1/326-328). Following an evidentiary hearing, the trial court entered an "Order Denying Motion to Suppress Statement of Accused." (R V1/313-314).

Blake is no stranger to the criminal justice system or questioning by law enforcement. At trial, Blake admitted that he had nine felony convictions. (R V7/784). Blake's videotaped confession included, among other things, that all three [Blake, Green and Key] walked up toward the door, Blake kept his finger on

[15]To the extent Blake arguably challenges the trial court's ruling on the motion to suppress, any such claim is procedurally barred as it was raised and rejected by this Court on direct appeal. *Blake*, 972 So. 2d at 842-845.

the trigger as he walked up to the door, Blake was the one who fired the shot at Mr. Patel, and Blake burned the clothes he was wearing at the time of the shooting. Blake maintained that the shooting was an accident.[16] (R V7/763-765; 777; 783). Blake confirmed, on videotape, that he was read his *Miranda* rights, he had been treated well by Detective Giampavolo, and he had not been threatened or mistreated. (R V7/784). Following an evidentiary hearing, the trial court denied the motion to suppress. (R V2/313-314). Blake testified at trial and denied shooting Mr. Patel and denied that he'd planned to rob the store. (R V8/950; 987).

On direct appeal, this Court affirmed the trial court's denial of Blake's motion to suppress. *Blake*, 972 So. 2d 839, 842-845. Blake now argues that trial counsel was ineffective in failing to

[16]In Blake's videotaped statement, played at trial, Blake admitted that he stole the Oldsmobile and started it with a screwdriver. (R V7/773). Blake picked up Richard Green and another boy from Lake Deer Apartments and went to Demetrius Jones' house to drop off some stolen items. (R V7/773-774). After leaving Demetrius' house, they went to the store because Green and the boy said they had been watching the store and it would be easy. (R V7/775). Green drove the Olds to Del's. (R V7/775). Green pulled in behind a fence, but because a dog was barking, they left and went to Lake Deer. (R V7/776). After a few minutes, they went back and parked in the store's parking lot. Blake, Green and the other boy went up to the door. Blake had the .9mm. (R V7/777). When they got up to the door, Blake could see Mr. Patel inside; it looked like Mr. Patel had something in his hand and was coming toward the door. (R V7/778). According to Blake, Mr. Patel scared him and Blake's gun went off; Blake said that he didn't mean to shoot anyone and it was an accident. (R V7/777). After the shooting, Blake didn't know what to do, so he ran. (R V7/780). As he ran for the car, Blake saw a blue car back up on Coleman Road. (R V7/780). According to Blake, he didn't know where the .9mm was and he'd burned the clothes he had been wearing. (R V7/781; 783).

retain an "expert on false confessions," such as Dr. Ofshe, and a mental health expert "to discuss the ramifications of Mr. Blake's mental status during the interrogation." (IB at 64; 68-69).

Under *Strickland*, there is a strong presumption that trial counsel's performance was not deficient. *Walker v. State*, 88 So. 3d 128, 134 (Fla. 2012). Moreover, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Walker*, 88 So. 3d at 134, citing *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). At the post-conviction hearing, Blake's experienced trial counsel, Gil Colon, testified that he "didn't believe that then or now, that [he] needed an expert to make that argument" [on false confessions]. (PCR V10/1695). In addition, trial counsel did not retain a mental health expert earlier in the case because defense counsel either had no concerns about Blake's mental health or because Blake refused to be seen by a mental health expert. (PCR V10/1663; 1696). Blake may not re-litigate the voluntariness of his confession in post-conviction. See, *Walker*, 88 So. 3d at 136-137 (affirming summary denial of IAC/guilt phase claim where the underlying challenge to the voluntariness of the defendant's confession was meritless and rejected on direct appeal).

The Court need not reach both *Strickland* prongs in every case. "[W]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." *Hurst v. State*, 18 So. 3d 975, 996 (Fla. 2009). Nevertheless, Blake also failed to demonstrate any resulting

prejudice. In Dr. Ofshe's opinion:

> **. . . by Mr. Blake's account of the interrogation tactics that were used, are interrogation tactics that *could* precipitate a false confession.** The failure of Mr. Blake's account to fit with the objectively knowable facts of the crime would be consistent with someone making up these pieces of information, and failing to know certain pieces of information, because the person was not in a position to directly observe it. In other words, the person wasn't there. I'm – ***it's not for me to ever draw conclusions as to whether it's a true or false confession.*** I'm simply pointing out these are indicia that should be looked at and considered.
>
> (PCR V13/2110-2111) (e.s.).

Dr. Ofshe admittedly could not give any opinion on whether Blake's confession was, or was not, a "false confession." (PCR V13/2111). Dr. Ofshe also admitted that his critique was based on Blake's own account of the interrogation. (PCR V13/2113). In relying on Blake's account, Dr. Ofshe was never provided with Blake's criminal history and has never talked with Blake himself. (PCR V13/2120). Thus, as a practical matter, if Blake's account is not accurate, there is no foundation for Dr. Ofshe's critique.

In addition, while Dr. Ofshe agreed that several of Blake's statements did "fit" the circumstances, Dr. Ofshe also suggested that some of Blake's information, including his knowledge of the caliber of the murder weapon, might have been "contaminated," either by Blake's presence in the car or by information received from law enforcement. Dr. Ofshe looks for a "fit" as indicative of a "true" confession. Both Green and Blake knew the identity of the shooter in 2002, when they each identified Blake as the one who

shot Mr. Patel. Green's prior sworn statements, including his grand jury testimony in 2002 and in-court testimony at Green's trial in 2004, also identified Blake as the one who shot Mr. Patel and were a "fit" with Blake's own confession. Although Dr. Ofshe agreed that guilty people do confess, Dr. Ofshe apparently discounted to irrelevance the circumstance that Blake, in no kind of coercive setting, told one of his trial lawyers [Al Smith] that he'd shot Mr. Patel. (PCR V13/2121). In Dr. Ofshe's view, Green's statements – indicating that the victim was shot in the arm and surprise that the victim died -- are "more important than any other facts of the case." (PCR V13/2123-2124). Under Ofshe's contamination theory, Green also could have learned this same information from his proximity to the shooting or from his confederates. Indeed, (1) Blake's videotaped statement included that "all of us" went to the door (R V7/777); (2) after hearing the gunshot, Mrs. Alderman saw two men running back to the car (R V5/437; 444); and (3) the suspects were together in the car that sped away after the shooting. (R V5/454-455; V6/585).

A defendant claiming ineffective assistance of counsel must explain how the failure to call the uncalled witness prejudiced the outcome of the trial. *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004). The testimony from Blake's post-conviction expert would not lead to suppression of Blake's voluntary confession. Without "official coercion," a confession will be deemed voluntary regardless of the psychological characteristics of the defendant.

