IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,584

KRISHNA MAHARAJ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

ANSWER BRIEF OF APPELLEE

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INTRODUCTION

This brief is written in 12 point Courier New Font. The parties will be referred to as they stood in the Court below. The symbol "D.A.R." will refer to the record from the direct appeal, which includes the trial transcripts. The symbols "R." and "T." will refer to the record and transcripts from the Rule 3.850 proceeding, respectively. The symbol "S.R." will refer to the supplemental record on appeal.

STATEMENT OF THE CASE AND FACTS

On November 5, 1986, Defendant was charged by indictment in the Eleventh Judicial Circuit Court, Case No. 86-30610, with the first degree murder of Derrick Moo Young; the first degree murder of Duane Moo Young; armed burglary; armed kidnapping of Derrick Moo Young; armed kidnapping of Duane Moo Young; aggravated assault; and possession of a firearm while engaged in a criminal offense.[1] (D.A.R. 1-5a) All crimes were alleged to have been committed on October 16, 1986.

Trial of this cause commenced on October 5, 1987. (D.A.R. 1917) The jury found Defendant guilty of two counts of first degree murder; two counts of armed kidnapping; and one count of

[1] The State entered a nolle prosequi to an additional count, charging armed kidnapping of Neville Butler prior to trial.

unlawful possession of a firearm while engaged in a criminal offense. He was acquitted of the armed burglary and aggravated assault counts. (D.A.R. 1714-20, 4183-87)

On November 6, 1987, a sentencing hearing was held before the same jury. (D.A.R. 4220) After the State and defendant presented evidence, the jury, by a seven to five vote, returned a recommendation of death for the murder of Duane Moo Young and by a six to six vote, a recommendation of life imprisonment for the murder of Derrick Moo Young. (D.A.R. 1752-53, 4497-98.)

The trial court sentenced Defendant, on December 1, 1987, to death for the murder of Duane Moo Young; life imprisonment for the murder of Derrick Moo Young; life imprisonment for the armed kidnapping of Duane Moo Young; life imprisonment for the armed kidnapping of Derrick Moo Young; and fifteen years imprisonment for unlawful possession of a firearm while engaged in a criminal offense. All sentences were to run consecutively. (D.A.R. 1755-84, 4566)

Defendant appealed his convictions and sentences to this court. The following issues were raised, verbatim:

ARGUMENT I.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO INTRODUCE PREJUDICIAL NEWSPAPER ARTICLES ACCUSING DEFENDANT/APPELLANT OF COMMITTING VARIOUS

CRIMES FOR THE ALLEGED PURPOSE OF SHOWING "MOTIVE".

ARGUMENT II.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO ELICIT TESTIMONY FROM ONE OF ITS WITNESSES ABOUT AN ATTEMPT TO MURDER AN INDIVIDUAL UNRELATED TO THIS ACTION.

ARGUMENT III.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO APPRISE DEFENDANT/APPELLANT IN A LEGALLY ADEQUATE MANNER, OF THE EFFECTS OF A MISTRIAL, WHEN THE ORIGINAL TRIAL JUDGE COULD NOT CONTINUE WITH THE CASE DUE TO HIS ARREST FOR BRIBERY.

ARGUMENT IV.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO ELICIT FROM POLICE OFFICER WITNESSES THE FACT THAT SEVERAL MONTHS PRIOR TO THE MURDERS, DEFENDANT/APPELLANT HAD A VARIOUS ASSORTMENT OF WEAPONRY IN THE TRUNK OF HIS AUTOMOBILE, NONE OF WHICH WAS ILLEGAL TO POSSESS NOR RELEVANT TO THE CHARGED OFFENSES.

ARGUMENT V.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SENTENCING DEFENDANT/APPELLANT TO DEATH WHEN, FROM THE STANDPOINT OF PROPORTIONALITY, THE UNINDICTED CO-CONSPIRATOR, NEVILLE BUTLER, TESTIFIED FOR THE STATE AND WAS NEVER CHARGED WITH THE CRIME.

ARGUMENT VI.

WHETHER THE STATE COMMITTED REVERSIBLE ERROR

IN FAILING TO CONFINE ITS CROSS-EXAMINATION OF THE DEFENSE WITNESSES IN THE PENALTY PHASE TO MATTERS RELATING TO THE AGGRAVATING/MITIGATING CIRCUMSTANCES SURROUNDING THE OFFENSES.

ARGUMENT VII.

WHETHER THE STATE'S COMMENTS TO THE JURY REGARDING THE MERE "ADVISORY" ROLE OF THE JURY IN THE SENTENCING PHASE DENIGRATED THE JURY'S ROLE IN THESE PROCEEDINGS RESULTING IN REVERSIBLE ERROR.

ARGUMENT VIII.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MANNER.

ARGUMENT IX.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

ARGUMENT X.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

SUPPLEMENTAL ARGUMENT

WHETHER THE TRIAL JUDGE ERRED IN EXCLUDING EVIDENCE OF THE STATE'S WITNESS FAILING HIS POLYGRAPH EXAMINATION WHEN SUCH EVIDENCE DIRECTLY RELATED TO THE CREDIBILITY OF SAID

> WITNESS WHO TESTIFIED AT TRIAL THAT HIS REVISED TESTIMONY WAS MADE SOLELY FOR THE BENEFIT OF A "CLEAN CONSCIENCE".

On March 26, 1992, the Court affirmed Defendant's convictions and sentences. On May 28, 1992, rehearing was denied. *Maharaj v. State*, 597 So. 2d 786 (Fla. 1992). In affirming Defendant's convictions and sentences, the Court outlined the facts of the case as follows:

> These murders occurred as a result of an ongoing dispute between Derrick Moo Young and Krishna Maharaj. Maharaj was arrested after an accomplice of his, Neville Butler, was questioned by the police and inculpated Maharaj.
>
> During the trial, the primary witness for the State was Neville Butler. Butler testified that in June, 1986, he worked for *The Caribbean Echo*, a weekly newspaper directed to the West Indian community in South Florida. Prior to Butler's employment, the *Echo* had published an article, in May, 1986, accusing Derrick Moo Young of theft. When Butler joined the Echo, he assisted the publisher, Elsee Carberry, in writing an article in July, 1986, which charged Maharaj with illegally taking money out of Trinidad. Butler testified that on October 10, 1986, an article was published in the *Echo* accusing Maharaj of forging a $243,000 check. This article explained that the check was the basis for a lawsuit that Moo Young had filed against Maharaj.
>
> Butler testified that in September, 1986, he was unhappy working for the *Echo* and contacted Maharaj seeking employment with *The Caribbean Times*, Maharaj's newspaper. Butler

testified that, at Maharaj's urging, he arranged for a meeting between Derrick Moo Young and Maharaj at the DuPont Plaza Hotel in Miami so that Maharaj could extract a confession from Moo Young regarding his extortion of $160,000 from Maharaj's relatives in Trinidad. Butler arranged this meeting for October 16, 1986, using the pretext of a business meeting with some Bahamian individuals named Dames and Ellis, who were interested in importing and exporting certain products. Butler arranged to use Dames' suite at the hotel. Butler stated that Maharaj made it clear that he should not tell Moo Young that he would be at the meeting.

According to Butler, Maharaj wanted to (1) extract a confession of fraudulent activity from Derrick Moo Young, (2) require Moo Young to issue two checks to repay him for the fraud, and (3) have Butler go to the bank with the checks to certify them, at which time Maharaj would allow Moo Young to leave upon hearing of the certification. Butler stated that Derrick Moo Young and, unexpectedly, Duane Moo Young, his son, appeared at the hotel room. Once inside, Maharaj appeared from behind a door with a gun and a small pillow. An argument broke out between Maharaj and Moo Young over the money owed. Maharaj shot Derrick Moo Young in the leg. At that time, Derrick Moo Young attempted to leave. Maharaj ordered Butler to tie up Duane Moo Young with immersion cords. Maharaj also ordered Butler to tie up Derrick Moo Young; however, before he could do so, Derrick Moo Young lunged at Maharaj. Maharaj fired three or four shots at Derrick Moo Young.

After shooting Derrick Moo Young, Maharaj questioned Duane Moo Young regarding the money. During this time, Derrick Moo Young crawled out the door and into the hallway. Maharaj shot him and pulled him back into the

room. Shortly thereafter, Duane Moo Young broke loose and hurled himself at Maharaj, but Butler held him back. Then Maharaj took Duane Moo Young to the second floor of the suite where he questioned him again. Later, Butler heard one shot. Maharaj came downstairs and both he and Butler left the room. They both waited in the car in front of the hotel for Dames.

Sometime later, Butler met with Dames and Ellis, the two men he used to lure Moo Young to the hotel. They encouraged him to tell the police what he knew of the murders. Later that day, Maharaj called Butler asking that he meet him at Denny's by the airport so they could make sure and get their stories straight. Butler called Detective Burmeister [sic] and told him what had transpired earlier that day in suite 1215 of the DuPont Plaza Hotel. The detective, along with another officer, drove Butler to Denny's to meet Maharaj and, at a prearranged signal, the detectives arrested Maharaj.

The State also presented the testimony of Tino Geddes, a journalist and native of Jamaica. He testified that in December, 1985, he met and began working for Elsee Carberry, the publisher of the *Echo*. Geddes stated that, while working for Carberry, he met Maharaj, and that he and Carberry went to Maharaj's home to discuss an article which Maharaj wanted the *Echo* to publish concerning Derrick Moo Young. Geddes stated that Carberry agreed to publish the article for $400. The article was published in the May 2, 1986, edition of the *Echo* and detailed the background of a civil suit filed against Derrick Moo Young by Maharaj's wife.

Geddes further testified that, because of the *Echo's* subsequent favorable coverage of Derrick Moo Young, Maharaj became hostile

towards Carberry. Geddes stated that Maharaj purchased exotic weapons and camouflage uniforms and that, on several occasions, he and Maharaj had tried to harm Carberry. On one occasion, Maharaj had Geddes meet him at the bar of the DuPont Plaza Hotel; then he took him to a hotel room. Maharaj had a light-colored automatic pistol and a glove on one hand. Maharaj told Geddes to call and lure Carberry and Moo Young to the hotel room. Fortunately, Geddes was unable to get either Carberry or Moo Young to come to the hotel room.

The State also presented Elsee Carberry, the publisher of *The Caribbean Echo*. Carberry testified that he knew both Maharaj and Derrick Moo Young before his paper started publishing the articles. Carberry stated that he was approached by Maharaj's accountant, George Bell, who requested that he publish a front-page article about Moo Young. Carberry refused this request until he met with Maharaj. A meeting was arranged and Carberry was provided documentation for the article. Carberry testified that Maharaj told him that Moo Young stole money from him and that he had documents to prove it. They agreed on a center spread and Maharaj paid $400 to have the article published.

