

IN THE SUPREME COURT OF FLORIDA

JASON DIRK WALTON,

Appellant,

v.

CASE NO. 78,070

STATE OF FLORIDA,

Appellee.

-----/

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF CASE AND FACTS

Most recently, this Court relinquished jurisdiction of this case to the trial court following an appeal from the denial of 3.850 relief. In Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993), this Court held that the Defendant was entitled to an evidentiary hearing to consider whether certain claimed public records exemptions applied or whether the documents requested were public records subject to disclosure. Based upon this ruling, this Court relinquished jurisdiction to the trial court to reexamine the Defendant's public records request. Pending resolution of that first issue raised in Walton's 3.850 motion, this Court reserved ruling on the remaining issues raised on appeal by Walton, which included the following:

(2) the jury received improper instructions regarding statutory aggravating circumstances; (3) the trial court erred in allowing a codefendant's mental health expert to testify at Walton's evidentiary hearing; (4) Walton was denied the effective assistance of counsel; (5) the trial court failed to independently weigh the aggravating and mitigating circumstances; (6) Walton's second sentencing proceeding was contaminated with the same evidence that was determined to have been inappropriately presented at his first sentencing proceeding; (7) Walton's sentence constitutes cruel and unusual punishment because the record is devoid of a finding of his individual culpability; (8) Walton's sentence is disproportionate, disparate, and invalid because a codefendant received a life sentence; (9) the jury was improperly and unconstitutionally instructed; (10) Walton's conviction should be reversed because new law now mandates a holding that his statements should have been suppressed; (11) Walton's absence

from a portion of the proceedings prejudiced his resentencing; (12) Walton's death sentence rests upon the unconstitutional aggravating circumstance of lack of remorse; (13) the trial court unconstitutionally shifted the burden of proof in its instructions at sentencing; and (14) the application of rule 3.851 violated Walton's constitutional rights.

See Walton, 634 So. 2d 1059, 1061 n.1.

After jurisdiction was returned to the trial court, extensive public records hearings were conducted. Following these hearings, the Defendant filed a Third Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend on November 6, 1998, containing thirty three claims.¹ (PC-1, Vol, 11, pp. 1869-2021). After the trial court

¹The claims include the following: (1) Walton's second sentencing proceeding was contaminated with the same evidence that was determined to have been inappropriately presented at his first sentencing proceeding; (2) the trial court was exposed to non-record material and therefore could not render an unbiased sentence; (3) the trial court failed to independently weigh the aggravating and mitigating circumstances; (4) Defendant's statements to police should have been suppressed (claim 5 in previous 3.850 motion); (5) the cold, calculated and premeditated aggravating factor and instruction are unconstitutionally vague; (6) the ethical rule prohibiting lawyers from interviewing jurors is unconstitutional; (7) Defendant was not competent to proceed to trial; (8) Defendant is innocent of first degree murder and innocent of the death penalty (same as claim 4 in first 3.850); (9) counsel was ineffective for conceding the admissibility of allegedly gruesome photographs; (10) the jury was improperly instructed on pecuniary gain aggravator; (11) jury instructions on avoiding arrest aggravator unconstitutionally vague; (12) the penalty phase instructions improperly shifted the burden to Defendant to prove that death was inappropriate; (13) the jury was unconstitutionally instructed to consider an automatic

issued an Order to Show Cause, the State filed the State's Response to Order to Show Cause on April 7, 1999. (PC-1, Vol. 11, pp. 2023-2031).

The Huff hearing was conducted on July 23, 1999. (Supplemental Record, Vol. 25, pp. 4074-4101). At the hearing, the State explained that, of the thirty three claims raised in the Third Amended Motion, only two to three claims were actually new when compared to the 3.850 motion filed prior to the Florida Supreme Court's remand. The new claims were found at Claim 8, paragraphs 28 and 32, and Claim 28.

aggravator; (14) numerous claims of ineffective assistance of counsel; (15) Florida's capital sentencing scheme is unconstitutional; (16) Defendant's death sentence is cruel and unusual punishment because the record is allegedly devoid of a finding on his individual culpability; (17) the trial judge failed to make factual findings at the sentencing hearing; (18) testimony related to Defendant's dealing in marijuana violated the holding in Johnson v. Mississippi; (19) the sentencing phase was tainted by testimony of unconvicted crimes; (20) counsel was ineffective during voir dire; (21) prosecutorial argument and jury instructions misled jury regarding ability to exercise mercy and sympathy; (22) trial court failed to sequester jury; (23) counsel was ineffective for failing to file a motion to change venue; (24) sentence improperly rests upon lack of remorse as an unconstitutional aggravator; (25) Defendant was absent from critical stages of the proceeding; (26) heinous, atrocious and cruel aggravator is unconstitutionally vague; (27) trial court failed to consider mitigators; (28) electrocution is cruel and unusual punishment; (29) jury improperly instructed on during the course of a robbery aggravator; (30) jury improperly instructed on previous violent felony aggravator; (31) length of time on death row constitutes cruel and unusual punishment; (32) Defendant is insane to be executed; and (33) cumulative error. (PC-1, Vol. 11, pp. 1869-2021).