Colorado v. Connelly, 479 U.S. 157, at 170-171 (1986). Blake has not presented any facts of coercion on the part of the police officers that would have rendered his confession involuntary and inadmissible.[17]

Although Blake's confession was voluntary, the defense suggests that it was not trustworthy. Without ever speaking with Blake, Dr. Ofshe opined, at most, that Blake's account of the interrogation tactics "*could* precipitate a false confession." In other words, maybe it did and maybe it didn't. The mere fact that an expert in "false confessions" has opined that some interrogation tactics, if used, "could" precipitate a false confession does not establish any entitlement to post-conviction relief. See, *Derrick v. State*, 983 So. 2d 443, 451 (Fla. 2008) (finding IAC claim, based on failure to present a "confessionologist," legally insufficient); *Bryant v. State*, 901 So. 2d 810 (Fla. 2005) (same); *Krawczuk v. State*, 92 So. 3d 195 (Fla. 2012) (Affirming denial of IAC claim for failing to offer testimony of mental health experts and others at the hearing on motion to suppress confession).

Alleged Failure to Adequately Prepare Blake for Testimony

Blake testified at trial and attempted to repudiate many of his prior statements to law enforcement. (R V8/950-1025; V9/1026-

[17]On direct appeal, *Blake*, 972 So. 2d at 844, this Court cited to *Connelly's* holding "that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."

1070). Blake also testified that Green [who had been convicted on the Patel homicide], was the one with the .9mm and Green was the one who shot Mr. Patel. (R V9/1069-1070). Blake alleges that he "received no preparation or instruction on testifying." (IB at 70). Despite being granted an evidentiary hearing on this IAC claim, Blake did not testify in post-conviction and there was no inquiry of trial counsel on the alleged failure to adequately prepare Blake to testify. Accordingly, this IAC sub-claim was abandoned below and failed for lack of proof. Blake did not demonstrate any deficiency of counsel and resulting prejudice. See also, *Taylor v. State,* 3 So. 3d 986, 997 (Fla. 2009) (Affirming denial of IAC claim where trial counsel testified in post-conviction that he did not rehearse Taylor's testimony, but told Taylor to testify truthfully; and, because Taylor had given a detailed confession, defense counsel felt he was limited in available strategies).

Alleged Failure to Challenge Inconsistent Theories of the Crimes

Any substantive claim based on *Bradshaw v. Stumpf*, 545 U.S. 175 (2005) is procedurally barred in post-conviction. See, *Marek v. State,* 8 So. 3d 1123, 1128 (Fla. 2009). Furthermore, Blake's IAC/guilt phase complaint fails to establish any deficiency of counsel and resulting prejudice under *Strickland*. The State consistently has argued that both Blake and Green should be held accountable for the crimes of first degree murder, armed robbery and grand theft; and, following their separate jury trials, they

each were found guilty of those crimes.[18] As ASA Castillo's closing argument at Green's trial reflected (GR V6/832), and as ASA Castillo confirmed at the evidentiary hearing, both Blake and Green were equally accountable as principals. Accordingly, Blake could not remotely establish any prejudice arising from the defense-disputed triggerman status. Indeed, in *Stumpf*, 545 U.S. at 187, the Court concluded that the precise identity of the triggerman was immaterial to the defendant's conviction for murder. See also, *Mendoza v. State*, 87 So. 3d 644, 655 (Fla. 2011) (noting that where the defendant was convicted of first-degree felony murder, the identity of the shooter was not material, citing *Lowe v. State*, 2 So. 3d 21, 30-31 (Fla. 2008).

The trial court's factual findings are supported by competent, substantial evidence and Blake has failed to demonstrate a deficiency of counsel and resulting prejudice under *Strickland*.

ISSUE III

THE *BRADY* CLAIM

In *Mungin v. State*, 2013 WL 3064817 (Fla. 2013), this Court summarized the *Brady* standards and standards of review:

[18]The jury found Blake guilty of first-degree murder, attempted robbery (with a finding that he discharged a firearm resulting in death), and grand theft of a motor vehicle. *Blake*, 972 at 840-42. As a result of his separate convictions for these crimes committed on 8/12/02, Green is serving a sentence of life imprisonment for the murder of Mr. Patel, fifteen years for attempted robbery with a deadly weapon, and five years for grand theft. Green is also serving a sentence of life imprisonment for an armed robbery committed on 9/12/02.

> In order to establish a *Brady* violation, "the defendant must demonstrate that (1) favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced." *Mungin* III, 79 So. 3d at 734 (citing *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *Way v. State*, 760 So. 2d 903, 910 (Fla. 2000)). To meet the materiality prong, the defendant must demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* However, in making this determination, a court cannot "simply discount[ ] the inculpatory evidence in light of the undisclosed evidence and determin[e] if the remaining evidence is sufficient." *Franqui v. State*, 59 So. 3d 82, 102 (Fla. 2011). "It is the net effect of the evidence that must be assessed." *Jones*, 709 So. 2d at 521.
>
> *Brady* claims present mixed questions of law and fact. Where the postconviction court has conducted an evidentiary hearing, this Court will defer to the factual findings of the postconviction court so long as those findings are "supported by competent, substantial evidence, but will review the application of the law to the facts de novo." *Hurst v. State*, 18 So. 3d 975, 988 (Fla. 2009).

The Trial Court's Order

The trial court's order denying Blake's *Brady* claim states, in pertinent part:

> The defense alleges that Mr. Blake's trial was afflicted with several violations of Brady v. Maryland, 373 U.S. 83 (1963). Just before Teresa Jones testified Assistant State Attorney Cass Castillo informed the Court and trial counsel that it had come to his attention that Ms. Jones had been arrested since the time that she gave her testimony in Mr. Green's case. Ms. Jones has a pending robbery charge involving several other people. Mr. Colon said they were not aware of this. Mr. Colon asked to voir dire Ms. Jones before cross-examination. The State conducted direct examination and she returned the following day for cross-examination. ASA Castillo

represented to the Court that he and ASA Pickard had never discussed her case, and Mr. Pickard made whatever decision he made on his own. He said that he did not know about the disposition of that case. On cross-examination, defense counsel asked Ms. Jones about her September 11, 2004, charge for armed robbery with a firearm and the fact that she had negotiated a plea two days ago to petit theft. Ms. Jones response was that she was innocent. The defense alleges that although the State led the court to believe the plea had been negotiated two days earlier, the plea had actually been negotiated on November 4, 2004, less than two months after she was charged. The felony plea form in Mr. Pickard's handwriting was executed long before her testimony and not filed until the day she testified for the prosecution.

The defense alleges that the representations of Mr. Pickard and Mr. Castillo about the matter are false, and Ms. Jones' testimony about the timing of her plea was false. Trial counsel was not told about the true circumstances of Ms. Jones' plea. The defense alleges that Mr. Jones' actually committed two armed robberies on September 11, 2004, but was only charged with one armed robbery. Though she faced two life felonies, she received only six month of probation for her role in one of the robberies. This evidence was not disclosed to the defense. Despite her testimony to the contrary, it appears Ms. Jones received favorable treatment with regard to violation of felony probation. Her probation was violated in June 2003, but the affidavit was suddenly withdrawn in April 2004. The defense alleges that at the time of Mr. Blake's prosecution, Ms. Jones told others that law enforcement threatened her to say what she was told or her children would be taken away from her. She was being investigated in December 2002 for child abuse, but the case was closed shortly after the investigation commenced. The defense argues that Mr. Blake's counsel were never informed about the consideration bestowed on Ms. Jones and the pressure applied to her by the State.