Carberry testified that, after the first article, Maharaj wanted him to do a weekly article on Moo Young. Carberry refused and Maharaj attempted to buy *The Caribbean Echo*. When this failed, Carberry learned that Maharaj was starting his own newspaper. Shortly thereafter, Carberry was contacted by Derrick Moo Young, who wanted to present his side of the story. Carberry met with Moo Young, who provided documentation to refute Maharaj's allegations. Carberry then began his own investigation and began publishing articles unfavorable to Maharaj. These

articles were printed June 20, June 27, July 18, July 25 and October 10, 1986.

On July 5 an article was published to inform the readership that the *Echo* could not be bribed. This statement was printed in response to Maharaj's attempt to bribe Carberry. The July 18 and 25 articles charged Maharaj with taking money illegally out of Trinidad. The October 10 article accused Maharaj of forging a $243,000 check and explained that Moo Young was filing a lawsuit against Maharaj based on the forged check. During this period of time, Maharaj severed his relationship with Carberry.

The State presented other corroborating evidence concerning the events that took place at the DuPont Plaza Hotel. The maid assigned to this room testified that she cleaned the room in the early morning of October 16, 1986, and, upon entering it, found that it had not been used the previous evening. She also explained that, when she left the room, it was in perfect order, including the fact that the "Do Not Disturb" sign was on the inside of the door. At 12:15 p.m., she and her boss were asked to check the room. They attempted to enter the room but were unable to do so because it was locked from the inside and, consequently, the master key would not work. She explained that the room could not be locked from the inside unless someone was in the room. Ten minutes later, she returned with a security guard, and they noticed that the "Do Not Disturb" sign was hanging on the doorknob. This time when she tried the master key, it worked; she opened the door and, upon entering the room, noticed that the furniture had been moved and that there were two bodies.

A police fingerprint expert testified that he found Maharaj's prints on: (1) the "Do Not Disturb" sign attached to the exterior

doorknob of suite 1215; (2) the exterior surface of the entrance door; (3) the outer surface of the downstairs bathroom; (4) the top surface of the desk; (5) an empty soda can; (6) the telephone receiver; (7) the top of the television set; (8) a glass table top; (9) a plastic cup; (10) the *Miami News* newspaper; (11) a *U.S.A. Today* newspaper; and (12) torn packages that held immersion heaters. Butler's prints were also found on a plastic glass, the telephone, the desk, the front door, and the television set.

The State presented a firearms expert, who examined the spent projectiles and casings. The expert testified that the eight bullets fired were from a pre-1976 Smith & Wesson model 39, a nine-millimeter semiautomatic pistol with a serial number under 270000. Evidence in the record established that Maharaj owned a Smith & Wesson nine-millimeter pistol, having a serial number of A235464.

The State also presented the testimony of the medical examiner, who stated that Derrick Moo Young had six gunshot wounds, the most serious of which entered the right side of the chest and exited the lower back. There was only one gunshot wound in Duane Moo Young, and it entered the left side of the face and exited the right side of the neck, having been fired at close range within up to six inches between the wound and the barrel. The medical examiner found that this wound was consistent with Moo Young's kneeling or sitting with his head close to and facing the wall of the room.

During the course of the State's case, the chief judge of the criminal division announced that the judge who had been presiding over the trial would not be able to continue. Counsel for Maharaj stated that he would make no motion for mistrial. The newly

assigned judge questioned Maharaj as to whether he desired a mistrial, to which Maharaj responded that he wished to proceed. The new trial judge certified that he had read the testimony of the previous witnesses and proceeded with the trial.

The defense did not present any witnesses in the guilt phase of the trial. After deliberations, the jury found Maharaj guilty as to each of the offenses charged except armed burglary and aggravated assault.

In the penalty phase, the State presented the testimony of the medical examiner, who described the nature of the wounds of each victim and explained the pain and effect of such wounds. Maharaj presented character witnesses including: (1) a congressman, who testified concerning Maharaj's character for truthfulness, honesty, and non-violence; (2) his civil lawyer, who testified that he was hired to litigate the claims against Derrick Moo Young and that these claims had a substantial chance of prevailing prior to the victims' deaths; (3) a retired judge from Trinidad, who testified that he had known Maharaj for forty years, that he was not a violent person, and that he was an individual who donated money to charitable causes; and (4) a doctor from Trinidad, who stated that he had known Maharaj for over forty years and knew that he was not prone to violence. Maharaj testified in his own behalf. He spoke about his background and explained how Moo Young's companies cheated him. Maharaj denied that he murdered either Derrick or Duane Moo Young and asked the jury to spare his life so that he could establish his innocence. He also prepared a letter to the jury outlining his numerous charitable gifts over the years.

After argument by counsel, the jury returned an advisory sentence as to the murder

> of Derrick Moo Young of life imprisonment by a six-to-six vote, and, as to the murder of Duane Moo Young, the jury voted seven to five in favor of the death penalty.

Maharaj, at 787-90.

Thereafter, Defendant petitioned the United States Supreme Court for a writ of certiorari and raised the following issues, verbatim:

> I.
>
> WHETHER DUE PROCESS, FUNDAMENTAL FAIRNESS, AND THE INTEGRITY OF THE COURTS COMPEL THE GRANTING OF A MISTRIAL WHEN THE STATE ARRESTS AND CHARGES A SITTING JUDGE BEFORE WHOM THE STATE IS PROSECUTING A FIRST-DEGREE MURDER CAPITAL PROSECUTION.
>
> II.
>
> WHETHER, BASED ON THIS COURT'S RECENT DECISION IN *ESPINOSA V. FLORIDA*, AND THE TRIAL COURT'S UTTER FAILURE TO DEFINE "HEINOUS, ATROCIOUS AND CRUEL", DEFENDANT'S SENTENCE OF DEATH BASED ON FLORIDA'S UNCONSTITUTIONALLY VAGUE AND OVERBROAD "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR MUST BE VACATED.
>
> III.
>
> WHETHER THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AND THE PROSECUTOR'S REPEATED COMMENTS MINIMIZING THE JURY'S ROLE AT DEFENDANT'S ADVISORY SENTENCING PROCEEDINGS DENIED THE PETITIONER DUE PROCESS OF LAW AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT GUARANTEED BY THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The petition for writ of certiorari was denied. *Maharaj v.*

Florida, 506 U.S. 1072 (1993).

On December 2, 1993, Defendant filed a Motion to Vacate Judgments of Conviction and Sentence With Special Request for Leave to Amend. In this motion, Defendant claimed that "(1) his counsel was ineffective in forty-five different ways; (2) his counsel was ineffective in failing to present an alibi defense; (3) he was deprived of due process under Brady because the prosecutor withheld favorable information; (4) prosecutorial and police misconduct affected the integrity of the verdict; (5) the prosecution presented false and misleading testimony at trial; (6) Maharaj's waiver as to the presentation of witnesses and as to the presentation of the alibi defense was not valid; and (7) he was entitled to the access of certain files under chapter 119, Florida Statutes (1995)." *Maharaj v. State*, 684 So. 2d 726, 727 (Fla. 1996). The lower court summarily denied the motion, and Defendant appealed the denial of this motion to this Court, which reversed, stating:

> After reviewing each of the claims raised in Maharaj's motion, we find that some of his allegations regarding ineffective assistance of counsel and his allegations regarding prosecutorial misconduct and discovery violations warrant an evidentiary hearing. . . .
>
> It does appear that a substantial number of Maharaj's claims may properly be denied without an evidentiary hearing because they

> were either raised or could have been raised on direct appeal and, consequently, cannot be relitigated in a postconviction relief proceeding. *Johnson v. State*, 593 So. 2d 206 (Fla.), *cert. denied*, 506 U.S. 839, 113 S. Ct. 119, 121 L. Ed. 2d 75 (1992); *Maxwell v. Wainwright*, 490 So. 2d 927 (Fla.), *cert. denied*, 479 U.S. 972, 107 S. Ct. 474, 93 L. Ed. 2d 418 (1986). It is inappropriate to use a collateral attack to relitigate an issue previously raised on appeal. *Medina v. State*, 573 So. 2d 293 (Fla. 1990). On the other hand, our review of Maharaj's motion reflects that an evidentiary hearing on at least some of his claims is warranted because those claims involve disputed issues of fact. *See*, *e.g.*, *Way v. State*, 630 So. 2d 177 (Fla. 1993)(one of the purposes of an evidentiary hearing is to resolve disputed issues of fact regarding issues that might warrant reversal). Specifically, we find that an evidentiary hearing is necessary to at least resolve whether (1) material was improperly withheld by the prosecutor, (2) Maharaj's counsel was ineffective by failing to properly advise him regarding his waiver on various issues, and (3) perjured testimony was knowingly presented at trial by the State.

Maharaj, 684 So. 2d at 728.

On remand, Defendant filed an amended motion for post conviction relief, raising the following claims regarding the guilt phase: ineffective assistance of counsel, suppression of favorable evidence, use of false testimony, newly discovered evidence, and violation of the Vienna convention. (R. 5962-6321) Defendant asserted that his counsel was ineffective for (1) failing to conduct a full investigation of critical evidence and prepare an

effective defense, (2) failing to call witnesses and/or failing to use evidence effectively, (3) failing to show reasonable doubt as to his guilt, (4) failing to show that spent projectiles and casings found at the crime scene could have been fired by more than a half million other guns, (5) failing to show the victims were ripping off Defendant, (6) failing to file pre-trial motions, (7) failing to properly cross examine the State's witnesses, (8) failing to investigate or use expert witnesses, (9) failing to request jury instructions or object to the ones that were given, (11) failing to present an effective closing argument, (12) waiving Defendant's right to present witnesses and testify, (13) failing to advise Defendant properly of his right to present witnesses and testify, and (14) failing to demand a mistrial when the trial judge was arrested midtrial. (R. 6218-50) He alleged that the State suppressed (1) the victims' passports, (2) papers and notes found in the victims' briefcase, (3) evidence that his gun was stolen in July 1986, (4) the identity and information regarding Adam Hosein, (5) evidence of the victims' criminal activities, (6) evidence negating his bad acts, (7) Butler's first statement to police, (8) evidence that Butler failed a polygraph, (9) evidence that Carberry was an illegal alien, (10) evidence that Buhrmaster had told Carberry that Defendant had implicated him, (11) evidence to

impeach State witnesses, (12) a report showing that the police had refused to pursue the victims' charges against Defendant, and (13) evidence of the relationship between the prosecution and its witnesses. (R. 6193-6218) The newly discovered evidence consisted of (1) evidence that Adam Hosein, Neville Butler and others probably committed the crime, (2) evidence that the victims were involved in money laundering and drug trafficking, (3) the victims' insurance policies, and (4) alibi witnesses. (R. 6186-90)

Prior to the evidentiary hearing, the lower court ordered that defense counsel's trial file be produced to the State. (T. 63) However, Defendant was unable to locate the file. (T. 63-65, 73-76, 93-96)