(Supplemental Record, Vol. 25, pp. 4078-4079). Defense counsel never disputed this characterization of the claims raised, (Supplemental Record, Vol. 25, pp. 4079-4101), and actually agreed that the cause was remanded for the limited purpose of addressing outstanding public records issues and allowing additional issues to be raised resulting only from any newly divulged public records. (Supplemental Record, Vol. 25, pp. 4090).

The trial court ruled that the remand was for the limited and specific purpose of permitting Defendant to obtain public records and then amend the prior Motion to Vacate based upon the production of those records. (Supplemental Record, Vol. 25, pp. 4090-4095; and PC-1, Vol. 14, p. 2422). The only claims which met the dictates of the remand were set forth in Claim 8, paragraphs 26 and 32, based on allegations of newly discovered evidence in the form of notes of Dr. Pierson and of a police officer. The trial court ruled that a hearing would be conducted on these two claims. (PC-1, Vol. 14, p. 2422). The other new issue, raised in claim 28, involving Florida's method of execution by electrocution was denied without an evidentiary hearing.

The evidentiary hearing was then conducted over several days on September 24, 1999, February 25, 2000, May 26, 2000, and June

23, 2000. (PC-1, Vol. 14, p. 2406-2407).

Ultimately, the trial court ruled that Defendant waived the claim raised in Claim 8, paragraph 26, which involved allegedly newly discovered handwritten notes of some unidentified person regarding Dr. Pierson's evaluation of the eight-year old child, Chris Fridella. In his motion, Defendant sought to test the legitimacy of the psychiatric testimony regarding Chris Fridella. However, as noted in the trial court's Order, no evidence was presented on this claim at the evidentiary hearing and Defendant did not argue this claim in written closings. (PC-1, Vol. 14, p. 2408). As such, the trial court deemed the argument abandoned.

Claim 8, paragraph 32, involved police notes consisting of a polygraph examiner's notes on Robin Fridella, a civil trespass report about Robin's custody dispute, and a police officer's notes on Robin Fridella which contained Robin's accusation of finding her husband [one of the murder victim's] in bed with another woman, and attributed Robin with the statement that "she would do anything to get the kids and that if she could not have the children, no one would." (PC-1, Vol. 14, p. 2409). This claim was also denied by the trial court. (PC-1, Vol. 14, p. 2411-2419).

The trial court also ruled on Defendant's argument that

Cooper and Walton's post-conviction hearings were improperly consolidated. This claim was denied. (PC-1, Vol. 14, p. 2419-2420).

Appellant now files a Supplemental Brief raising additional issues stemming from the second evidentiary hearing.

SUMMARY OF ARGUMENT

Issue I: Appellant's newly raised claim of ineffective assistance of counsel is procedurally barred where the information related to this claim was previously known to both the Defendant and his counsel. As such, this claim does not arise from the newly produced public records, and is not, therefore, the proper subject of the limited remand ordered by this Court.

Substantively, this claim of ineffective assistance is also without merit. Defense counsel pursued the strategy that the murders were the result of a robbery gone bad. As a result, any information relating to Robin Fridella's involvement was antagonistic to this theory. Thus, Appellant has failed to show either deficient performance or prejudice relating to this claim.

Issue II: The documents relating to Robin Fridella constitute neither newly discovered evidence or improperly withheld Brady material. The information contained in the documents was previously known to both Defendant and his attorney. Moreover, this information could not have produced an acquittal on retrial.

Issue III: Where Dr. Merin testified that the allegedly newly discovered documents had no impact on his evaluation of

the Defendant, Appellant has failed to demonstrate that he is entitled to a new trial. Moreover, where Appellant called Dr. Merin to testify in the most recent evidentiary hearing, no error resulted from any alleged conflict stemming from his work on co-defendant Cooper's case.

Issue IV: No improper consolidation of Cooper and Walton's cases occurred. The portion of the evidentiary hearing held in conjunction with counsel for both codefendants was appropriate where both defendants were present, each with his own counsel, and each had the right to present or cross-examine the witnesses on their individual considerations.

ISSUE I

WHETHER DEFENDANT WAS DENIED EFFECTIVE
ASSISTANCE OF COUNSEL. (AS RESTATED BY
APPELLEE).

In this first issue, Appellant raises virtually the same claims of ineffective assistance of counsel which were raised in the Initial Brief previously filed with this Court.² Thus, to the extent these identical claims were already addressed by the State in the Answer Brief previously filed, the State will rely upon those arguments set forth in the State's Answer Brief.

The only new claim raised in this issue deals with counsel's use of Dr. Fleming's mental health opinion of the Defendant. Appellant argues that the additional information learned about Robin Fridella altered Dr. Fleming's opinion, and, thus, should have altered the defense case. Based upon the testimony of defense counsel O'Leary, (PC-1, Vol. 23, pp. 3912-3952), the State disagrees.