At the evidentiary hearing, former Assistant State Attorney Hardy Pickard was called as a witness. Mr. Pickard was asked about negotiated pleas and plea offers, and particularly the plea offer he made to Ms. Jones dated November 4, 2004. **He did not specifically remember that plea form, but he described his general manner of making plea offers. His testimony was that he tried to send out plea offers to defense counsel at the time he sent out discovery rather than months later when he may have forgotten some of the facts of the case. He**

testified that he never gave Ms. Jones any consideration because she was a witness in a murder case. He also testified that he never had discussions with her attorney, Bill Sites, about her cooperation as a witness. He testified that he did not know if he knew she was going to be a witness in Mr. Blake's trial at the time he signed the plea agreement on November 4, 2004, but he was aware she was going to be a witness at the time she pled three or four months later. At the evidentiary hearing, Bill Sites testified that he did not have any discussions with Mr. Pickard about any homicide case involving Mr. Blake. ASA Cass Castillo, who prosecuted the case against Mr. Blake, testified at the evidentiary hearing that he was not involved in the prosecution of Ms. Jones. He said that he was aware that she had a pending case. He testified that he was unaware of any child abuse complaint against Ms. Jones at that time, and he never made any threats to her about taking her children away.

At the trial, counsel for the Defendant were advised prior to the cross-examination of Teresa Jones that she had recently entered a plea. They were given time to look into the matter, and trial counsel asked her about the matter at the trial. Counsel also brought out at the trial that Ms. Jones had one felony conviction and had been convicted twice of a crime involving dishonesty.

The Court finds that the Defendant has not shown that the prosecution suppressed evidence with regard to their treatment of Ms. Jones and her various charges. Additionally, even if some information about her prosecution was withheld in some manner either intentionally or unintentionally, the Court does not find there is any reasonable probability that this undermines confidence in the outcome of the trial.

The defense also alleges that it appears Demetrious Jones also obtained consideration from the State for his testimony. He was being prosecuted for possession of cocaine at the time of Mr. Blake's trial. He was granted pre-trial release in December 2003. The defense alleges that after Mr. Jones picked up more charges the following month, the office of the State Attorney made it clear that Mr. Blake's prosecutor was to be kept apprised of dealings with Mr. Jones. It was noted that Mr. Jones was given a below guidelines sentence after he was allowed to plead shortly before Mr. Blake's trial. In 2007, Mr. Jones picked up additional charges and violations of community control, and the prosecutor approved a below

guidelines sentence and referred to one of Mr. Blake's non-capital case numbers. At the evidentiary hearing, Hardy Pickard, testified that he had no memory of Demetrius Jones or any plea involving him. ASA Cass Castillo testified at the evidentiary hearing that he is confident he wasn't contacted about giving his input into Mr. Jones's sentence. He said that he did remember at some point helping Mr. Jones get out of jail for something he had been arrested for. He did not know if the defense was aware of Mr. Jones pending cases at the time he testified at Mr. Blake's trial. **As discussed with regard to Claim II of this Order, at his trial, Demetrius Jones admitted that he had pending criminal charges, and he was not going to be sentenced until after he gave his testimony. He indicated he had no guarantees concerning what he would receive, but he was hoping for lenient treatment. The Court finds that the Defendant has not shown that the prosecution suppressed evidence with regard to their treatment of Mr. Jones and his various charges. Additionally, even if some information about his prosecution was withheld in some manner either intentionally or unintentionally, the Court does not find there is any reasonable probability that this undermines confidence in the outcome of the trial.**

The defense alleges that the person on the surveillance videotape seemed to be wearing red shorts, and the State maintained that Mr. Blake was the one wearing the red shorts. The defense alleges; "the Florida Department of Law Enforcement bench notes that were not disclosed to trial counsel included a description of the shorts taken from Green on the morning of the crimes. The shorts were described as "red". That description is not included in the property forms that were prepared by law enforcement and available to the defense. The description in the property form characterizes Green's shorts as "cotton" and Mr. Blake's shorts as "red". The defense alleges that had the defense known about Green's shorts they could of [sic] pointed out to the jury that the individual approaching the store and firing the gun has clothing that matched Green's clothing. The defense alleges that the State improperly concealed this testimony.

Crime Scene Technician Renee Arlt assisted the Sheriff's department in converting digital files to VHS format. She also printed some still photographs and wrote a report. In that report, Ms. Arlt indicated that you can see red shorts that go knee length on the suspect. Ms.

Arlt testified at the trial and the videotape of the shooting was introduced at trial.

A review of the videotape indicates someone coming to the door of the store in what appear to be red shorts. Clothes of both Mr. Blake and Mr. Green were sent off to the Florida Department of Law Enforcement to be tested. It seems likely that counsel was not provided with any documentation showing law enforcement had described Mr. Green's shorts as being red.

The Court finds that the Defendant has not shown that the prosecution suppressed evidence with regard to the color of Mr. Green's shorts. Additionally, even if some information about the color of Mr. Green's shorts was not disclosed to the defense, the Court does not find there is any reasonable probability that this undermines confidence in the outcome of the trial or the sentences imposed on the Defendant. It is not clear who may have been wearing the red shorts seen in the video. Mr. Blake advised the police that he had burned the clothes that he wore at the time of the robbery. The shorts that were taken from Mr. Green were not taken from him at the time of the attempted robbery and shooting. At the evidentiary hearing, Mr. Green said he was wearing dark clothes when he approached the store and shot Mr. Patel.

The defense also alleges that the State was suppressing evidence regarding its dealing with Teresa Jones and Demetrius Jones. The Defense alleges Ms. Jones was being threatened that her children would be taken away, and she was receiving favorable treatment on her charges based on her cooperation. The Defense alleges Demetrius Jones was also getting favorable treatment on his charges. The Court more thoroughly discussed the testimony of Teresa Jones and Demetrius Jones in Claim II of this Order, and **the Court does not find that the State suppressed evidence from the defense with regard to Teresa Jones and Demetrius Jones in violation of Brady.**

The defense also alleges the conflicting positions taken by the State in the Green case and the Blake case regarding Teresa Jones and whether she was afraid of Mr. Blake and his family violated Mr. Blake's right to due process. In the Green case, the prosecutor admitted that conflicting statements were not due to a fear of Mr. Blake. The Court more fully discussed this issue in Claim II of this Order, and the Court does not find that Mr. Blake's due process rights were violated by alleged inconsistent positions taken by the State with respect to

> Mr. Green and Mr. Blake.
>
> * * * [omitted re: penalty phase /prior violent felony aggravator]
>
> The Court does not find that there were any violations of Brady by the State or any violations of Mr. Blake's due process rights with regard to the allegations raised by the Defendant in Claim III of his motion. Claim III of the Defendant's Motion is denied.
>
> (PCR V45/7661-67) (e.s.).

Argument

Blake has not established the *suppression* of evidence under *Brady.* There "is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence." *Floyd v. State,* 18 So. 3d 432, 451 (Fla. 2009) (quoting *Provenzano v. State,* 616 So. 2d 428, 430 (Fla. 1993). There is no suppression if the defendant knew of the information or had equal access to obtaining it. *Maharaj v. Sec'y for the Dept. of Corr.,* 432 F.3d 1292, 1315 n. 4 (11th Cir. 2005) (addressing this Court's rejection of *Brady* claim where the defendant had "equal access" to the evidence); *Jennings v. McDonough*, 490 F.3d 1230, 1239 (11th Cir. 2007) (addressing this Court's rejection of *Brady* claim based on taped statement by a witness and noting that nothing prevented Jennings from talking to the witness himself and, thus, there was no suppression).