The lower court also considered Defendant's motion for access to the grand jury transcripts. (T. 44-46, 62-63, 82, 91-92) The lower court ordered the transcript and reviewed it in camera. After doing so, the lower court denied the motion. (T. 91-92)

Prior to the evidentiary hearing, the lower court considered ruling on which claims would be the subject of the hearing. (T. 108-09) However, the lower court decided to proceed with the hearing without ruling on any of the claims. (T. 141-42)

At the evidentiary hearing, Manelous Stavros testified that he had met with Defendant in July 1986 to borrow money. (T. 184-85)

At the time of the meeting, Defendant was upset and claimed that the police had taken money and a gun from him during a stop. (T. 186-87) On cross, Stavros admitted that he had given a statement to a defense investigator in November 1986, in which he asserted that Defendant had not stated that a gun was taken. (T. 188-89)

Eric Hendon, Defendant's trial counsel, testified that he was retained in January 1987, to represent Defendant. (T. 194-95) Prior to representing Defendant, Hendon had defended a number of first degree murder cases but had never proceeded to a penalty phase because of his success in the guilt phase. (T. 197-99)

Hendon testified that one night almost a year before trial, Defendant called him to the jail and claimed to have spoken to a Mayra Trinchet. (T. 223-24, 348) According to Defendant, Trinchet had stated that if she was paid a $50,000 retainer, she would obtain a bond for him based on his polygraph results and her relationship with Judge Gross. (T. 224) Hendon advised Defendant against retaining Trinchet and told Defendant that he believed that she was a prosecutor and that no bond would be granted. (T. 225) Hendon also reported the Defendant's account to Kastrenakes, one of the prosecutors on the case. (T. 226) Hendon took no further action because he did believed Trinchet was simply trying to steal his client. (T. 226) Hendon also did not wish to pursue an

investigation into these charges because Defendant would have had to speak to the authorities. (T. 349)

Hendon opined that after the contact with Trinchet, Defendant did not receive any further "favorable" treatment from Judge Gross. (T. 234) Hendon explained that his definition of "favorable treatment" was consideration of problems in scheduling and "general pleasantries that counsel are afforded or accorded during the course of litigation." (T. 234-35) This lack of "favorable treatment" did not extend to substantive matters. (T. 350) He did not discuss any possibility of recusing Judge Gross based on this lack of "favorable treatment" because he did not associate it with the contact with Trinchet. (T. 235)

Hendon advised Defendant against moving for mistrial when Judge Gross was arrested midtrial because he was happy with the jury and the manner in which the proceedings were going to that point. (T. 242) He also anticipated that some future state witnesses would contradict some of the testimony already elicited.[2] (T. 242) Further, Hendon's theory of the case was that the state witnesses were not being truthful, and Hendon felt that the arrest

[2] In particular, Hendon anticipated that the State would call Eddie Damas, whose testimony was expected to contradict Prince Ellis, who had already testified for the State. Additionally, Ellis' testimony was inconsistent with some of Butler's testimony. (T. 354)

of the judge might reenforce the concept that people connected to the government were not always honest. (T. 355) He did not consider the contact with Trinchet in giving this advice because he did not see a connection. (T. 242) However, in giving this advice, Hendon stressed that it was Defendant's decision, and he did not threaten Defendant in any way to get him to agree with the advice. (T. 356, 360)

Hendon believed that Butler had passed his polygraph examination based on March 20, 1987 letter from the prosecutor. (T. 247) The letter informed Hendon that Butler had passed the polygraph test with regard to the fact that Defendant shot the victims and that Butler was not armed and did not participate in the killings. (R. 158) The letter also informed Hendon that Butler needed to correct his testimony regarding what happened before and after the murders and invited him to redepose Butler. (R. 158) At the time Butler was redeposed, Hendon was informed that Butler had spoken to the prosecutors with regard to the change in his testimony and was told that he could be charged with perjury. (R. 5696-97) Hendon never received a copy of the polygrapher's report. (T. 256) However, Hendon did know who the polygrapher was. (T. 457)

Hendon became aware that the victims had life insurance during

the sentencing phase of trial. (T. 268) He was unaware that the State had investigated the status of civil suits against the victims. (T. 272) He was also unaware that the victims were allegedly under investigation for fraud. (T. 274-75)

Hendon was aware that a briefcase, containing the victims' personal property, had been recovered from the crime scene. (T. 272-73) He had seen photographs of the briefcase, showing its contents, which included passports. (T. 273) He sent his investigator to review the contents and was informed that they had been returned to the victims' family. (T. 273-74) He was told that Detective Buhrmaster would retrieve the contents of the briefcase for inspection. (T. 394) Hendon never saw copies of the victims' passports. (T. 279)

Hendon investigated the financial background of the victims because Defendant believed that they were involved in drug trafficking. (T. 281-84) He learned that the victims were from a middle to upper middle class, law-abiding family. (T. 281-84) He was unable to substantiate Defendant's allegations. (T. 281-84) He was given a copy of the Scott report prior to trial, which contained innuendo regarding drug dealing by the parties. Prior to trial, this report was excluded because it was mere speculation. (T. 300-07)

Hendon investigated Jaime Vallejo Majais and Adam Hosein. Majais had been living in the room across the hall from the murder scene and working in the hotel. (T. 307-13) Hendon received a statement from him, was provided with an overseas telephone number and address and was informed that he could no longer be located. (T. 307-10, 403-04) Hendon's investigation of Majais yielded nothing. (T. 307-10) Defendant had claimed that Hosein was involved in the drug trafficking business with the victims. (T. 310-13) However, Hendon's investigation disclosed no evidence to support this allegation. (T. 310-13) Hendon never received any information from the State about a phone call allegedly from Hosein to the murder room the day after the murder. (T. 317, R. 2041)

Hendon consulted with Defendant regarding his decision not to testify. (T. 328) Defendant appeared to understand that he had a right to testify. (T. 413) In doing so, Hendon informed Defendant that the choice was his to make but that he advised against testifying. (T. 328) The advice was based on a concern that questions regarding Defendant's character would be asked and an evaluation of the strength of the State's case. (T. 328-30) Hendon was afraid the State would extensively question Defendant regarding the matters contained in the newspaper articles. (T. 414) Hendon was unaware of the status of certain British warrants

for Defendant. (T. 415) Hendon thought the warrants may have been for fraud and homicide. (T. 452-53) Hendon did not force Defendant to agree not to testify and never told Defendant that he had to do as he was told. (T. 416) If Defendant had insisted upon testifying, Hendon would have called him as a witness. (T. 417)

Defendant chose to testify in his own behalf during the penalty phase. (T. 418) Hendon understood that Defendant stood in a different posture at that point and hoped his testimony would humanize him. (T. 418-19) Hendon would not directly respond to questions regarding whether Defendant's penalty phase testimony was responsive to the questions. (T. 419-21) Instead, Hendon stated that he did not think a person who had been convicted of first degree murder would be entirely composed and referred the trial court to a videotape of the testimony. (T. 419-21)

Hendon also explored the possibility of calling witnesses on Defendant's behalf. (T. 330) After Defendant provided Hendon with a list of witnesses, Hendon had an investigator speak to the witnesses and obtain affidavits from them. (T. 330-31) Hendon reviewed the affidavits, spoke to some of the witnesses, evaluated the strength of the State's case. (T. 331-32) Hendon and Defendant had extensive discussions about calling these witnesses. (T. 422) During these discussions, Hendon advised against filing

an alibi witness list and presenting these witnesses. (T. 332, 422) One of the reasons for this was that it would reveal the existence of Tino Geddes to the State. (T. 423-24) However, Hendon filed the witness list at Defendant's insistence. (T. 423)

Thereafter, Geddes refused to cooperate with the defense, was named as a State witness and recanted the affidavit he had provided to the defense. (T. 424) During deposition, Geddes provided damming testimony against Defendant. (T. 427) In fact, all of the alibi witnesses were listed as witnesses by the State. As a result, Hendon did not pursue the alibi defense at trial. (T. 427) When the State rested its case, Hendon still had the option of pursuing the alibi but advised Defendant against doing so. (T. 427-28) After ample consultation and without coercion, Defendant agreed with Hendon's advice and admitted on the record that he did not wish to call any alibi witnesses. (T. 427-30)

Hendon explained that Defendant was actively involved in his case. (T. 353) Hendon never overrode Defendant's decisions with regard to how to handle the case because Defendant would not have stood for his doing so. (T. 353)

Hendon testified that he was aware prior to trial that the State had witnesses, phone records and documentation that would show that Defendant had been at the DuPont Plaza the day before the

murder. (T. 399-401) The evidence would also show that Defendant had arranged to reserve room 1215 at that time. (T. 399-401) Based on his knowledge of this evidence, Hendon decided that he would argue the validity of the witnesses' identification of Defendant to the jury rather than moving to suppress the identifications. (T. 401-02)

Hendon testified that he made a strategic decision not to move to suppress Defendant's statement to Detective Buhrmaster pretrial. (T. 410) Hendon felt that it was better to argue the issue to the judge and jury at trial. (T. 409-10) In making this decision, Hendon claimed to be unaware that Defendant may have invoked his right to counsel and did not recall seeing any notations in police reports indicating that Defendant had done so. (T. 445-51, R. 2021, 2034) Hendon acknowledged that he could not be sure which police reports he had received. (T. 472) However, he did observe that an issue had been raised at trial regarding him only receiving a portion of one report. (T. 469-71) Further, Defendant never told Hendon that he had invoked his rights, the date of the notation in the police report was not the date of the statement admitted at trial and the notation indicated that the police did not speak with Defendant after he invoked his rights. (T. 467, 473-75) During trial, the issue of the voluntariness of the

statement was litigated. (T. 411-12)

Defendant then attempted to call Dickson, who administered the polygraph to Butler. (T. 481-82) The State objected on the grounds that Dickson had no independent recollection of the test and that polygraphs were not admissible. (T. 481-82) Defendant responded that Dickson would merely authenticate his report and that the report should be admissible to show that the polygraph was the reason Butler changed his testimony, that statements made during the examination were not revealed and that Butler testified at trial to matters on which he had been found deceptive during the polygraph. (T. 482-85) The lower court permitted Dickson to testify that he performed the polygraph and to authenticate his report. (T. 485-86) However, the lower court reserved ruling on whether the polygraph was admissible. (T. 486) The State then stipulated that the report was authentic. (T. 486)

Paul Ridge, one of the prosecutors at trial, testified that he asked Butler to submit to a polygraph because of inconsistencies in his account and because Defendant had taken a polygraph. (T. 497-98) Ridge informed the polygrapher of the facts and circumstances of the case and of the area that concerned him. (T. 499-500) One area that concerned Ridge was the length of time Butler sat in the car with Defendant after the murder. (T. 500-01) He also was

concerned about whether Butler knew Defendant intended to kill the victims before the crime. (T. 501-02) The reason for this concern was that Butler's relationship with Defendant was greater than he had revealed. (T. 502)