Initially, to the extent that Appellant claims that the documents pertaining to Robin Fridella constitute Brady material, it is unclear how counsel could be found ineffective

²In fact, pages twenty one through forty three, and fifty seven through fifty nine of the Supplemental Brief are virtually identical to pages thirty nine through fifty six of the Initial Brief. The only new allegations appear in the Supplemental Brief at pages forty four through fifty seven.

based upon evidence withheld by the State. As such, this claim must be considered as an alternative to the Brady claim raised in Issue II.

Toward that end, because the trial court found that this information was known to Defendant, (PC-1, Vol. 14, p. 2418), this claim should be barred as successive. See Jennings v. State, 782 So. 2d 853, 861 (Fla. 2001)(defendant's backup ineffective assistance claim, raised if the Court declined to find a Brady violation because the testimony was already possessed by appellant independent of the State's notes, properly barred as successive), citing Pope v. State, 702 So. 2d 221, 223 (Fla. 1997) (explaining that successive ineffective assistance of counsel claim based on a different ground is properly barred absent an allegation of newly discovered evidence).

This claim should also be barred given the limitations placed on the remand by this Court. Appellant was permitted to amend his 3.850 motion only to raise "...additional claims or facts discovered as a result of the disclosure..." of additional public records. See Walton v. Dugger, 634 So. 2d 1059, 1062 (Fla. 1993). Consequently, where the trial court ruled that the information relating to Robin Fridella was previously known to Defendant, the newly raised claims of ineffective assistance of

counsel are procedurally barred.

However, should this Court fail to find the new claim of ineffective assistance of counsel to be procedurally barred, this claim also fails on the merits. In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. 668, 689, 66 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331 (Fla. 1997); Rose v. State, 675 So. 2d 567 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. 668, 689, 66 U.S. at 687, 695; Valle, 705 So. 2d 1331, 1333; and Rose, 675 So. 2d at 569.

A proper analysis requires that counsel's performance be reviewed with a spirit of deference; there is a strong presumption that counsel's conduct was reasonable. Strickland, 466 U.S. at 689, 66 U.S. at 689.

Factually speaking, while Drs. Fleming and Sultan conducted additional evaluations of Defendant based upon the information learned about Robin Fridella, defense counsel's testimony made it clear that no prejudice resulted from the failure to use this information at trial. Based upon Defendant's admission that he was present when the murders were committed, the defense theory claimed that this was simply a robbery gone bad. (PC-1, Vol. 23, pp. 3937-3938). Defense counsel pursued the strategy that Defendant abandoned the robbery when no goods were found, and that he had nothing to do with the shooting. This theory was supported by the fact that the victims were shot with shotguns, and that Defendant had a pistol while the other two co-defendants both had shotguns. (PC-1, Vol. 23, pp. 3937-3938). As such, defense counsel repeatedly testified that any information relating to Robin Fridella's involvement was totally irrelevant to his defense both at the guilt and penalty phases of trial. (PC-1, Vol. 23, pp. 3923-3924, 3927-3928, 3933, 3939-3940, 3948, 3951). In fact, O'Leary testified that he was surprised the State did not use this evidence against Defendant

to demonstrate premeditation. (PC-1, Vol. 23, pp. 3939-3940).

In view of counsel O'Leary's testimony, Appellant has failed to establish either deficient performance on counsel's part or any prejudice resulting therefrom. While Appellant maintains that the information about Robin Fridella should have altered the mental mitigation evidence, this type of disagreement with trial counsel's strategy cannot support the request for a new sentencing hearing. See Patton v. State, 784 So. 2d 380, 391 (Fla. 2000), citing Rose v. State, 675 So. 2d 567 (Fla. 1996) (holding disagreement with trial counsel's choices as to strategy was not ineffective assistance of counsel); see also Cherry v. State, 659 So. 2d 1069 (Fla. 1995) (concluding standard is not how current counsel would have proceeded in hindsight).

ISSUE II

WHETHER THE STATE WITHHELD EXCULPATORY AND
IMPEACHMENT EVIDENCE, IN VIOLATION OF BRADY
V. MARYLAND, SUCH THAT APPELLANT IS
ENTITLED TO A NEW TRIAL AND/OR PENALTY
PHASE. (AS RESTATED BY APPELLEE).

In addition to the ineffective assistance of counsel raised above in Issue I, Appellant also argues that the investigative documents related to Robin Fridella constitute Brady material and/or newly discovered evidence. According to Appellant, the information contained in the documents involving Robin Fridella demonstrates that she may have been involved in the murders and had undue influence over Appellant which would have been relevant to both the guilt and penalty phases of trial. Again, given the defense theory of the case, as testified to by Attorney O'Leary, the State disagrees.