Furthermore, Blake has not established "materiality" under

Brady.[19] "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Green*, 540 U.S. 263, 287 (1999).

Teresa Jones: Before the cross-examination of Teresa Jones at Blake's trial, the defense was informed that (1) Teresa had been charged with robbery, (2) she had recently entered a plea to petit theft, and (3) ASA Pickard's plea offer had nothing to do with her testimony at Blake's trial. Defense counsel investigated the recent disposition of Teresa Jones' criminal case and questioned her about it at trial. Nevertheless, Blake insists that there was "more" to

[19]In *Cone v. Bell*, 556 U.S. 449, 473 (2009), the United States Supreme Court noted, "[I]n our seminal case on the disclosure of prosecutorial evidence, defendant John Brady was indicted for robbery and capital murder. At trial, Brady took the stand and confessed to robbing the victim and being present at the murder but testified that his accomplice had actually strangled the victim. *Brady v. State*, 226 Md. 422, 425, 174 A.2d 167, 168 (1961). After Brady was convicted and sentenced to death he discovered that the State had suppressed the confession of his accomplice, which included incriminating statements consistent with Brady's version of events. *Id.*, at 426, 174 A.2d, at 169. The Maryland Court of Appeals concluded that Brady's due process rights were violated by the suppression of the accomplice's confession but declined to order a new trial on guilt. **Observing that nothing in the accomplice's confession "could have reduced ... Brady's offense below murder in the first degree," the state court ordered a new trial on the question of punishment only**. *Id.*, at 430, 174 A.2d, at 171. We granted certiorari and affirmed, rejecting Brady's contention that the state court's limited remand violated his constitutional rights. 373 U.S., at 88, 83 S.Ct. 1194." *Cone v. Bell*, 556 U.S. at 473. (e.s.)

Teresa Jones' plea. Blake asserts that her plea was not "*negotiated*" just two days before she testified, but had been "*negotiated*" on November 4, 2004. (IB at 78). Blake's trial attorneys were experienced defense attorneys familiar with ASA Pickard and the general sequence of plea proceedings in Polk County. At trial, the defense emphasized that Teresa Jones' criminal case had been "*resolved*" just two days earlier. There is nothing unusual or suspect about the timing of the plea offer form sent to Teresa Jones, via her counsel. At the post-conviction evidentiary hearing, retired prosecutor Hardy Pickard explained:

> When I review the case initially, **when it comes to my desk from intake and I do discovery, I found that it is a lot easier to make a plea offer at that same time** rather than waiting months down the road when I had forgotten some of the facts of the case and have to go back and reread all the reports to decide what my plea offer is. So when I read the police reports and do the discovery to go to Defense counsel I generally, and it -- it's not true with every case but **generally my policy was I would make a plea offer at that time.** And this is a – called a felony plea form, which is the a plea offer I wrote out that I was going to send to Ms. Jones' attorney.

(PCR V9/1490) (e.s.).

ASA Pickard generally tried to get plea offers to defense counsel as quickly as possible, preferably at the time he sent out discovery, in order to move the cases along and resolve some pleas at status conference, rather than waiting until the pretrial. (PCR V9/1510). He would have furnished the plea offer packet [dated November 4, 2004] to Bill Sites, who was Teresa Jones' attorney.

(PCR V9/1480; 1507). The Clerk's office would schedule the case for a status conference and, thereafter, set a pre-trial conference. (PCR V9/1508). Teresa Jones accepted the plea offer on February 22, 2005. (PCR V9/1507). Blake suggests that this was no "innocent timing of the plea" (IB at 79), but ASA Pickard explained that this timeframe was entirely consistent with the routine cycle set by the Clerk's office. (PCR V9/1508-1509).

ASA Pickard never gave Teresa Jones any consideration because she was a witness in a murder case and never had any discussions with her attorney, Bill Sites, about her cooperation as a witness. (PCR V9/1496-1497). Sites confirmed that he did not have any discussions with ASA Pickard about any homicide case involving Blake. (PCR V42/7227). Sites recalled that Teresa "felt pretty confident that she had not been involved in it to the degree that was alleged and she thought she would ultimately be vindicated." (PCR V42/7230-7231). All of Teresa's co-defendants also entered pleas. ASA Pickard vaguely recalled the disposition of their charges. (PCR V9/1494). Levi Alexander, who was "the worst of the bunch," got a substantial time in prison (probably 12-15 years, with firearm mandatories); Gerald Jones (who might be Teresa Jones' brother) also got a prison sentence; and another female, Tabor, who was the getaway driver, pled to a felony and may have received probation. (PCR V9/1495-1496). Based on ASA Pickard's review of all of the police reports, Teresa Jones received the most lenient disposition. (PCR V9/1496; 1512). The two males were the ones who

got out and committed the robbery, Ms. Tabor was driving the car, and Teresa was just sort of sitting there. (PCR V9/1512-1513).

Blake also relies on a 2002 child abuse investigation report on Teresa Jones, two years before her robbery charge, that was closed as unfounded. (PCR V9/1492; 1506). Blake has not shown how this report actually would have been admissible at trial and, therefore, he cannot establish any materiality under *Brady*. See, *Wood v. Bartholomew*, 516 U.S. 1, 5-6 (1995) (noting that inadmissible polygraph test was not "evidence" and, therefore, was not material under *Brady*); *Gilliam v. Sec'y for Dept. of Corr.*, 480 F. 3d 1027, 1033 (11th Cir. 2007), citing *Breedlove v. Moore*, 279 F.3d 952, 964 (11th Cir. 2002) (upholding denial of *Brady* claim based on inadmissibility of evidence and noting that "[i]nadmissible evidence could only rarely meet [*Brady's* materiality] standard - indeed no Supreme Court case . . . has found inadmissible evidence was material for *Brady* purposes").

The "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." Rather, a "petitioner's burden is to establish a reasonable probability of a different result." See, *United States v. Agurs*, 427 U.S. 97, 109-110 (1976). Even if Blake could arguably establish suppression, which the State disputes, Blake has not shown that the allegedly favorable evidence "could reasonably be taken to put the whole case in such a different light

as to undermine confidence in the verdict." See, *Strickler*, at 287.

Demetrius Jones: As trial, Demetrius admitted that he had pending criminal charges and that he was not to be sentenced until after his testimony. Although he had no guarantees, Demetrius was hoping that his testimony would result in lenient treatment. (R V6/656). Demetrius admitted that he had outstanding warrants in August of 2002, but was not arrested due to his cooperation. (R V6/658). Demetrius was released on a VOP. (R V6/660).

The jury verdict was returned in this case on February 25, 2005. ASA Pickard's plea offer to Demetrius, via his counsel, was dated March 3, 2005. (PCR V9/1518). On March 2, 2005, a "no bill" was entered by an intake attorney, Joe Williams, on a separate case involving Demetrius [felony battery/domestic assault]. (Def. Ex. #8). ASA Pickard would not have known the underlying facts of that case simply by the "no bill" at intake. (PCR V9/1519-1520).