Ridge considered that Butler had passed the polygraph because it indicated that he was truthful about having witnessed Defendant commit the murders. (T. 504-06) Any representation that Ridge made at the time of trial that Butler passed the polygraph was based on the fact that he passed regarding the crucial aspects of the test. (T. 996-97) Ridge admitted that after the test Butler was confronted about the inconsistencies in his testimony in some areas. (T. 503-04)

Ridge admitted that he had the police search the gun registration records to see if Defendant had registered a gun of the type used in the murder. (T. 530-31) No such registration was found. (T. 531) Defendant attempted to question Ridge regarding guns registered to other individuals named Maharaj. (T. 532-33) However, the trial court sustained a State objection to this line of questioning because the records showed that these individuals had registered .38 caliber weapons and the murder weapon was a .9 mm. (T. 532-33)

Ridge believed that the reason why he made the note regarding

speaking with the Florida Highway Patrol liaison about the gun and money was that Hendon had made representations that Defendant's gun and money had been taken during a traffic stop. (T. 548) Defendant attempted to ask if Ridge had been told of Defendant's allegation by Detective Buhrmaster. (T. 548-49) However, the lower court sustained an objection on relevancy grounds. (T. 549-50)

Ridge stated that he did not recall when he learned that the victims had life insurance. (T. 562) Ridge acknowledged that the State Attorney's office received, on July 15, 1987, a copy of an objection to a request for production filed by the victims' family in their suit against William Penn Life Insurance. (T. 563-64, R. 1080-81) The objection sought to block the production of documents owned by the victims that were in the possession of the State. (R. 1080-81) The objection does not specify what the documents were and does not mention life insurance. (R. 1080-81) Ridge stated that he did not infer that the victims had life insurance from the objections. (T. 566)

Ridge asked Detective Buhrmaster to investigate Defendant's allegation that the victims were drug traffickers. (T. 567) The investigation revealed no arrests, convictions or on-going investigations of the victims by state or federal authorities. (T.

1000) Ridge also invited Hendon to give him any evidence he collected regarding the allegations. (T. 567) Hendon was never able to produce any evidence to substantiate the allegations or to further an investigation. (T. 1000-01) Ridge did not recall ever seeing any documentation that showed the victims were laundering hundreds of millions of dollars and the only possible reference to a letter of credit in that amount may have been in the newspaper articles. (T. 568)

John Kastrenakes, the other prosecutor at trial, agreed with Ridge that Butler did not fail the polygraph. (T. 593-94) Kastrenakes based this opinion on the fact that Butler was shown to be truthful on the fact that he witnessed Defendant commit the murders and was not a gunman. (T. 594)

Kastrenakes explained that the change in Butler's testimony as to what occurred prior to the murder occurred as a result of being confronted with evidence, such as phone records, prior to the administration of the polygraph. (T. 602-04) He explained that Butler may have characterized his change in testimony as voluntary because he was not subpoenaed to testify at the meeting where the change occurred. (T. 604-05) Kastrenakes was sure Defendant was aware of the polygraph results and its effect on Butler's testimony because he raised it as an issue on appeal. (T. 628-29)

Kastrenakes did not consider the finding of deception regarding the activities after the murder important because his only concern was regarding disposal of the murder weapon. (T. 605-06) However, Geddes explained what happened to the murder weapon. (T. 606-07) Further, Butler insisted that this portion of his story was true even after the polygraph, and there was no evidence to contradict it. (T. 607)

Kastrenakes did not recall when he learned of the life insurance either. (T. 607-08) He did recall that he obtained the knowledge seeing a colleague who was representing the insurance company at a hearing in this matter. (T. 607-08, 635) He did not recall seeing the objections to production in the insurance suit. (T. 608)

Kastrenakes stated that the two letters of credit were not in the State Attorney's file at the time of trial. (T. 609, R. 1216-19) He was sure the document was received after trial because the original had marking on it indicating that it was sent to the file warehouse for filing, which only occurs if the file is closed at the time the document is received. (T. 610-13)

Lieutenant David Rivero was a homicide detective who had a minor involvement in the investigation of this case. (T. 653-54) He was on vacation at the time of the crime and Defendant's arrest.

(T. 654) After he returned from vacation, he discussed the case with Detective Buhrmaster. (T. 655-56) In this discussion, Rivero recalled that Buhrmaster had said that Defendant denied being in the room. (T. 657-58) Rivero admitted that he had stated in a pretrial deposition that Buhrmaster had told him that Defendant had admitted to being in the hotel room. (T. 659-61) He pointed out however that on cross examination in that deposition he had clarified that all Buhrmaster had said to him was that Defendant admitted to being "there" the day of the murders. (T. 661-63) He explained on deposition that he had taken that to mean the room but it might only have meant the hotel and that Buhrmaster never said that Defendant admitted to being in the room. (T. 661-64) After reviewing the supplemental police report, which was not available prior to the deposition, Rivero realized that Defendant had not admitted to being in the room and had only admitted to being in the hotel. (T. 664-67)

Defendant then brought up the subject of the admissibility of documents allegedly received from the law firm for William Penn Life Insurance and the court file of the federal prosecution of Nigel Bowe. (T. 671-74) Defendant sought a ruling on the admissibility of these documents in order to facilitate the calling of the witnesses necessary to authenticate them. (T. 671-74)

With regarding to the William Penn documents, Defendant asserts that they were relevant to show what would have been discovered if he had known about the financial dealing of the victims. (T. 680-83) The State responded that the testimony of Hendon and Kastrenakes showed that it learned of the William Penn suit at the same time the defense did. (T. 684) Further, the State asserted that the documents would not have been admissible at trial, that Defendant was aware of the victims' business dealings, having been a partner in them, and that introduction of the document would have opened the door to damaging evidence about Defendant since he was a partner. (T. 684-87) Finally, the State pointed out that much of this information was not discovered until after trial. (T. 687-88) Defendant asserted that objection to production showed the State knew of the existence of this information, that Buhrmaster was aware of the life insurance within two days of the crime and that the contents of the victims' briefcase would have revealed this information. (T. 688-89) Further, Defendant contented that the door to the negative information about him was already opened because of the newspaper articles. (T. 690) The lower court deferred ruling until Buhrmaster testified. (T. 692)

With regard to the Nigel Bowe documents, the State asserted

that any connection between his drug dealing and the victims was sheer speculation. (T. 693) The fact that the victims had dealing with him in their businesses did not mean that they were involved in drug trafficking with him or that he arranged their murder. (T. 693-94) Defendant responded that the documents did not prove that the victims were drug dealers by themselves but would show he was involved in a conspiracy when considered with other evidence, particularly the testimony of Ron Petrillo. (T. 694) The lower court deferred ruling until after Petrillo testified but indicated that it thought the claim was speculative. (T. 695-96)

Finally, the State renewed its motion to exclude any expert testimony from Steven Potolsky. (T. 696) As grounds, the State asserted that expert testimony was not necessary and that Potolsky's testimony would be misleading because he had only reviewed a portion of the documents in the case. (T. 696-700) Defendant responded that Potolsky's testimony was necessary because of the alleged complexity of the ineffectiveness claim. (T. 701-02) The lower court inquired what experience Potolsky had in trying capital cases at the time this matter was tried. (T. 702) He was informed that Potolsky had been co-counsel on a capital case in 1986 and counsel in another in 1987 or 1988. (T. 771-73) He also litigated pretrial matters in capital cases that were tried

after this matter and attended a seminar on handling capital cases. (T. 773) The lower court excluded Potolsky's testimony, having previously indicated that it felt argument of counsel would be more valuable than testimony from Potolsky. (T. 773-74, 704-07)

Defendant also sought a ruling on the admissibility of the transcripts of the tape of a British television show on this case. (T. 707-08) The State objected because it had never been given access to the complete, unedited tapes and could not verify the accuracy of the transcription. (T. 709) The lower court found the transcripts inadmissible because the State was unable to review the tapes. (T. 710-11) Defendant then requested funds to transport a witness with the tape from England, which the lower court denied. (T. 711-12)

Detective Buhrmaster testified that he knew the victims had life insurance. (T. 719) However, he could not remember when he learned of this other than the fact that it was before trial. (T. 719-20) He did not recall meeting with an investigator from an insurance company regarding this case. (T. 736-37) Reviewing a letter from an investigator for the William Penn Insurance Company to the investigator's supervisor did not refresh his recollection. (T. 737-38, R. 2445-55)

Detective Buhrmaster recalled recovering a briefcase from the

scene and a defense investigator asking to look at the contents. (T. 729-30) However, Buhrmaster did not have the contents at the time of the request. (T. 730) Subsequently, Buhrmaster got the contents of the briefcase back. (T. 730)

Buhrmaster stated that some of the documents that Defendant was claiming were from the briefcase were not[3] and that he did not know if the remainder were from the briefcase. (T. 730-32, R. 2184-2250) He was sure that the copies of the passports, credit cards and some of the business cards were from the briefcase because he made those copies. (T. 736) Buhrmaster recalled the briefcase containing a legal pad with writing similar to that contained on the copy of the legal pad that Defendant claimed came from it. (T. 733, R. 2252-88) However, Buhrmaster did not believe that the copy was accurate because it had more pages than the legal pad. (T. 733-34)

From the passports, Buhrmaster was aware that the victims had traveled extensively prior to their deaths. (T. 740) However, he also knew that the victims were involved in the import-export business. (T. 788)

Buhrmaster stated that if a person invoked his rights, he

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[3] Buhrmaster was sure that some business cards with his initials on them, a storage receipt for the victims' car and a claim check for a car were not from the briefcase. (T. 732)

would stop interviewing the person. (T. 748) Buhrmaster stated that he would stop talking to anyone who stated that he did not wish to speak to him anymore. (T. 748) However, Buhrmaster did not recall Defendant making any such statement during his initial interview with him. (T. 749-51) In fact, Defendant had agreed to give a statement during the initial interview after waiving his *Miranda* rights. (T. 793-94) The invocation of rights noted in the trial preparation materials occurred four days after the arrest and initial statement. (T. 794-95) After Defendant invoked his rights, Buhrmaster did not speak to him anymore. (T. 795)

Buhrmaster checked the sound proofing of the murder scene and determined that it was not good. (T. 752) However, he determined that there were no other occupants of the floor on which the murder occurred at the time. (T. 796) Further, there was extensive construction on the floor immediately below the murder floor, which was generating a great deal of noise. (T. 796)

Buhrmaster did not recall being present at the interview with Butler, at which he was given the polygraph. (T. 753-56) He denied working out with the prosecutors what he would testify to regarding why Butler changed some of his statements. (T. 756) Buhrmaster did admit that certain notes regarding why Butler had changed his statements were in his handwriting but did not recall

why he wrote the notes. (T. 756-58)