The documents in question include the handwritten notes from two Pinellas County Sheriff's Officers. As set forth in the Order Denying Defendant's Third Motion to Vacate,

[t]hese notes consisted of: a polygraph examiner's notes on Robin Fridella; a civil trespass report about Robin's custody dispute; and a police officer's notes on Robin Fridella which contained Robin's accusation of finding her husband in bed with another woman, and attributed Robin with the statement that "she would do anything to get the kids and that if she could not have the children, no one would".

(PC-1, Vol. 14, p. 2409). The trial court's Order rejected Appellant's contentions that these documents constitute either

newly discovered evidence or Brady material.

A. Newly discovered evidence.

Initially, any claim of ineffective assistance of counsel based upon this "newly discovered evidence" is procedurally barred. This claim could have, and should have, been raised in the initial 3.850 motion. See Downs v. State, 740 So. 2d 506 (Fla. 1999).

Substantively, Appellant has failed to identify any newly discovered evidence which would justify granting a new trial. The test for determining whether to grant a new trial based on newly discovered evidence first requires a finding that the evidence was unknown and could not have been known at the time of trial through due diligence. See Robinson v. State, 770 So. 2d 1167, 1170 (Fla. 2000), citing Jones v. State, 591 So. 2d 911, 916 (Fla. 1991)(Jones I). Once past this threshold finding, a court must apply the second prong which requires a finding that the newly discovered evidence "would probably produce an acquittal on retrial." See Robinson, 770 So. 2d 1167, 1170, citing Jones I, 591 So. 2d 911, 915. Appellant's claim of newly discovered evidence fails both of the relevant prongs.

First, as noted in the trial court's Order, the information contained in these documents was known by both Appellant and the

defense counsel, Donald O'Leary, at the time of trial.

Defendant's statement to police when arrested on January 20, 1983, included that he knew Robin and Steve Fridella were fighting over custody of their kids and that she had mentioned going back to Steve. (See Exhibit 14: Defendant's confession to the Police, pages 289-290). Records which are available as public record do not qualify as newly discovered evidence because they are available on diligent search. Porter v. State, 653 So. 2d 374, 378 (Fla. 1995); See Ziegler v. State, 632 So. 2d 48, 50 (Fla. 1993); Agan v. State, 560 So. 2d 222 (Fla. 1990). Regardless of whether the exact documents were available, the information therein was known to Defendant and his counsel before trial.

(PC-1, Vol. 14, p. 2409-2410).

Second, the trial court explained that nothing in the documents related to Robin Fridella contain any information which would probably produce an acquittal on retrial.

Evidence known all along to Defendant of any influence his girlfriend had over him is not of such a nature that it would probably produce either an acquittal or life sentence on retrial, the second prong of the legal test set forth in Jones v. State, 591 So. 2d 911, 915 (Fla. 1991), for considering the admissibility of newly discovered evidence. See Davis v. State, 742 So. 2d 233, 237 (Fla. 1999); See also Sims v. State, 750 So. 2d 622, 625 (Fla. 1999). This second prong includes the requirement that "newly discovered evidence" be admissible. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998). If admissible, the next consideration is the weight to be afforded, based on materiality, relevance and credibility, and whether it is merely cumulative or impeachment evidence. Id. at 521-522.

In this case, Defendant fails to show that the "newly discovered evidence" would be admissible in the guilt phase. The information obtained through public records request was known in substantial amount by both Defendant and his counsel and could have been

obtained with due diligence. The two doctors, Fleming and Sultan, admitted on cross-examination that even after talking with Defendant about the documents and the information therein, they had no information of any involvement by Robin Fridella in the murders or even in the burglary/robbery. Mere speculation that someone else helped plan the crimes is not admissible evidence. See Davis v. State, 744 So. 2d 233 (Fla. 1999). A defendant's version of how the crime occurred does not equate to newly discovered evidence. See Scott v. Dugger, 634 So. 2d 1062 (Fla. 1993). Any influence of another does not change Defendant's own involvement in the burglary/robbery murders with the three co-perpetrators at the scene.

The records does not support that any information of Robin Fridella's influence over Defendant was unknown to Defendant or his counsel. Further, Defendant has not shown that the outcome would have been different had defense counsel had the polygraph examiner's notes, the civil trespass report about Robin's custody dispute, and the officer's notes. As shown by Defendant's confession to the police, Defendant and defense counsel were aware of the custody dispute and divorce proceeding between Robin and Steve Fridella. The State used in its opening statement at re-sentencing the fact that Defendant feared that his girlfriend Robin would go back to her husband, but Defendant never claimed that he was acting under the substantial domination of Robin and has always denied his guilt. The State argues that even assuming that Robin Fridella was more involved in planning the Robbery and murders, it would not have lessened Defendant's guilt in the guilt phase given the questionable admissibility of such evidence in the guilt phase. Mendyk v. State, 592 So. 2d 1067, 1077 (Fla. 1992).

(PC-1, Vol. 14, p. 2410-2411).