At trial, the jury knew, among other things, that (1) Demetrius Jones was a criminal himself and familiar with the participants in this case, (2) Demetrius had his own charges pending [possession of cocaine and VOP], (3) Demetrius' court hearing dates had been postponed until after he testified, (4) Demetrius hoped for lenient treatment as a result of his testimony, (5) Demetrius violated his probation and had an outstanding warrant in August of 2002, (6) Demetrius spoke to law enforcement and was not arrested, (7) in December of 2003, Demetrius was charged with selling cocaine and resisting an officer without violence, and he

was released, (8) Demetrius was arrested and released on a VOP in February of 2004, (9) Demetrius was arrested on a VOP in April of 2004, and released and instructed to stay in contact with Chuck Zeller, an investigator for the State Attorney's Office, (10) Demetrius could face up to 15 years in prison on just the possession of cocaine with intent to sell charge, and another five years for the VOP/possession of cocaine and another year for the resisting an officer; therefore, Demetrius was looking at the possibility of 21 years in prison. (R V6/654-655; 658-663; V7/666).

Blake's *Brady* claim is also predicated on two exhibits -- ASA Pickard's plea offer form to Demetrius Jones and an unrelated "no bill" at intake -- that did not exist at the time of the guilt phase. Documents that did not exist could not have been suppressed. See, *Duckett v. State,* 918 So. 2d 224, 235 (Fla. 2005). Blake failed to demonstrate any entitlement to relief under *Brady* based on the alleged additional impeachment evidence. *Strickler also* defeats any claim of materiality. In *Strickler*, the withheld documents consisted of police interview notes and correspondence between detectives and the State's primary trial witness. The Court held that the documents were not material, finding that the defendant still would have been convicted and sentenced to death even if the testifying witness had been severely impeached. *Strickler*, 527 U.S. at 294. Here, the allegedly withheld information is not remotely as informative or exculpatory as the documents deemed not material in *Strickler*.

The Video of the Shooting and the Assailant's Clothing

Blake also alleged a *Brady* violation relating to the assailant's clothing depicted on the video of the shooting and a pair of shorts obtained from Green approximately *16½ hours after the shooting*. In denying this *Brady* sub-claim, the trial court found that Blake failed to show that the prosecution suppressed evidence with regard to the color of Green's shorts. And, even if some information about the color of Green's shorts was not disclosed to the defense, the trial court did not find there is any reasonable probability that this undermines confidence in the outcome of the trial. As the trial court noted, "[i]t is not clear who may have been wearing the red shorts seen in the video. Mr. Blake advised the police that he had burned the clothes that he wore at the time of the robbery. The shorts that were taken from Mr. Green were not taken from him at the time of the attempted robbery and shooting. At the evidentiary hearing, Mr. Green said he was wearing dark clothes when he approached the store and shot Mr. Patel." (PCR V45/7665-7666).

The convenience store's surveillance camera captured the scene inside the store. The defense deposition of crime scene technician Renee Arlt was taken by attorney Keith Peterson on April 1, 2003 (State Ex. 3, PCR V43/7402-7415). Technician Arlt was asked to assist the Sheriff's Department in converting the digital files to VHS format for easier viewing. Technician Arlt also printed some still photographs from the video. (PCR V43/7406; 7412). A copy of

her report was provided to the defense at Arlt's deposition; and, when asked about the photo of the suspect, Technician Arlt stated:

> It's a subject wearing a gray-hooded shirt or something wrapped partially around his face. And in one shot, in front of the doors, you can see red shorts that go knee length, and a black leg.
>
> Q. Okay. And this video is in color; is that correct?
>
> A. Yes.
>
> Q. Okay. All right. And the stills that you pulled out, those are also in color?
>
> A. Yes.

(PCR V43/7412-7413).

Renee Arlt's deposition was taken on April 1, 2003 (filed April 14, 2003). (PCR V43/7402). Thus, long before trial, the defense was aware that (1) the shooting was captured on the store's surveillance camera, (2) a videotape, in color, was made from the digital images, and (3) still photographs, in color, were printed from the crime scene video. In addition, Renee Arlt also testified at trial (R V7/835-39) and the videotape of the shooting was introduced into evidence at trial. (R V7/839-840). The defense was furnished with all of the police reports in this case, including Detective Raczynski's report which reflected that around 10:20 p.m. on August 12th -- approximately *16½ hours after* the murder -- the detectives obtained a pair of shorts and shoes from Richard Green. The FDLE report which addressed the examination for glass fragments on the clothing and shoes that were obtained from both Green and Blake was also furnished to the defense at the time of trial. (D.

Ex #41) (PCR V20/3377-3379). Both Detective Raczyinski and FDLE examiner, Ted Berman, testified at trial. Moreover, Blake testified at trial and claimed that Green was wearing grey and red when he got out of the car at the store. According to Blake, the sweater was grey, but Blake couldn't remember whether it had a hood or not. (R V8/1009).

Again, there is no suppression if the defendant knew of the information or had equal access to obtaining it. This Court has repeatedly held that information cannot be deemed to have been suppressed where the defense was, or reasonably should have been, aware of the information. *Owen v. State*, 986 So. 2d 534, 547 (Fla. 2008); *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000); *Maharaj*, 432 F. 3d at 1315 n. 4.

Blake has not established the suppression of exculpatory or impeachment evidence and materiality under *Brady*. Ultimately, the prejudice prong is determined by examining "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290 (quoting *Kyles v. Whitley*). And, once again, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Agurs*, 427 U.S. 97, 109–10. None of Blake's claims, individually or cumulatively, warrant post-conviction relief.

ISSUE IV

THE NEWLY DISCOVERED EVIDENCE CLAIM

Blake's claim of "newly discovered evidence" is based on the recantations by Richard Green and Demetrius Jones in post-conviction. The trial court found the post-conviction testimony of both Richard Green and Demetrius Jones was not credible.

Standards of Review

In *Spann v. State*, 91 So. 3d 812, 816-817 (Fla. 2012), this Court summarized the standards applied to newly discovered evidence claims based on the recantation of a witness:

> While this Court has recognized that the recantation of a witness may under some circumstances qualify as newly discovered evidence, see *Wyatt v. State*, 71 So. 3d 86, 100 (Fla. 2011), we have also observed that recantations are, as a general matter, "exceedingly unreliable." *Bell v. State*, 90 So. 2d 704, 705 (Fla. 1956). Our decision in *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994), sets forth the principles to be followed when the testimony of a recanting witness is submitted as newly discovered evidence:
>
> > Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial. "Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury." Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted.

Id. at 735 (citations omitted) (quoting *Bell*, 90 So.2d at 705); see also *Lambrix v. State*, 39 So. 3d 260, 272 (Fla. 2010); *Archer v. State*, 934 So. 2d 1187, 1196 (Fla. 2006). In accordance with *Armstrong*, "recanted testimony that is alleged to constitute newly discovered evidence will mandate a new trial only if (1) the court is satisfied that the recantation is true, and (2) the recanted testimony would probably render a different outcome in the proceeding." *Davis v. State*, 26 So. 3d 519, 526 (Fla. 2009).