Buhrmaster admitted that he had seen a telex from Interpol. (T. 759, R. 2300) The telex stated that Defendant had been arrested for dealing in stolen property but was no longer wanted by the London Police. (R. 2300)

Buhrmaster acknowledged that he had submitted documents, including the hotel register, for handwriting comparison to Defendant. (T. 759-60, R. 2065) However, he did not recall if he ever received the results of the analysis. (T. 760) Defendant then requested the report of the handwriting analysis and claimed that it had to be exculpatory. (T. 760) After researching the issue, the State located a note, showing that the handwriting analysis had been canceled because of a scheduling problem and because the hotel register had been completed by a hotel employee. (T. 781-82) Further, Defendant had stipulated at trial that his hand writing was on the letters that were introduced. (T. 782)

Buhrmaster was asked to investigate the victims to see if they had a criminal history, which Buhrmaster considered a standard request. (T. 788) As part of this investigation, he checked state, local and federal agency records and determined that the victims had never been arrested or been the subject of a criminal investigation. (T. 789-91) He did learn that the victims had

brought a criminal complaint against Defendant in Broward County. (T. 792-93)

Arthur McKenzie testified that he saw Defendant with Tino Geddes and another man in Fort Lauderdale between 11:30 and 12:00 on the day of the crime. (T. 832-38) However, on cross examination, he stated that he saw them a week after the crime. (T. 842) He stated that he remembered the day because he was late paying his rent, which was due two days after the crime. (T. 842-43)

Douglas Scott, the delivery person for Defendant's newspaper, testified that he saw Defendant at the newspaper office shortly before noon on the day of the crime. (T. 845-48) He denied having arranged this testimony with Tino Geddes. (T. 849)

Prior to calling George Bell, Defendant's accountant, Defendant moved in limine to exclude reference to his criminal history because adjudication had been withheld. (T. 853-54) The State responded that Bell had pled to drug trafficking charges involving Nigel Bowe and Adam Hosein, which would be relevant to Defendant's involvement in drug trafficking. (T. 855) In making its argument, the State noted that Defendant's trial counsel had withdrawn the name of this witness and that Defendant had failed to question Hendon about his decision to do so. (T. 857-58, 859)

Because of this failure, the trial court excluded the witness but decided to evaluate his pretrial affidavit and deposition. (T. 861)

Breton Ver Ploeg represented William Penn Life Insurance in the suit over the victims' life insurance. (T. 925-26) He testified that certain documents in Defendant's appendices came from his file on that litigation. (T. 927-35) Ver Ploeg admitted that the documents in the appendices were not all of the documents from that litigation. (T. 936) The State objected to the admission of these documents as irrelevant, and the trial court admitted the documents subject to proof of their relevance. (T. 935, 942)

Ron Petrillo was hired by Defendant's first attorney as a private investigator. (T. 1012-14) In the course of his investigation, Petrillo looked into room 408 at the DuPont Plaza. (T. 1022-23) He found that it did not have a door to the room next door, room 406, and the only way to get between the room was by entering the hallway. (T. 1023)

Petrillo saw a briefcase in one of the crime scene photographs. (T. 1024) He went to the police and was allowed to view the empty briefcase. (T. 1025) He never saw the contents of the briefcase. (T. 1026)

After hearing the evidence and argument of counsel and considering post hearing memoranda, the lower court denied the motion regarding Defendant's conviction in detailed 25 page order. (R. 6623-46) The lower court did grant Defendant relief from his death sentence. (R. 6623-46) Defendant appealed the denial of his motion regarding his conviction.

SUMMARY OF THE ARGUMENT

Defendant did not raise his claim that a mistrial was required because of the initial trial judge's arrest mistrial below and the claim was raised on direct appeal. As such, this claim is barred.

Defendant also did not contend below that his counsel was ineffective for failing to move to recuse the initial trial judge pretrial, and the claim is barred.

The lower court properly denied Defendant's claims that his counsel was ineffective for advising Defendant to waive the mistrial issue, and the waiver was valid. This was a proper strategic decision.

The lower court did not deny Defendant funds to conduct the post conviction proceedings. Funds were unavailable because of Defendant's insistence on the timing of the proceedings below.

The lower court properly determined that counsel was not ineffective in the guilt phase. The decisions were proper strategic decisions, Defendant failed to prove that counsel was deficient, and Defendant was not prejudiced.

The lower court properly concluded that the State did not suppress evidence. Defendant was aware of the evidence pretrial, the evidence was immaterial, and Defendant did not show that the State knew of the evidence.

The lower court's rulings regarding evidence at the hearing below were proper. The testimony Defendant sought to elicit was irrelevant.

The lower court also properly handled the matter of the grand jury transcripts. Defendant was aware of the contradiction in this testimony pretrial. The lower court obtained and review in camera the transcript and determined that it contained no additional impeachment evidence and that the interests of justice did not require the violation of grand jury secrecy.

Defendant's claim that the State violated his rights under the Vienna Convention was barred. Further, Defendant has no standing to raise this issue and showed no prejudice.

Defendant is not entitled to any relief from his convictions. Further, he is not entitled to discharge.

ARGUMENT

I. THE ISSUES RELATED TO THE ARREST OF THE INITIAL TRIAL JUDGE ARE BARRED AND MERITLESS.

Defendant first asserts that his conviction should be reversed because a mistrial was not declared when the judge was arrested mid-trial. In support of this claim, Defendant places considerable weight on his allegation that Trinchet's approach to Defendant was an attempt to solicit a bribe by the initial trial judge. However, Defendant presented no evidence linking Trinchet to the trial judge. As such, Defendant did not prove that Trinchet's approach was a solicitation of a bribe by the trial judge.

Further, while Defendant claims that his trial counsel's testimony shows that the initial trial judge's actions after the bribe attempt prejudiced him, trial counsel's testimony does not support this allegation. Trial counsel testified that only change he noticed in the initial trial judge after the encounter with Trinchet was that he was not courteous. (T. 234) Trial counsel specifically stated that the change did not extend to substantive issues. (T. 350)

Defendant next contends that the initial trial judge should have recused himself because he was taking bribes. However, Defendant did not raise this issue in his motion in the lower

court. As such, this claim is barred. *Shere v. State*, 24 Fla. L. Weekly S301 (Fla. Jun. 24, 1999); *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988).

Even if the claim had been raised below, it would still be barred and meritless. Defendant appears to contend that the initial trial judge should have admitted to taking bribes and recused himself on this basis. However, in *Breedlove v. State*, 580 So. 2d 605, 606-07 (Fla. 1991), this Court held that a government official is not required to waive his privilege against self incrimination to provide facts favorable to a defendant. Thus, under *Breedlove*, the initial trial judge was not required to admit his criminal conduct to help Defendant.

Further, the real gravamen of Defendant's claim appears to be that he should have received a new trial when the initial trial judge's illegal conduct became known mid-trial despite his waiver. However, this issue was raised on direct appeal and rejected:

> With regard to the third claim, concerning the change of the trial judge, we find no error. The record indicates that Maharaj expressly agreed to proceed with the second judge and that his counsel stated he would not move for a mistrial. Therefore, this claim is without merit.

Maharaj, 597 So. 2d at 790. As such, this claim is barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

Defendant next contends that his trial counsel should have moved to recuse the trial judge after the Trinchet encounter. Again, this issue was not raised in Defendant's motion. As such, it is barred. *Shere v. State*, 24 Fla. L. Weekly S301 (Fla. Jun. 24, 1999); *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988).

Even if the issue had been raised, the lower court's denial would still be proper. Trial counsel testified that he did not consider the Trinchet encounter significant because he merely thought she was trying to steal his client. (T. 226) Further, counsel stated that he did not pursue the matter further because he did not wish to have the police in contact with Defendant. Defendant's allegation that his counsel should have considered the Trinchet encounter as a bribe solicitation is an attempt to apply hindsight to counsel's actions, which is precluded by *Strickland v. Washington*, 466 U.S. 668, 694-695 (1984).

Further, Defendant presented no evidence that Trinchet was connected to the initial trial judge at the evidentiary hearing below. As such, Defendant failed to show that the Trinchet encounter would have provided grounds for recusal. Further, the only alleged bias after the Trinchet incident was that the trial judge would not accommodate defense counsel's schedule. (T. 234-35, 350) As such, trial counsel would not have had grounds to move

to recuse the trial judge. *See Correll v. State*, 698 So. 2d 522, 524 (Fla. 1997)(motion to recuse only legally sufficient if alleges facts that a reasonable prudent person would fear getting fair hearing). He therefore cannot be deemed ineffective for failing to do so. *Kokal v. Dugger*, 718 So. 2d 138 (Fla. 1998)(counsel not ineffective for failing to raise meritless issue); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla.), *cert. denied*, 516 U.S. 965 (1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992).

Next, Defendant contends that his counsel was ineffective for not investigating the grounds for mistrial and that his waiver based on this advice was therefore not voluntary. The lower court rejected this claim, stating:

> Regarding the defendant's claim that counsel failed to demand or move for mistrial after the bribery arrest of the first trial judge, the Court finds that this claim is also without merit. Counsel testified that he fully informed the defendant of his right to move for a mistrial and the decision was his. The defendant clearly made an informed and intelligent waiver of his right to a mistrial. Accordingly, there is no evidence in the record to show that counsel was deficient. Further, the Court concludes that the defendant raised this issue on appeal and cannot relitigate this matter in a postconviction relief proceeding. . . .
> The Court finds trial counsel's testimony to be worthy of belief. Further, the Court finds that the defendant chose not to testify, and

> therefore, he did not offer any evidence to refute trial counsel's testimony of effective assistance of counsel provided to the defendant.

(R. 6632-33)(citations omitted). These findings are supported by competent, substantial evidence and should be affirmed.

At the evidentiary hearing below, counsel testified that he made a strategic decision to advise Defendant against moving for a mistrial. (T. 242) Contrary to Defendant's assertion, this decision was based on more than just the expected contradictions between Damas' testimony and Ellis' testimony. Counsel testified that he was happy with the jury and the manner in which the proceedings were going. (T. 242) Further, he felt that the contradictions between Ellis' testimony and Butler's testimony were helpful. (T. 354) Counsel also felt that the arrest of the judge midtrial might reenforce his trial theory, which was that the State's witnesses were lying. (T. 355) Finally, counsel testified that he allowed Defendant to make the final decision, without threat or coercion. (T. 356, 360) As such, the lower court's findings are supported by the record, apply the correct law and should be affirmed.

While Defendant contends that his counsel should have investigated the facts before deciding to advise Defendant against seeking a mistrial, Defendant does not point to any facts that

counsel would have discovered. Defendant merely alleges that counsel should have viewed the facts known to him differently. However, such second guessing does not support a claim of ineffectiveness. *See Strickland*, 466 U.S. at 689; *Shere*, 24 Fla. L. Weekly at S301 n.9; *Cherry v. State*, 659 So. 2d 1069, 1073 (Fla. 1995).