Appellant also includes polygraph results taken from Robin Fridella in the claim of newly discovered evidence. The trial court's Order dealt with this claim as follows:

The polygraph examiner's notes on Robin Fridella

showed that he (Deputy Poe) believed that she was being untruthful about her involvement. Defendant argues that this information was material and could have been used to impeach key State's witnesses' testimony and to attack the State's theory of motive. Defendant also argues that this information also could have been used in the penalty phase to attack the aggravating factors used to sentence Defendant to death.

However, in its Response the State argues that Robin Fridella's polygraph results were not material, were inadmissible, and would not have changed the outcome of the proceedings. Polygraph results are inadmissible without stipulation of both parties. Brookins v. State, 495 So. 2d 135, 138 (Fla. 1986); See LeCroy v. Dugger, 727 So. 2d 236 (Fla. 1998). The reason for their inadmissibility is not so much that they are hearsay but that they are unreliable.

The Court agrees. As noted by the Court at the conclusion of Mr. O'Leary's testimony at the evidentiary hearing, any information about Robin Fridella's involvement in the burglary/robbery and murders regarding her influence on Defendant was something known to Defendant, which he could have shared with this counsel. Additionally, the record shows that during Defendant's evidentiary hearing of December 6, 1994, on public records, Deputy Poe testified that he had changed his mind about the results of his polygraph testing of Robin and no longer felt that it showed deception. Deputy Poe testified that the test had been given at a time when he was just beginning such testing, and through later experience he no longer had faith in his original results of several of the tests he had first conducted. Thus, the polygraph results would not have been allowed as a mitigator at the sentencing phase.

Further, the Court finds that the test would not have established a mitigating circumstance "that Defendant was under the substantial domination of Robin Fridella." The trial court's discretion in rejecting the statutory mitigator of acting under the substantial domination of another was affirmed on direct appeal in San Martin v. State, 705 So. 2d 1337, 1348 (Fla. 1998). See Valdes v. State, 626 So. 2d 1316, 1324 (Fla. 1993); See also Pooler v. State, 704 So. 2d 1375, 1379 (Fla. 1997).

(PC-1, Vol. 14, pp. 2411-2413).

The State would reiterate the fact that Detective Poe no longer believes that Fridella's polygraph shows deception. As such, the results of the polygraph could not possibly produce an acquittal on retrial. Thus, this allegedly newly discovered evidence does not justify a retrial of either the guilt or penalty phase of Appellant's case. Consequently, where the trial court applied the correct rule of law and competent substantial evidence supports the ruling denying a new trial, the trial court's holding must be affirmed. See Jones v. State, 709 So. 2d 512, 532 (Fla. 1998)(citations omitted).

B. Brady claim.

Alternatively, Appellant argues that the newly discovered evidence discussed above constitutes Brady material improperly withheld by the State. The trial court's Order set out the case law with respect to a Brady claim, and, ultimately, found as follows:

In Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused...violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The prosecutor's obligation under Brady extends to the disclosure of evidence that could be used for impeachment, as well as exculpatory evidence. See United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985). In accordance with Brady, Bagley, and Kyles

v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995), the United States Supreme Court has recently enunciated in Strickler the three significant elements or components that a defendant must prove to successfully assert a Brady violation:

The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 281-282, 199 S.Ct. 1936, 144 L.Ed. 286 (1999).

The Court finds that Defendant fails to successfully assert a Brady violation. First, Defendant fails to demonstrate that the evidence presented at the evidentiary hearings was favorable to him. Assuming arguendo that Robin Fridella was more involved in planning the burglary/robbery and the murders, it would not have lessened Defendant's guilt in the guilt phase given the questionable admissibility of such evidence in the guilt phase. Mendyk v. State, 592 So. 2d 1076, 1077 (Fla. 1992); See Spaziano v. State, 570 So. 2d 289, 291 (Fla. 1990)(holding that a police investigator's notes concerning interview with third party is not automatically favorable to the defendant).

Furthermore, the record is clear that Defendant was aware of the witness in question (his girlfriend), and more importantly, he knew the information about which she testified. Although the "due diligence requirement is absent from the Supreme Court's most recent formulation of the Brady, test, it continues to follow that a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant." Occhicone v. State, [768 So. 2d 1037 (Fla. 2000)].³ Thus the police officer's notes were

³In addition to the trial court's analysis, the State would add that the inherent or implicit question in the "suppression

not exculpatory, nor did they have any impeachment value. This is evidenced by defense attorney Donald O'Leary's testimony at the initial evidentiary hearing on September 24, 1999. Mr. O'Leary, who had been an attorney for 13 years when appointed to represent Defendant in 1983, testified that he was familiar with Brady and had made it a part of his initial Demand for Discovery in Defendant's case, to receive any relevant discovery, and had later separately made a Demand for Exculpatory Information. Mr. O'Leary represented Defendant in both the trial in February 1984 and re-sentencing in August of 1986. Mr. O'Leary identified defense exhibits 1 through 5 as the discovery motions he had filed, and testified that he understood Brady to include all relevant information of guilt or innocence, exculpatory or inculpatory which could be used for the defense investigation. Additionally, he testified that although he would have expected to have received pursuant to Brady the information that the police had about Robin Fridella's custody problems in the divorce proceeding against her husband and that she had accused him of sleeping with another woman, he said that it would not have been consistent with his theory of defense and would, in his opinion, have actually been antagonistic.