Moreover, this Court has explained that when, as in this case, "a newly discovered evidence claim relies on an admission of perjury, the critical issue of credibility necessarily arises." *Archer*, 934 So. 2d at 1196. Unlike this Court, "the trial judge is there and has a superior vantage point to see and hear the witnesses presenting the conflicting testimony. The cold record on appeal does not give appellate judges that type of perspective." *State v. Spaziano*, 692 So. 2d 174, 178 (Fla. 1997); see also *Nixon v. State*, 2 So. 3d 137, 141 (Fla. 2009) (noting that appellate courts do not "reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses" (quoting *Brown v. State,* 959 So. 2d 146, 149 (Fla. 2007))). For that reason, "[t]his Court will not substitute its judgment for that of the trial court on issues of credibility." *Johnson v. State*, 769 So. 2d 990, 1000 (Fla. 2000). "When reviewing a trial court's determination relating to the credibility of a recantation, this Court is 'highly deferential' to the trial court and will affirm the lower court's determination so long as it is supported by competent, substantial evidence." *Lambrix*, 39 So. 3d at 272 (quoting *Heath v. State*, 3 So. 3d 1017, 1024 (Fla.2009)).

Spann, 91 So. 3d 812, 816-817.

The Trial Court's Order

In denying Blake's "newly discovered evidence" claim, the trial court's order stated, in pertinent part:

The defense claims that Mr. Blake is innocent of the offenses for which he was convicted and sentenced to death. The Defendant alleges that Demetrius Jones now admits his testimony in Mr. Blake's trial was untrue. The

Defendant alleges that Mr. Jones now says he did not see Mr. Blake following the crimes and he testified at Mr. Blake's trial, and Mr. Blake did not ask him to get rid of the gun. Mr. Green was looking for Key to try to orchestrate the story to give law enforcement. Mr. Jones saw Mr. Blake and Mr. Green together and Green was trying to get Blake to leave town, but Mr. Blake indicated he did not want to leave. Mr. Jones says that Kevin Key-Herrington told him that Green shot and killed Mr. Patel. Key says that when Green ran up to the door, the man inside pushed the door closed and Green shot him through the window. Key also told Jones that Mr. Green was the only one that got out of the car. Teresa Jones also told other people that Green was the shooter. Vanbossell Preston has admitted to fabricating his testimony due to pending charges, and Melinda Watson has admitted to trying to help Vanbossell Preston her cousin.

Since, the time of Mr. Blake's trial, Mr. Green has admitted that he shot Mr. Patel. The defense alleges that Mr. Jones' testimony was used to establish that Mr. Blake was present and assisted in the planning of the robbery. Additionally, Mr. Jones testified to inculpatory statements Mr. Blake made after the crimes. The defendant alleges it is clear the post-crime statements Jones alleges were made by Mr. Blake did not take place.

* * * [omitted re: Vanbossell Preston/penalty phase/prior violent felony aggravator]

At the evidentiary hearing, Demetrius Jones recalled talking to Rosa Greenbaum when he was in the county jail, and he agreed it might have been in April 2009. He was asked if anyone from the State asked him about his conversation with Rosa Greenbaum. He said he told them he really did not say anything to her. He thinks he talked to the State after he was out on probation. He went to the State Attorney's office and talked to Mr. Castillo and someone he called officer Zeller. They asked him what he said to Ms. Greenbaum. He agreed that he recalled telling Ms. Greenbaum that Key had told him that Green was the shooter. Mr. Jones said that he told Ms. Greenbaum that Mr. Green took the guns in a backpack from the car. He said that Mr. Green tried to sell the guns. He said Mr. Green later told him that he had thrown a gun in the lake. He testified that he also remembered Mr. Green telling him about trying to use nail polish remover to remove fingerprints from the doors. Mr. Jones said Green told him he wanted to speak to his cousin "Red Man" so he could tell him what to say. He said that "Red Man" was his cousin Kevin Key. He said Mr. Blake never told

him anything. On cross-examination, Mr. Jones was asked if he remembered testifying that he saw Key, Blake and Green talking about going to do a robbery that hadn't happened yet. He said yes, but Mr. Blake wasn't there. He said he did not remember testifying that Mr. Blake was there at that point in time.

Mr. Jones was asked about the trial transcript which indicated that around noon or 1 o'clock he saw Mr. Blake in Winter Haven. Mr. Blake was looking nervous, and he testified at the trial that Mr. Blake said somebody got shot. Mr. Jones said that he did not remember saying that. He agreed he probably did say that at the trial. At this point in time, he did not remember Mr. Blake saying that.

* * * [omitted re: penalty phase/prior violent felony aggravator]

Richard Green testified at the evidentiary hearing. He was asked about the crime that took place on August 12, 2002. He said that they went to the front of Mr. Patel's business, and they could see that about half the lights were on. This indicated to them that Mr. Patel was not all the way open yet, but he was already there. Mr. Green got out of the car, and he described what happened. "I walked up to the store or the door and Mr. Patel, he kind of like came to the door in a panic and then I panicked and then I fired a shot inside the business." (EH March 28, 2011, VII/200). Mr. Green testified that Mr. Key and Mr. Blake did not have any reason to know that he was going to attempt to commit a robbery when he got out of the car. He testified that as he was walking to the door he had adjusted his hoodie to hide the dreads. He had pulled the sweatshirt over his face. He said the sweatshirt was gray or black. He said he was wearing dark clothing, and he was the only one that got out of the car. He said he ran back to the car after the weapon was fired and left. He was asked when he decided to admit that he was the shooter. He responded, "Years after being incarcerated I thought about it and realized somebody's life was on the line for something that they didn't do." (EH March 28, 2011, VII/209).

On cross-examination, Mr. Green agreed that he had testified at his own trial regarding the killing of Mr. Patel, but he did not recall who he said had killed Mr. Patel. He was asked if his defense had been that Harold Blake had shot Mr. Patel, and he said that it was. He agreed that he got on the witness stand and said that he saw Mr. Blake go up to the door and shoot Mr. Patel. Mr.

Green agreed that he was past appeal and postconviction motions as far as the murder and armed robbery are concerned.

In Davis v. State, 26 So. 3d 519 (Fla. 2010), the Florida Supreme Court opined, "Specifically, recanted testimony that is alleged to constitute newly discovered evidence will mandate a new trial only if (1) the court is satisfied that the recantation is true, and (2) the recanted testimony would probably render a different outcome in the proceeding."

The Court did not find Demetrius Jones' testimony at the evidentiary testimony to be credible. The court finds that the account Mr. Jones gave at Mr. Blake's trial was much more credible.

At Mr. Blake's trial, Mr. Jones testified that he knew Mr. Green and had met Mr. Blake through Richard Green. He testified that Mr. Green's nickname was "Plump". He testified that he was talking with Richard Green, Mr. Blake, and Kevin Key ("Red Man") at his home early in the morning on August 12, 2002. Mr. Blake, Green, and Key had arrived at his home between 3:00 a.m, and 4:00 am. in an older model four door car. Mr. Blake was driving. Mr. Green was in the passenger seat in front and Kevin Key was in the back. The back passenger window of the car was broken out. There was broken glass on the back seat of the car. He saw two guns in the car. One of the guns was a 38 caliber revolver and the other gun was a 9 mm, Mr. Green had the revolver in the front of his hoodie sweater and the 9 mm was on the front seat. He had previously seen Green and Blake with the guns. Mr. Jones said they were supposed to go to Lakeland and rob people who sold drugs. He said that Mr. Blake asked him to go with them, but he did not do so after talking with Kevin Key about it. Kevin Key, Green, and Blake left in the car. Mr. Green was driving, Mr. Blake was in the front passenger seat, and Kevin Key was in the back of the car.