Finally, Defendant appears to contend that he is entitled to relief because the second trial judge allegedly had the State write the sentencing order for him and the first post conviction judge was recused.[4] However, Defendant ignores that he has received relief for these claims. Defendant's death sentence has been vacated. He has been given a second round of post conviction proceedings. As Defendant has received the relief to which he was entitled for these alleged violations, there is no basis to provide further relief.

[4] Defendant also asserts that the State prepared the initial order summarily denying the post conviction motion as the result of an ex parte communication. However, Defendant presented no evidence to substantiate this claim below.

II. THE LOWER COURT DID NOT DENY DEFENDANT FUNDS.

Defendant initially contends that the lower court denied him funds to pursue the evidentiary hearing in this matter. However, the record is clear that the lack of funding was due to Defendant's insistence on the timing of the hearing.

The lower court attempted to assist Defendant in obtaining funds. When the motion for costs was originally made, the lower court first considered whether the county could provide the funding. (T. 19) However, the county and Defendant both agreed that under *Hoffman v. Haddock*, 695 So. 2d 682 (Fla. 1997), the county was not responsible for bearing them. (T. 21-22) As such, the lower court denied the motion to assess the costs against the county but referred the matter to Judge Schaeffer. (T. 26)

Judge Schaeffer considered the request and objected to the use of out-of-state experts where local and in-state experts were available. (T. 47-48) However, she agreed to reconsider the request if Defendant found local or in-state experts. (T. 48-50)

While Defendant contends that Judge Schaeffer's refusal to provide funds was erroneous, the record is clear that Judge Schaeffer properly determined that Defendant was not entitled to funds from this source. Defendant privately retained both the attorneys who represented him when his motion for post conviction

relief was originally filed and his present attorney, who initially represented him on appeal from the initial summary denial. The Office of the Capital Collateral Representative (CCR) did not declare a conflict in this matter. The funds administered by Judge Schaeffer are for matters in which conflict counsel has been appointed. As such, Judge Schaeffer could not provide Defendant with funds.

While Defendant claims a conflict based on his lack of representation during the relinquishment on direct appeal, he did not argue this issue to the lower court when it was raised as a basis for Judge Schaeffer's refusal to provide funding. (T. 85-86) As such, this issue is not preserved. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla.1982)("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

Even if the claim had been preserved, it is meritless. Pursuant to §27.702, Fla. Stat. (1989), CCR could not commence representing a defendant until his direct appeal was complete. Here, Defendant was in the middle of his direct appeal at the time of the relinquishment and not entitled to be represented by CCR. Further, Defendant did not request that he be represented by CCR. Defendant attempted to retain private counsel to handle the

relinquishment. Failing that, Defendant asked that the public defender or private counsel be appointed. As such, there was no conflict of interest between Defendant and CCR.

Because CCR was the proper party to provide the funds, the lower court then sought funds from them. (T. 86) However, CCRC-South did not have a director at the time, which impaired its ability to provide funding. (T. 86, 102) When the director was named, he indicated that funding would not be available until October. (T. 122-23) However, Defendant declined to wait until funds were available and took no action to compel CCR to provide funding. (T. 29, 102) As such, the record clearly reflects that the lack of funding was due to Defendant’s insistence in having an evidentiary hearing before the funds were available.

III. THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, *BRADY*[5] VIOLATIONS, AND PRESENTATION OF PERJURED TESTIMONY.

Defendant raises a variety of claims of alleged *Brady* violations and alleged ineffective assistance of counsel. In order to show a *Brady* violation, Defendant must prove:

> (1) that the State possessed evidence favorable to him; (2) that he did not possess the favorable evidence nor could he obtain it with any reasonable diligence; (3) that the State suppressed the favorable evidence; and (4) that had the evidence been disclosed to [defendant], a reasonable probability exists that the outcome of the proceedings would have been different.

Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla.), *cert. denied*, 516 U.S. 965 (1995).

In order to prove a claim of ineffective assistance of counsel, Defendant must demonstrate both that counsel's performance was deficient, and that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the defendant of a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668 (1984).

Deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness

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[5] *Brady v. Maryland*, 373 U.S. 83 (1963).

under prevailing professional norms, and a fair assessment of performance of a criminal defense attorney:

> requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that criminal defense counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 694-695.

Further, strategic choices made by a criminal defense counsel after thorough investigation of law and facts relevant to plausible options are "virtually unchallengeable." They may only be overturned if they were "so patently unreasonable that no competent attorney would have chosen it." *Haliburton v. State*, 691 So. 2d 466, 471 (Fla. 1997)(quoting *Palmes v. Wainwright*, 725 F.2d 1511, 1521 (11th Cir. 1984)(quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983))).

Even if a criminal defendant shows that particular errors of defense counsel were unreasonable, the defendant must show that they actually had an adverse effect on the defense in order to establish ineffective assistance of counsel. The test for prejudice

requires the defendant to show that, but for counsel's unprofessional errors, the result of the proceeding would have been different, or, alternatively stated, whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. *Hill v. Lockhart*, 474 U.S. 52 (1985).

A. THE LOWER COURT PROPERLY REJECTED DEFENDANT'S ASSERTION THAT THE STATE VIOLATED *BRADY* BY FAILING TO DISCLOSE THAT THE VICTIMS HAD LIFE INSURANCE.

Defendant initially asserts that the state suppressed the fact that the victims had life insurance. However, Defendant does not explain why his counsel could not have known the victims had insurance through an exercise of due diligence. Defendant deposed Shaula Nagle pretrial and never asked her about insurance. Since Defendant failed to show that he could not have learned of the insurance through due diligence, his *Brady* claim must fail. *See Roberts v. State*, 568 So. 2d 1255 (Fla.1990)(finding no *Brady* violation where prosecution and defense have same access to alleged exculpatory evidence); *James v. State*, 453 So. 2d 786 (Fla.)(same), *cert. denied*, 469 U.S. 1098 (1984).

Further, Defendant did not show that the issue of insurance was material. Defendant does not claim that the victims were

killed because of their insurance. Instead, Defendant asserts that the insurance policies were material because it would have shown that the victims were in fear for their lives. However, the State submits that people buy life insurance for reasons other than that they expect to be murdered. Further, Defendant was well aware that the victims feared for their lives. Shaula Nagel testified on deposition that Derrick Moo Young feared that Defendant would kill him. (D.A.R. 238-39)

Further, while Defendant contends that the insurance caused Shaula Nagel to testify falsely at deposition, this claim is meritless. As argument in Issue III.C, *infra*, Nagel's testimony was not false. Defendant also asserts that the insurance would have lead him to information about the victims' financial status. However, in making this claim, Defendant ignores that he was the victims' business partner until shortly before their deaths. As such, he knew of their financial condition. Thus, Defendant failed to show that the insurance would have affected the outcome of his trial, and the lower court properly denied the claim.

B. THE LOWER COURT PROPERLY REJECTED DEFENDANT'S CLAIM THAT THE STATE VIOLATED *BRADY* BY FAILING TO DISCLOSE THE CONTENTS OF THE VICTIMS' BRIEFCASE.

Defendant next alleges that the State violated *Brady* by

suppressing the information found in the victims' briefcase. The lower court rejected this claim, stating:

> Regarding the passports and papers and notes contained in a brief case belonging to the victims found at the crime scene, the record shows that trial counsel was aware of these items before and during trial. Specifically, the passport describes foreign travel by the victims from the United States to Panama, Jamaica and other countries. The notes and papers pertain to International letters of credit, appointments, insurance policies on the victims, possible involvement in the commission of fraud and other information.
>
> The court finds that trial counsel deposed the lead detective regarding this evidence. Counsel should and could have moved to compel the production of these items but did not do so. His private investigator attempted to inspect this evidence at the Miami Police Department, but was told that the evidence had been returned to the victims' family. The court finds that the evidence would not have impeached the testimony of the State key witness Neville Butler nor would it have resulted in a markedly weaker case for the prosecution and a markedly strong one for the defendant.
>
> Further, the court concludes that the evidence was not favorable to the defendant as it relates to either guilt or punishment.

(R. 6634-35) These findings are supported by competent substantial evidence and must be affirmed.

Ron Petrillo, Defendant's investigator, stated that he attempted to get the contents of the briefcase and was told they had been returned to the victims' family. (T. 1024-26) Detective

Buhrmaster testified both at trial and at the evidentiary hearing that the property had been returned to the family and subsequently retrieved. (T. 729-30, D.A.R. 3525-26) As such, it is clear that Defendant was aware of the status of the contents of the briefcase and any issue regarding the State's failure to disclose them, could have and should have been raised on direct appeal. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991).

Further, the lower court's findings with regard to the value of the contents are also well supported. While Defendant asserts that had he seen the passports, he would have known the true financial status of the victims. However, in making this argument, Defendant ignores that he was the victims' business partner until approximately seven months before their murder. He also ignores that he was their next door neighbor and was involved in lawsuits against the victims, alleging that they had taken several hundred thousand dollars. Finally, he neglects to mention that Shaula Nagel testified about some of the victims' travels. As such, Defendant has failed to demonstrate that he could not have known this information through and exercise of due diligence, and no *Brady* violation occurred. *See Roberts v. State*, 568 So. 2d 1255 (Fla.1990)(finding no *Brady* violation where prosecution and defense have same access to alleged exculpatory evidence); *James v. State*,

453 So. 2d 786 (Fla.)(same), *cert. denied*, 469 U.S. 1098 (1984).

Defendant also asserts that the notes in the briefcase would have shown that the victims were involved in money laundering. However, Defendant was already aware that the victims were involved in the loan transactions. Shaula Nagel testified on deposition that at the time of their deaths, the victims were brokering a loan deal in which a Los Angeles church would be using gems as collateral for a loan involving the government of Barbados or another country, proceeds of which would fund the building of a resort. (D.A.R. 228-29, 232-33) As such, Defendant did not show that he could not have learned of the information through due diligence, and no *Brady* violation occurred. *See Roberts*, 568 So. 2d at 1260; *James*, 453 So. 2d at 790.

Despite this knowledge, Defendant was unable to show an improprieties after an investigation into the victims' finances. Further, Defendant did not show that any of these transactions were improper in the evidentiary hearing below. On appeal, Defendant asserts that he does not have to show what the notes meant. However, Defendant is incorrect. To prove a *Brady* violation, Defendant must show that the evidence was material and favorable to him. *Hildwin*, 654 So. 2d at 109. Since Defendant has not done so, the claim was properly denied.

C. THE LOWER COURT PROPERLY FOUND THAT THE STATE DID NOT KNOWINGLY PRESENT PERJURED TESTIMONY IN SHAULA NAGEL'S DEPOSITION.