On cross-examination Mr. O'Leary explained the

component" is whether the defendant possessed such evidence or could have possessed it with reasonable diligence. If the defendant could have uncovered the evidence, then there can be no finding of state suppression. See Johns v. Bowersox, 203 F.3d 538, 545 (8th Cir. 2000), cert. den., 531 U.S. 1038 (2000) (defining "state suppression" component of Brady as "[t]here is no suppression of evidence if the defendant could have learned of the information through 'reasonable diligence'"). Walton does not cite to any authority which supports his claim that this Court has significantly altered the substance/requirements of a Brady claim by abandoning the "due diligence" prong. To the contrary the State notes that the circuit courts have applied this same analysis in light of Strickler. See United States v. Grintjes, 237 F.3d 876, 880 (7th Cir. 2001) (holding Brady does not apply where evidence could have been discovered by defense with use of diligence); United States v. Maloof, 205 F.3d 819, 827 (5th Cir. 2000)(same); United States v. Corrado, 227 F.3d 528, 538 (6th Cir. 2000)(same).

defense theory he had pursued as a planned robbery that had gone bad through actions of the co-perpetrators while Defendant was outside and had already abandoned any plan of finding any drugs or cash inside. He said that the theory had been developed based on the evidence the State had as well as Defendant's admissions of his presence at the murder scene. Mr. O'Leary said that the exhibits of which he had been unaware (the polygraph examiner's notes on Robin Fridella; the civil trespass report about Robin's custody dispute and the police officer's notes on Robin Fridella) **would not have changed his strategy and that he was surprised they had not been used by the State against him because they would have added fuel to the fire that the murders were planned and premeditated.** He also said that he would not have used the information or "newly discovered evidence" in the penalty phase because it was too drastic of a change from the theory presented in the guilt phase.

The appellate record of Mr. O'Leary's first and rebuttal closing arguments for trial and opening argument for the re-sentencing phase reflect the theory he pursued of Defendant being only an accomplice with the other three male co-perpetrators, to burglary/robbery and an unaware non-participant of the murders by co-perpetrators Richard Cooper and Terry Van Royal. (See Exhibit 15: Defense counsel's opening statement for re-sentencing). Clearly, to have claimed that Defendant committed the murders because he "was so devoted to Robin Fridella that he would have done anything, even murder, to be with her" (Defense Closing Argument memorandum page 11) would have been inconsistent with and actually antagonistic to the defense theory of defense.

On re-direct, Mr. O'Leary assured Ms. Izakowitz that he would not have wanted to use any testimony about Robin Fridella's influence over Defendant even in the second penalty phase, where the State did argue that Defendant was afraid Robin would leave him. Mr. O'Leary recalled that the State's theory of guilt included felony murder, and he would have wanted to avoid any emphasis that Defendant pre-planned even the robbery independent of the other younger co-perpetrators. Additionally, Mr. O'Leary answered that he did not believe that the argument that Defendant

was blinded by love for Robin Fridella would have been a practical matter to have presented for consideration of mitigation by a jury. On recross-examination Mr. O'Leary answered that he believed that it would have been an insult to the jury to have presented it as a suggestion of possible mitigation when the defense argument was consistent that Defendant was only an accomplice, with the other three males, to robbery and an unaware non-participant to the murders.

The Court finds that Defendant fails to show how counsel's performance was deficient, or how that performance could have prejudiced the outcome of the proceedings. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Id. at 689, 104 S.Ct. 2052, 80n L.Ed.2d 674 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight..."); See Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) ("The standard is not how present counsel would have proceeded, in hindsight."). Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected, and counsel's decision was reasonable under the norms of professional conduct. See Rutherford v. State, 727 So. 2d 216, 219 (Fla. 1998); State v. Bolender, 503 So. 2d 1247, 1250 (Fla. 1987).

Furthermore, the Court finds that Defendant's claim fails to show prejudice. See Strickland v. Greene, 527 U.S. 263, 281-282 (1999); See Occhicone v. State, [768 So. 2d 1037 (Fla. 2000)]. As explained by the United States Supreme Court in Kyles, a "showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation without more". Kyles, 514 U.S. at 437, 115 S.Ct. 1555 (1995); See Strickler, 119 S.Ct. at 1948; Bagley, 473 U.S. at 675, 105 S.Ct. 3375 (1985). The fact that a third person was a suspect early in the investigation, and that the theory was later abandoned does not make such exculpatory information required to be disclosed by the State. Spaziano v. State, 570 So. 2d 289, 291 (Fla. 1990).