Mr. Jones testified that he ran in to Mr. Blake later in the day, and Mr. Blake was acting nervous. He said that Mr. Blake told him they were trying to do a robbery. Mr. Blake told him that someone got shot. He asked him to help him get rid of a gun. Mr. Blake did not have the gun with him. He told Mr. Blake that he would try to sell it to some Jamaican people. He also had contact with Richard Green later in that day. Mr. Green had a 9 mm gun. They tried to sell it to some Jamaicans, but they were unsuccessful. Later that night, possibly on the 13th he went with Mr. Green in Teresa Jones' car to a

lake. Mr. Green threw the gun into the lake, and it separated into two pieces as it flew through the air.

On cross-examination, Mr. Jones was confronted with a statement by defense counsel that he had given to Detective Raczynski on August 20, 2002, concerning what occurred during the early morning hours of August 12. In his statement, Jones told law enforcement that he, Richard Green and "Red Man" were talking about doing a robbery. In the statement he said that they tried to call Mr. Blake. When Mr. Jones testified that it was Mr. Blake's idea to do a robbery, defense counsel once again showed Mr. Jones the August 12 statement, and Mr. Jones agreed that what the statement said was correct. On further cross-examination Mr. Jones seemed to be saying that Mr. Blake suggested robbing people with some weed, then he said he didn't feel like it, and then he wanted to go rob someone.

The Court did not find the testimony that Richard Green gave at the evidentiary testimony to be credible. At his own trial, Mr. Green testified that Mr. Blake was the shooter.

The account Mr. Green gave of Mr. Blake's participation in the crimes was much more credible at his own trial.

The Court does not find that the testimony given by Vanbossell Preston at the evidentiary hearing was credible with respect to his testimony that Mr. Blake did not tell him that he admitted that he killed Kelvin Young. The Court finds that Mr. Preston's testimony at Mr. Blake's trial for the homicide of Kelvin Young was much more credible when he discussed Mr. Blake's participation in that homicide and said that Mr. Blake told him that he shot Kelvin Young.

As discussed above the Court does not find that the testimony given by Mr. Jones, Mr. Green, and Mr. Preston that allegedly constitutes newly discovered evidence to be credible or a truthful recantation. Claim VIII of the Defendant's Motion is denied.

(PCR 45/7689-95) (e.s.).

Argument

Blake's claim of "newly discovered evidence" is based, primarily, on the post-conviction testimony of his accomplice,

Richard Green. Green's prior sworn statements and testimony uniformly identified Blake as the "shooter." In post-conviction, Green declared that he is the "real" shooter. For years, Green denied his involvement in the murder of Mr. Patel. (GR V4/589-610; V5/611-638). Green is currently serving two separate sentences of life imprisonment, has concluded his direct appeal and post-conviction proceedings, and recognized that he can never face the death penalty for the murder of Mr. Patel. Green's post-conviction declaration is virtually "risk free." Moreover, as noted, the defense-disputed identity of the "shooter" does not undermine Blake's conviction.[20] See, *Stumpf*, 545 U.S. at 187 (concluding that the precise identity of the triggerman was immaterial to the defendant's conviction for murder); *Mendoza v. State*, 87 So. 3d 644, 655 (Fla. 2011) (where defendant was convicted of first-degree felony murder, identity of the shooter was not material).

Blake also relies on the "recanted" testimony of Demetrius Jones, who testified at trial about the actions of the trio [Green, Blake and Key] before the crime, the statements and behavior of Blake and Green after the shooting, and the disposal of the murder weapon by Green. And, Blake refers extensively to various hearsay

[20]Blake's trial counsel knew that Blake had confessed and that Green also had identified Blake as the one who shot Mr. Patel. Blake admitted to his trial co-counsel, Al Smith, that he was the one who approached the door and the gun went off; Blake never said that Green was the one who shot Mr. Patel. (PCR V11/1850-1851). Blake never told Al Smith anything other than he was the person that was at the door when Mr. Patel got shot. (PCR V11/1852-1853).

and double-hearsay statements (such as the statements that Green purportedly made to Key and Key repeated to Demetrius), but Blake has not demonstrated that any of those hearsay statements would be admissible at the guilt phase.

"Recanted testimony that is alleged to constitute newly discovered evidence will mandate a new trial only if (1) the court is satisfied that the recantation is true, and (2) the recanted testimony would probably render a different outcome in the proceeding." *Davis v. State*, 26 So. 3d 519, 526 (Fla. 2009). In *Spann*, *supra*, this Court affirmed the denial of post-conviction relief in another capital case where the defendant argued that he was entitled to a new trial based on a recantation by his accomplice. At trial, the State's primary witness against Spann was his accomplice, Philmore. In post-conviction, Philmore denied that Spann had any involvement in the robbery or carjacking and murder of the victim. Philmore claimed he had "changed [his] life" and "decided it was time to tell the truth." The trial court denied Spann's motion to vacate, finding Philmore's recantation "*not credible, untruthful, and exceedingly unreliable*." Here, as in *Spann*, the "recantation" testimony of the post-conviction witnesses was rejected as not credible and not reliable.

In post-conviction, Demetrius Jones claimed that Blake did not ask him to get rid of the gun and that he was <u>not</u> with Green when he threw the gun into the lake. However, after Demetrius Jones was interviewed by law enforcement, Jones accompanied Detective

Raczynski to the lake and showed him where the gun had been tossed into the lake. (R V6/655). A dive team from the Sheriff's office recovered the firearm, which was missing the magazine clip. (R V7/692-694). The firearm recovered from the lake was the same firearm that discharged the bullet that killed Mr. Patel. The shell casing found outside of the store was fired from the same gun that was recovered from the lake. (R V7/730-735).

As previously noted, the trial court found that the post-conviction testimony of the recanting witnesses was not credible. Blake failed to establish that (1) the court is satisfied that the recantation is true and (2) the recanted testimony would probably render a different outcome in the proceeding.

ISSUE V

THE IAC/PROSECUTOR'S COMMENTS CLAIM

In this issue, Blake asserts both a procedurally barred challenge to the prosecutor's statements at trial and a claim of ineffective assistance of counsel at the guilt phase.

The Trial Court's Order

In denying Blake's intertwined post-conviction claim below, the trial court stated, in pertinent part:

> In his Motion, the Defendant alleges that the prosecutor's statements throughout the Defendant's trial unfairly prejudiced him from getting a fair trial. The Defendant mentions a number of examples of statements by the Assistant State Attorney during the trial that he argues are improper. One of the State's witnesses was Teresa Jones. The Defendant alleges that "On direct examination, the prosecutor elicited testimony about Jones' fear of Mr. Blake and his family to explain why

she committed perjury before the grand jury as to the fact that Mr. Blake had been the one who removed two guns from the car." The Defendant also alleges that "Again, on redirect examination, in order to explain Jones' shifting stories about Mr. Blake's actions, the State brought up the fact that Jones had concerns for her safety." The Defendant alleges there is no evidence that Mr. Jones had been threatened by Mr. Blake or his family. The defense alleges that the prosecutor argued at the trial of Mr. Green that Mr. Jones' excuse that she feared Mr. Blake was fabricated.