Defendant next asserts that the State knowingly presented perjured testimony from Shaula Nagel on deposition. In order to prove this claim, Defendant was required to show: "(1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the statement was material." *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991). To demonstrate perjury, a defendant must show more than mere inconsistencies. *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989); *see also United States v. Bailey*, 123 F.3d 1381, 1395-96 (11th Cir. 1997)(proof of perjury requires more than showing of mere memory lapse, unintentional error or oversight); *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994)(conflicts in testimony are insufficient to show perjury). Here, Defendant did not show that Nagel's testimony was even inconsistent and did not show that the State was aware of even the inconsistencies.

The basis of Defendant's claim is alleged inconsistencies between Nagel's deposition in this matter and her depositions in her civil suit. However, the civil depositions were taken after the conclusion of Defendant's trial. (R. 531, 659) The depositions do not indicate that the State was involved. As such,

Defendant did not show that the State had any way of being aware of an alleged difference in Nagel's testimony, and no *Brady* violation was demonstrated. *See Roberts*, 568 So. 2d at 1260; *James*, 453 So. 2d at 790.

Further, a reading of the depositions shows that the testimony was in fact consistent. Defendant's first allegation of perjury is that Nagel represented that the victims' import/export business was only to Trinidad, was sporadic and concerned toilets. In fact, these statements were made in connection with KDM International, a company in which Defendant was a principal. (D.A.R. 226-28) Further, Nagel also explained that the victims had been involved in shipping appliances to Costa Rica and brokering a deal in which a Los Angeles church would be using gems as collateral for a letter of credit with the government of Barbados or Costa Rica to obtain funds to build a resort in Costa Rica. (D.A.R. 228-29, 232-32, 248)

Defendant next asserts that Nagel lied because she testified that DMY had no assets. However, Nagel did not testified that DMY had no assets; Nagel testified that DMY had just been created and had no revenue yet. (D.A.R. 225) Further, while Nagel stated in her civil deposition that she knew more about DMY than anyone else alive, she also stated that her knowledge of the company was

limited because the victims ran the company. (R. 537)

Defendant's next allegation of perjury is that Nagel stated that her family had recently come to this country. In fact, Nagel never mentioned when the family had come to this country and was answering whether Defendant had paid to bring the family here. (D.A.R. 244-45) Thus, the testimony was correct.

Next, Defendant asserts that Nagel mislead him regarding Cargill International. In fact, Nagel's testimony was that her father was arranging to export appliances with Jeralco Levya, whose business she thought was named Cargill. (D.A.R. 248) Further, Nagel testified in her civil deposition that she knew nothing about Cargill International. (R. 676) Thus, Defendant failed to show that the testimony was false.

Defendant's next perjury allegation is that Nagel knew that Defendant was not involved in a scam related to printing presses. Nagel was not asked about this in her criminal deposition. Further, she did not testify that Defendant was not involved. She testified that she was unsure which of the two KDM companies, in one of which Defendant was a principal, had conducted the transaction and that it was with members of Defendant's family. (R. 576-77) Thus, Defendant did not show any falsehood.

Finally, Defendant asserts that Nagel lied about her knowledge

of her father's alleged relationship with Butler, Damas and Hosein. With regard to Butler, Defendant does not point to any information to contradict Nagel's statement. With regard to Damas, Defendant refers to a statement Nagel made to an insurance investigator and does not explain how the State would have known of it. With regard to Hosein, Nagel testified that she only learned the name Amer Enterprises in April of 1987, after her February 1987 criminal deposition, and did not know anything about it at the time of her November 1987 civil deposition. (R. 531, 542, 666-67, D.A.R. 220)

As Defendant did not show that either Nagel's testimony was false or that the State knew about any difference in her testimony, Defendant failed to show that the State violated *Giglio*. Thus, the lower court properly denied this claim.

D. THE LOWER COURT PROPERLY DETERMINED THAT THE CLAIMS REGARDING NEVILLE BUTLER WERE PROCEDURALLY BARRED AND MERITLESS.

Defendant next asserts that the State suppressed the results of Butler's polygraph and suborned perjury regarding why Butler changed his testimony. The lower court rejected this claim, stating:

> The Court concludes that the prosecutor did not allow a key witness to commit perjury. Both the prosecutors testified that Butler was called to their office without immunity to clear up some questions regarding his

> testimony. Butler voluntarily responded to their offices and changes part of his testimony before the polygraph. However, they stated, and the Court concurs, that Butler never changed his testimony as it relates to the defendant being the shooter and Butler not being armed with a gun. Further, the court finds that Butler's testimony is consistent with the physical evidence and other testimony.
>
> The Court also finds that the prosecutor notified trial counsel by letter (March 20, 1987) that Butler had "passed with regard to the questions asked of him as to your client being the shooter in this matter and him not being armed or participating in the shootings of the Moo Youngs." Further, the prosecutor invited counsel "to redepose Butler at his convenience regarding events that occurred prior to the homicide and post homicide." Defense counsel did redepose Butler on March 30, 1987. Finally, the Court concludes that the defendant's claim that the prosecutor excluded evidence that Butler failed his polygraph test when such evidence related to his credibility had been raised on direct appeal. The Florida Supreme Court found that this claim was without merit and needed no further discussion.

(R. 6640) These findings are supported by competent, substantial evidence and should be affirmed.

First, contrary to Defendant's assertion, Butler not fail the polygraph. In fact, the polygraph report shows that of the eleven questions asked, Butler was only found to be deceptive regarding one. (R. 153-54) This question concerned whether he had stayed in a car with Defendant for two hours after the shooting. (R. 153-54)

The answers to two other questions were found to be inconclusive. (R. 153-54) These questions concerned whether he knew that the victims were to be shot before the meeting and whether he was telling the complete truth about the incident. (R. 153-54) Butler's responses to the remaining questions, which concerned having actually witnessed Defendant shooting the victims, having not been armed and drugs not been involved in the crime, were indicative of truthfulness. (R. 153-54) Both of the prosecutors testified at the evidentiary hearing that since witnessing the crime was the vital portion of Butler's testimony, they considered that he had passed the polygraph. (T. 504-06, 593-94)

This information was communicated to defense counsel pretrial. The prosecutor wrote defense counsel and informed him that Butler had "passed with regard to the questions asked of him as to your client being the shooter in this matter as well as he not being armed or participating in the shootings of the Moo Youngs." (R. 158) The letter then informed counsel that as a result of questioning before and after the polygraph, Butler's testimony had changed regarding the events before and after the murder. (R. 158) While Defendant now contends that he did not understand the import of these statements, the fact that he raised the issue of the polygraph results on appeal belies this conclusion.

Further, the prosecutors did testify, consistent with the information in the letter, that the change in testimony was occasioned by questioning both before and after the polygraph. (T. 503-04, 602-05) They also testified that Butler was voluntarily at the meeting. (T. 604-05) As Kastrenakes pointed out at the evidentiary hearing below, this may have caused Butler to consider his change in testimony voluntary, and Defendant presented no evidence below to show that Butler considered his change in testimony anything but voluntary. (T. 604-05) Further, they stated that Butler changed his testimony when confronted to contradicts between his testimony and other evidence. (T. 503-04, 602-04) They did not state that Butler changed his testimony when confronted with the polygraph results. As such, the evidence does not show that the State suborned perjury.

Moreover, Defendant claimed on direct appeal that the polygraph results should have been admissible to impeach Butler. Supplemental Brief of Appellant, Case No. 71,646 (Filed September 6, 1990). This Court rejected this issue as meritless. *Maharaj*, 597 So. 2d at 790-91. As such, this claim is barred. *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990).

Even if the claim was not barred, the claim is meritless. Polygraph results are inadmissible in Florida absent a stipulation between the parties. *See Delap v. State*, 440 So. 2d 1242, 1247 (Fla. 1983); *Zeigler v. State*, 402 So. 2d 365, 373 (Fla. 1981); *Sullivan v. State*, 303 So. 2d 632, 634 (Fla. 1974). Here, Defendant presented no evidence of a stipulation. As such, the polygraph results were inadmissible, could not have affected the outcome and no *Brady* violation occurred.

Defendant asserts that he could have used the polygraph results because they were inconsistent with Butler's testimony. First, Defendant asserts that he could have used a statement about what occurred in the car after the murder to show that Butler could have escaped Defendant earlier. However, Butler's trial testimony was not that he was forced to wait in the car with Defendant. Instead, Butler testified that they stayed in the car at his insistence. (D.A.R. 2828-29) He stated that he was not trying to escape from Defendant because he felt that he was guilty of the murders. Butler was impeached with his prior statements that he was forced to remain in the car. (D.A.R. 3067) As such, presenting testimony that Butler could have left would not have impeached him.

Defendant next alleges that Butler could have been impeached

with his denials of having purchased the heaters. However, Butler was impeached with his denials of having purchased the heaters. (D.A.R. 3056) As such, Defendant does not explain how this cumulative evidence would have affected the trial.

Defendant also appears to assert that the alleged failure to disclose the polygraph results is a *Brady* violation even if they could not be used for impeachment or as substantive evidence. However, the Supreme Court rejected this exact claim in *Wood v. Bartholomew*, 516 U.S. 1 (1995). As such, this Court should reject this claim.

Defendant next asserts that his counsel was ineffective for not using Butler's first statement to the police to impeach him. However, counsel did attempt to use the first statement, and Butler admitted that everything in it but the account of the murder was a lie. (D.A.R. 3050-51, 3096-97, 3101-02) As such, any further attempt to use this statement would merely have been cumulative, and counsel cannot be deemed ineffective for failing to present cumulative evidence. *Valle v. State*, 705 So. 2d 1331, 1334-35 (Fla. 1997); *Provenzano v. Dugger*, 561 So. 2d 541, 545-46 (Fla. 1990); *Glock v. Dugger*, 537 So. 2d 99, 102 (Fla. 1989); *Card v. State*, 497 So. 2d 1169, 1176-77 (Fla. 1986), *cert. denied*, 481 U.S. 1059 (1987).

Defendant also alleges that the State suppressed evidence that the victims had been in contact with Damas and regarding the time at which the meeting was set. However, the basis of the claim that the State knew about prior contact with Damas is a letter between the insurance investigator and his supervisor.[6] (D.A.R. 2445-55) The letter does not indicate that it was sent to the State and Buhrmaster testified that he had never seen it. (T. 736-38) None of the comments in the letter are attributed to Buhrmaster or any other state representative, and the Nagel comment indicates that it was made in an interview between Nagel and the insurance adjustor. (R. 2445-55) Further, all the comment shows is that someone using the name Damas never reached the victims. Defendant did not call Nagel at the evidentiary hearing to identify Damas as the caller or Damas to testify that he had in fact called the victims. Without this testimony, it is not possible to know if Damas in fact called the victims.