Defendant must establish that the defense was prejudiced by the State's suppression of evidence, in

other words, that the evidence was material. See Strickler, 119 S.Ct. at 1948. The United States Supreme Court articulated the specific test for determining the materiality of evidence in order to meet the prejudice prong of Brady: "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682, 105 S.Ct. 3375 (1985); See Strickler, 119 S.Ct. at 1952. Prejudice is measured by determining "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" Id. at 290, 119 S.Ct. 1936 (quoting Kyles v. Whitley, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). The evidence must be considered in the context of the entire record. See Haliburton v. Singletary, 691 So. 2d 466, 470 (Fla. 1997)(quoting Cruse v. State, 588 So. 2d 983, 987 (Fla. 1991)).

In this case, the notes or documents to which Defendant alludes do not contain material information that would produce an acquittal or a life sentence on retrial. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)(citing Jones v. State, 591 So. 2d 911, 915 (Fla. 1991)). This Court acknowledges that the Florida Supreme Court has stated that attorney notes of witness interviews maintained by the State constitute Brady material. Young v. State, 739 So. 2d 553 (Fla. 1999). However, in this case, the notes were handwritten by a police officer, and the record affirmatively reflects that Defendant was aware of this witness (his girlfriend), and more importantly, he know about the information to which she testified.

Defendant's admissions to the police on January 20, 1983, included that he was aware that Robin had a child custody hearing coming up and that they were fighting for the kids. Defendant never admitted that he had killed any of the victims or that he ever planned to do so. Defendant said that he was dating Robin at the time, that they were not living together, and that she had said something about going back to her husband, but that he did not believe they were planning on getting back together. (See Exhibit 14: Defendant's confession to the police, pages 289-290). Defendant told the police that Robin knew nothing

about his involvement. (See Exhibit 14, pages 290-291). The Court's re-sentencing order noted testimony of a friend whom Defendant had told that he was upset because Robin was thinking of going back to her husband, Steve Fridella, and that it looked like he would have to "waste" Steve Fridella.

Thus, Defendant's Brady claim is without merit because there is no reasonable probability of a different outcome had the handwritten police notes been used by the defense at trial. All of the documents to which Defendant refers as newly discovered evidence cannot reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict or the sentence. Way v. State, 760 So. 2d 903 (Fla. April 20, 2000); See Thompson v. State, 759 So. 2d 650 (Fla. April 13, 2000). Additionally, Defendant fails to meet the second prong of the legal test set forth in Jones for considering the admissibility of newly discovered evidence. Jones v. State, 591 So. 2d 911, 915 (Fla. 1991).

(PC-1, Vol. 14, pp. 2413-2419).

Under these circumstances, Appellant has not demonstrated that he is entitled to a new trial or a new resentencing proceeding. As such, giving great deference to the trial court's factual findings and independent review to the legal question of prejudice, the ruling of the trial court with regard to the alleged Brady violation must be affirmed. See Rogers v. State, 782 So. 2d 373, 377 (Fla. 2001)(citations omitted).

ISSUE III

WHETHER ERROR RESULTED FROM DR. MERIN'S TESTIMONY IN WALTON'S CASE WHERE HE WAS PREVIOUSLY RETAINED IN CO-DEFENDANT COOPER'S CASE. (AS RESTATED BY APPELLEE).

This issue was raised previously in Appellant's Initial Brief, at Issue III, almost verbatim. The only new argument stems from Appellant's attempt to relate this issue to the alleged newly discovered evidence involving Robin Fridella. According to Appellant, Dr. Merin was asked whether these materials would have impacted his initial evaluation. Notably, Appellant fails to point out that Dr. Merin specifically testified that, after reviewing the new material, nothing changed his opinion as initially expressed in 1991. (Supplemental Record, Vol. 25, p. 4182). As such, Appellant has failed to demonstrate how he might be entitled to a new trial as a result of Dr. Merin's evaluation.

Appellant also argues that the trial court prevented defense counsel from questioning Dr. Merin regarding the alleged conflict in his involvement in evaluating co-defendant Cooper. However, the trial court simply ruled that the conflict issue had been resolved at the prior evidentiary hearing which occurred before this Court remanded the proceedings. As such, since nothing in counsel's argument involved the alleged newly

discovered evidence, this was not a proper topic for the most recent evidentiary hearing.

While Appellant argues that he was referring to a new conflict problem arising from Dr. Merin's testimony at the 1999-2000 evidentiary hearing, the trial court ruled on that claim, as well. The trial court specifically held that no conflict existed. (Supplemental Record, Vol. 25, p. 4173). More importantly, Dr. Merin was called to testify at the evidentiary hearing by the Defendant, not the State. Moreover, Appellant fails to allege that Dr. Merin ever testified for Cooper in his most recent evidentiary hearing.

Appellant's reliance upon Sanders v. State, 707 So. 2d 664 (Fla. 1998), is misplaced. In Sanders, Dr. Merin was first retained by defense counsel and then later appeared on behalf of the State in the initial trial proceedings. This Court reversed because Dr. Merin was not called as a witness by the defendant, and because the defendant did not otherwise waive the attorney-client privilege. 707 So. 2d 664, 669. Thus, the posture of Sanders was fundamentally different than the instant case which was at the post-conviction stage where the attorney-client privilege was waived based upon Defendant's claims of ineffective assistance of counsel.