The defense alleges that the prosecutor elicited improper character evidence from Mr. Blake during his cross-examination when he inquired about Mr. Blake's business of "stealing property and selling it." During cross-examination, Mr. Blake explained why he was crying on the videotape by saying, "when I get real mad, I cry." The defense alleges that this allowed the prosecutor to assert his theme of lack of remorse getting Mr. Blake to acknowledge that he wasn't "crying because you felt bad about what happened to Mr. Patel."

The defense argues that in the closing argument, the Assistant State Attorney pointed out that the arrest of Mr. Blake was very serious and the officers had to be "extremely careful with [Mr. Blake]. The defense alleges that the prosecutor also told the jury to look at Mr. Blake's demeanor on the stand." You had an opportunity to see Mr. Blake in this case when he testified, Mr. Blake, I would suggest to you, is incapable, incapable, of being told what to do. He had anger in his tone. He was combative with the questions that I was asking. He was not responsive to the things I was — that I was trying to get from him. He accused me of behaving like the detectives did.

* * * [omitted re: penalty phase]

To the extent that the Defendant is challenging the prosecutor's arguments, statements, or examination at trial on some basis other than ineffective assistance of counsel, the challenges are procedurally barred. See Floyd v. State, 18 So. 3d 432 (Fla. 2009). The Court finds that arguments made by the prosecutors that are the subject of Claim V constitute fair argument based on the evidence presented at the trial, fair comment on the evidence, or a proper response to the arguments made by the Defendant. See Franqui v. State, 59 So. 3d 82 (Fla. 2011). The Court also finds the arguments made by the

prosecutor regarding the circumstances of the underlying crimes do not constitute non-statutory aggravation. The Court finds that counsel's performance did not fall below an objective standard of reasonableness with regard to the Claim V of the Defendant's Motion.

Additionally, the court finds that even if defense counsel was deficient in some manner with regard to raising proper objections to the arguments and statements of the prosecutor, such deficiency does not establish a probability sufficient to undermine confidence in the outcome of his Trial. Claim V of the Defendant's Motion is denied.

(PCR V45/7683-85) (e.s.).

Argument

To the extent Blake argues that the prosecutor's comments themselves were improper, this issue is procedurally barred because it should have been raised on direct appeal. See, *Jennings v. State*, 2013 WL 3214442, 14 (Fla. 2013).

As to the IAC claim, Blake does not identify any defense inquiry at the post-conviction hearing on his claim that trial counsel was ineffective for failing to object to allegedly improper comments. As a result, this IAC claim is abandoned. In addition, Blake failed to demonstrate any deficiency of counsel and resulting prejudice. The defendant carries the burden to overcome the presumption that, under the circumstances, trial counsel's actions might be considered sound trial strategy. See, *Zakrzewski v. State*, 866 So. 2d 688, 692-693 (Fla. 2003), citing *Ferguson v. State*, 593 So. 2d 508, 511 (Fla. 1992) ("The decision not to object is a tactical one.")

Furthermore, the prosecutor's arguments that are criticized by

Blake constitute fair argument based on the evidence presented. Trial 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)). Moreover, in this case, as in *Franqui v. State,* 59 So. 3d 82, 97 (Fla. 2011), Blake failed to establish how the alleged instances of ineffective assistance of counsel prejudiced him — mere conclusory allegations are not sufficient. Here, as in *Franqui*, the majority of the prosecutorial arguments alleged to be improper were fair comment on the evidence or inferences arising from the evidence, or proper response to the arguments of defense counsel. Moreover, any alleged error, even if any arguably existed, which the State emphatically disputes, would have been harmless. See, *State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986).

ISSUE VI

THE *AKE v. OKLAHOMA* CLAIM

Lastly, Blake asserts a procedurally-barred claim based on *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985).

The Trial Court's Order

In denying this post-conviction claim below, the trial court's order states, in pertinent part:

> The defense also asserts that Mr. Blake was entitled to adequate mental health examination concerning guilt phase issues. Mr. Blake's susceptibility to coercion, his understanding of the circumstances surrounding his interrogation, and issues of his culpability compared to

his co-defendant were not considered because no mental health expert was retained to consider these issues.

The defense alleges that Ake is extended to non-pyschological [sic] experts and that Mr. Blake was denied his right to assistance of an expert in false confessions. An expert could have assisted Mr. Blake in showing that his statement was in fact false and not freely and voluntarily given.

To the extent the Defendant is arguing a substantive claim based on Ake v. Oklahoma, not based on a claim of ineffective assistance of counsel, his claim is procedurally barred. See Floyd v. State, 18 So. 3d 432 (Fla. 2009). In Stewart v. State, 37 So. 2d 243, 255 (Fla. 2010), the Florida Supreme Court discussed the type of postconviction claim based on Ake that is not procedurally barred because it could have been raised on direct appeal. "In *Stewart*, the Court opined, "*Ake v. Oklahoma*, 470 U.S. 68, 84, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985), the United States Supreme Court concluded that in a sentencing proceeding, "due process requires access to psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase." While ordinarily a postconviction claim based on Ake is procedurally barred because it could have been raised on direct appeal, a defendant is entitled to litigate during postconviction a claim that a prior mental health expert's examination was so "grossly insufficient" that the expert "ignore(d) clear indications of either mental retardation or organic brain damage." Raleigh v. State, 932 So. 2d 1054, 1060 (Fla. 2006) (quoting Sireci, 502 So. 2d at 1224)."

The Court finds that a claim based on Ake v. Oklahoma is not applicable to the facts of this case. The Court does not find that Dr. Kremper's examination was grossly insufficient or that he ignored clear indications of either mental retardation or organic brain damage. As more fully discussed in Claim IV of this Order, from a professional/ethical standpoint it was not appropriate for Doctor Kremper to be retained as the mental health professional by the defense when he had previously been retained by the State in another case involving Mr. Blake. The deficiency of counsel with respect to mental health mitigation is addressed by the Court in Claim IV of the Defendant's Motion. Claim VI of the Defendant's Motion is denied.

(PCR V45/7686-88) (e.s.).

Argument

Any substantive claim based on *Ake v. Oklahoma* is procedurally barred. *Floyd v. State*, 18 So. 3d 432 (Fla. 2009). Blake's claim that *Ake* also encompasses a "false confession" expert is not only procedurally barred, but meritless. In *Ake*, the Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." *Ake*, 470 U.S. at 74, 105 S.Ct. 1087. As noted in *Conklin v. Schofield,* 366 F.3d 1191, 1206 (11th Cir. 2004), the Court in *Ake* limited its holding to psychiatric assistance. To the extent Blake relies on an IAC claim, the State relies on the arguments in Issue II of the instant brief.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the State submits that the trial court's order, denying relief on the guilt phase claims in Blake's Rule 3.851 motion to vacate, should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic transmission to Linda McDermott, Esq. at lindammcdermott@msn.com, McClain & McDermott, P.A., 20301 Grande Oak Blvd., Suite 118-61, Estero, Florida 33928, this 12th day of August, 2013.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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