In fact, when Dr. Merin listed the items he reviewed for his

evaluation of Defendant, he did not include any information obtained in his work with Cooper. (Supplemental Record, Vol. 25, p. 4159-4160). Defendant further fails to identify any testimony from Dr. Merin resulting from his evaluation of Cooper. Additionally, if Cooper's information was used, this could not be considered newly discovered evidence where the proposed conflict was clearly known to Defendant and his counsel as evidenced by the original 3.850 motion.

ISSUE IV

**WHETHER ERROR OCCURRED WITH RESPECT TO THE
TRIAL COURT'S HANDLING OF COOPER AND
WALTON'S POST-CONVICTION PROCEEDINGS. (AS
RESTATED BY APPELLEE).**

Appellant asserts that reversible error resulted from the trial court's decision to allow co-defendant Cooper's attorneys to cross-examine witnesses during Walton's post-conviction hearing. Appellant argues that this procedure improperly consolidated the two defendants' hearings and that death row cases may not be consolidated in this manner.

The trial court's Order dismissed this claim as follows:

Regarding Defendant's allegation that an illegal consolidation of two (2) postconviction cases occurred, this Court finds that it is without merit. The Court merely held a joint hearing which included the same witnesses who resided out of the State of Florida. This was done in the interests of judicial economy to avoid conducting the same hearing twice. The joint hearing was legal because both co-defendants Walton and Cooper were present, each with his own counsel, and each had the right to either present or cross-examine the witnesses on their individual considerations. Teffteller v. Dugger, 676 So. 2d 369 (Fla. 1996). Although Cooper's attorney objected at the beginning of such hearing regarding hearsay and relevancy, it is important to note that he withdrew his objection on the record during the proceeding.

Defendant misrepresents the holding in Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). In Brown, the Supreme Court held that consolidation was often a matter within the sound judicial discretion of the trial court on a balancing of advantages and disadvantages, taking into account any dissimilarity of claims presented. However, the Court found that no future joint petitions for habeas corpus seeking to challenge the constitutionality of the death sentence

would be entertained. The Brown holding is inapposite to Defendant's remanded post-conviction proceeding.

(PC-1, Vol. 14, pp. 2419-2420). Thus, no error resulted from the trial court's decision to allow Cooper's attorneys to question witnesses during Walton's hearing.

Appellant also argues that the trial court improperly failed to consider newly discovered evidence regarding co-defendant Royal's vacillating statements concerning Walton's actions during the murders. First, this issue is not related to any of the public records documents. As such, this issue is procedurally barred as not being part of the limited remand set out by this Court.

Substantively, this issue is also without merit. First, Royal's affidavit claiming Walton was the mastermind of the crime was not created until 1995, well after Walton's trial proceedings were concluded. Subsequently, in 2000, Royal recanted that Walton was the mastermind of the crime. However, in his 2000 testimony, Royal also testified, for the first and only time, that Walton shot one of the victims. No other testimony or evidence ever indicated that Walton shot any of the victims. As such, it is unlikely that any testimony from Royal would ever be presented by either the State or defense due to Royal's complete lack of credibility and his implication of Walton in the actual shooting. Because Royal's contradictory

statements render Walton either the mastermind of the crime or an actual triggerman, nothing in these statements have the potential to probably produce an acquittal on retrial. See Robinson, 770 So. 2d 1167, 1170. See also Downs v. State, 572 So. 2d 895, 901 (Fla. 1990)(death penalty proportionate for trigger man); and Hall v. State, 403 So. 2d 1321, 1323 (Fla. 1981)(evidence, including fact that defendant and his companion were together at site of victim's assault and death, supported conclusion that, even if defendant did not pull trigger, he was a principal to crime of murder).

Given these circumstances, Royal's statement could not have changed the outcome of the proceedings. This is especially true where Walton admitted to planning the robbery, and the defense strategy claimed that no one planned to murder any of the victims. Additionally, Royal's claim that someone else planned the murders would be inconsistent with the current theory put forth that Appellant committed the crimes at the direction of Robin Fridella. Nonetheless, Appellant attempts to tie this argument into the claim that his death sentence is disproportionate when compared to Royal's life sentence. This specific issue was raised in the Initial Brief, Issue VIII, filed in this matter prior to remand. As such, Appellee would rely upon the Answer Brief previously filed in opposition to

this issue. See also Sexton v. State, 775 So. 2d 923, 935 (Fla. 2000)(death sentence proportionate to other cases where "masterminds" sentenced to death, even though they did not actually commit the murder).

CONCLUSION

Based on the foregoing arguments and authorities, the decision of the trial court denying 3.850 relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Pamela H. Izakowitz, Capital Collateral Regional Counsel - South, 303 S. Westland Avenue, Tampa, Florida 33601-3294, this _____ day of January, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

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).

COUNSEL FOR APPELLEE