Further, the fact that Damas called does not change the fact that Damas had an alibi for the time of the murders. It does not

[6] Defendant also asserts that a notation on the note pad in the victims' possession supports this claim. The notation includes a phone number and the name "Ed." (R. 2282) However, the number is inconsistent with Damas' phone number. (D.A.R. 2295) Defendant presented no evidence to link this number to Damas. Thus, the note does not prove a link between the victims and Damas.

change the fact that Defendant's fingerprints were found at the crime scene on objects that were brought there or moved during the crime. It does not change the fact that Defendant was furious at the victims. It does not change the fact that Butler witnessed Defendant kill the victims. As such, it would not have affected the outcome of the proceedings, and Defendant failed to prove that a *Brady* violation occurred.

With regard to the time of the meeting, the record reflects that Defendant was aware of this notation prior to trial since the information was elicited at trial. (D.A.R. 3525) The reason why this issue was not stressed was because the theory at trial was that the meeting was set for 9:30 with Damas. (D.A.R. 3054) Further, Defendant speculates that the victims met with hotel staff before their meeting. However, Defendant presented no evidence below to support this allegation. With regard to Tony Falcon, the notation states, "Car-Hire-Tony-DuPont Tony Falcon." (R. 2260) The note is undated and appears in the middle of a pad. (R. 2260) As such, this note does not indicate that the victims spoke with Falcon the day of their murders. With regard to Patrick Dillon, the speculation is based on a business card, which Buhrmaster testified was not recovered from the victims but was obtained by him in the course of his investigation. (R. 2189, T. 732) Given

that the time of the meeting was before the jury and Defendant did not show what the victims were doing before the murders, Defendant failed to show a *Brady* violation.

E. THE LOWER COURT PROPERLY DETERMINED THAT THE CLAIMS REGARDING ELSEE CARBERRY WERE PROCEDURALLY BARRED AND MERITLESS.

Next, Defendant alleges that the State suppressed evidence that showed that the articles published in the *Caribbean Echo* were false and that his counsel was ineffective for failing to move to exclude them or show that they were false. Defendant also asserts that the State suppressed evidence that would have impeached Carberry.

With regard to showing that the article were false, Defendant's contention ignores the fact that the articles were admitted to show that they enraged Defendant. As such, their truthfulness was not really relevant. *Koon v. State*, 513 So. 2d 1253, 1255 (Fla. 1987)(truth of statement introduced to show that statement gave defendant motive for killing irrelevant), *cert. denied*, 485 U.S. 943 (1988). Further, the information Defendant claims should have been admitted would not have proven the allegations false or was already presented.

First, Defendant contends that his counsel could have shown that the victims' registration of Defendant's paper was improper.

However, Carberry's testimony was to this effect. As such, this claim has no merit.

Defendant next asserts that the State suppressed evidence that would have shown that the victims were the ones involved in the shipping of the printing equipment to Trinidad. However, Defendant ignores that the article implicated both Defendant and the victims. As such, evidence that the victims were involved would not have disproved the allegation. Further, Defendant does not explain how he could not have known of this information, especially considering the equipment was allegedly shipped to his brother.

Defendant next asserts that the State suppressed evidence that would have proven the allegation that a Mr. Persuad was paid a bribe was false. However, the allegation was that Mr. Persuad was the one paying the bribe. (D.A.R. 2373) As such, a check showing that Persuad paid the victims, the source of the information in the articles, would have not proven the allegation false.

Defendant next alleges that the State suppressed evidence that would have shown Defendant did not forge a check. However, the allegedly suppressed evidence consisted of a draft of a letter to the bank stating that Defendant forged the check. Defendant does not explain how this would have shown that he did not do so. Moreover, he does not explain how he was not aware of any evidence

on this subject or could not have been aware through an exercise of due diligence. Further, it was well known that Defendant and the victims had numerous civil suits against one another. As such, having Defendant's civil lawyer testify would not have shown the newspaper article was false.

Defendant also alleges that his counsel should have impeached Carberry regarding the fact that the threat he reported in his paper that Defendant had made to kill Carberry was really a threat against the paper only. However, counsel did impeach Carberry on this point at trial. (D.A.R. 2390-93) As such, counsel cannot be deemed ineffective for failing to do what he in fact did.

Defendant next asserts that the State suppressed evidence that Detective Waldman was not investigating the victims and him. However, Defendant does not explain why his counsel could not have known of this information through the exercise of due diligence. He was aware of the allegation in the newspaper and could easily have called Waldman. As such, Defendant failed to prove that the State violated *Brady*. *See Roberts*, 568 So. 2d at 1260; *James*, 453 So. 2d at 790.

Additionally, Defendant ignores the fact that the incident involved in Waldman's report outlined one of many allegations filed with the police regarding Defendant and the victims. As outlined

in the insurance investigator's letter, there were numerous allegations. (R. 2454-55) The investigation into all of these allegations was allegedly dropped only because of the murders. (R. 2455) Since Defendant did not present the testimony of Waldman at the evidentiary hearing below, he failed to show that the report regarding one allegation would have proven the story false.

Next, he contends that the State suppressed a check from his wife to Carl Tull that would allegedly show that the allegation that Tull was not "anxious to clarify many financial dealing involving [Defendant]" was false. However, Defendant does not explain how his counsel was unable to know of Defendant's wife's actions by an exercise of due diligence, and no *Brady* violation occurred. *See Roberts*, 568 So. 2d at 1260; *James*, 453 So. 2d at 790. Further, Defendant presented no evidence below regarding this check, its purpose or how it related to the comment in the article. Thus, Defendant did not show that this allegation was false.

He further asserts that the State suppressed evidence that would show that Defendant was no longer wanted in England. Defendant does not explain why his counsel could not have obtained this evidence through due diligence. *See Roberts*, 568 So. 2d at 1260; *James*, 453 So. 2d at 790. Further, the Interpol telex does not show that Defendant was no longer wanted in England. (S.R. 7)

In fact, the telex substantiates the article that Defendant was still wanted but that England was not seeking extradition. (S.R. 7)

With regard to the claim that counsel was ineffective for failing to move to exclude the newspaper articles, the issue of the propriety of their admission was raised on direct appeal. Contrary to Defendant's suggestion, this Court did not simply find this claim procedurally barred; it addressed the merits:

> The first claim concerns the admission into evidence of a series of newspaper articles from The Caribbean Echo by the State. The trial judge denied Maharaj's pretrial motion in limine related to these articles. At trial, Maharaj failed to object when the articles were presented and admitted into evidence. Consequently, we find that he did not preserve the issue for appellate review. **Even assuming a proper objection had been made, we find that the articles were relevant to show Maharaj's motivation in harming Derrick Moo Young.** Given the circumstances surrounding this cause, the articles were relevant to establish Maharaj's motivation and intent.

Maharaj, 597 So. 2d at 790 (emphasis added, citations omitted). As such, the lower court's rejection of the claim as procedurally barred was proper. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

With regard to the claim that the State suppressed impeachment evidence of Carberry, the lower court denied this claim stating:

> Similarly, the nondisclosure of the police

> memo describing Elsee Carberry was an illegal alien . . . would not have resulted in a markedly weaker case from the prosecution and a markedly strong one for the defense. Carberry's testimony pertained primarily to the newspaper articles admitted for the State to show a motive for the murders. The newspaper articles introduced in evidence were printed on June 20, June 27, July 18, July 25, and October 10, 1986. Clearly, those articles were printed well before the murders occurred on October 16, 1986. Therefore, the value of Carberry's testimony and his newspaper articles would not have been substantially reduced or destroyed by the suppressed evidence.

(R. 6638) These findings are amply supported by the record, which shows that Carberry did testify about the newspaper articles. (D.A.R. 2346-97) Further, Carberry was impeached at trial by Geddes' testimony that Carberry was devious, that he used his paper to harass people that he did not like and that he had a grudge against Defendant, Butler's testimony that Carberry's paper was sensational and he would not use his real name because of its reputation, and Carberry's own admission that he had a poor reputation. (D.A.R. 2240-42, 2735, 2373) As such, further impeachment on this subject would have been cumulative, and counsel was not ineffective for failing to present it. *Valle v. State*, 705 So. 2d 1331, 1334-35 (Fla. 1997); *Provenzano v. Dugger*, 561 So. 2d 541, 545-46 (Fla. 1990); *Glock v. Dugger*, 537 So. 2d 99, 102 (Fla. 1989); *Card v. State*, 497 So. 2d 1169, 1176-77 (Fla. 1986), *cert.*

denied, 481 U.S. 1059 (1987).

While Defendant asserts that if his counsel had been aware of the memo, he could have shown that Carberry stole from and defrauded many people, he does not explain how this evidence would have been admissible. Defendant did not show that any of these alleged bad acts resulted in Carberry's conviction. As such, these allegations would have been inadmissible. *Hitchcock v. State*, 413 So. 2d 741, 744 (Fla. 1982)("Evidence of particular acts of misconduct cannot be introduced to impeach the credibility of a witness.") Since the content of the memo would not have been admissible, it could not have affected the outcome of the trial. *Wood v. Bartholomew*, 516 U.S. 1 (1995).

Defendant also asserts that the fact that the letter claims that Carberry is an illegal alien shows that the State had a deal with him to prevent his deportation. However, Defendant did not show that Carberry was in fact an illegal alien nor even ask the prosecutors about the alleged deal at the evidentiary hearing. Further, the State is not responsible for immigration decisions; the federal government is. *See Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948)("The Federal Government has broad constitutional powers in determining what aliens shall be admitted, the period they may remain, regulation of their conduct before

naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers.") As such, the State could not have entered into the deal Defendant alleges existed.

F. THE LOWER COURT PROPERLY DETERMINED THAT DEFENDANT'S WAIVER OF HIS RIGHT TO TESTIFY WAS VALID.

Defendant next asserts that his counsel was ineffective for advising him not to testify and that his subsequent waiver was therefore invalid. The lower court properly rejected this claim, stating:

> Further, counsel testified that the defendant asked him for his opinion regarding defendant testifying at trial, and they discussed the strengths and weaknesses of the case. Counsel stated that he advised the defendant against testifying because of the introduction of the newspaper articles that provided a motive for the murders and the issue of defendant's character. Counsel stated that ultimately it was defendant who decided that he did not want to testify. Counsel stated that he reviewed with the defendant the waiver colloquy that the court would address with him. (R. 3731-3733). The Court finds that this claim is without merit.

This findings are supported by competent, substantial evidence and should be affirmed.

At the evidentiary hearing, trial counsel testified that he did advise Defendant against testifying. (T. 328) However, he

stated that Defendant made the final decision not to testify. (T. 416-17)

Defendant now claims that he would have testified had counsel's advise been different. However, Defendant failed to prove this allegation below; he did not testify at the evidentiary hearing below. Defendant appears to contend that he does not have to show prejudice. However, this Court has rejected that argument and required a showing of prejudice. *Oisorio v. State*, 676 So. 2d 1363 (Fla. 1996). Further, Defendant did not even proffer the content of his proposed testimony in his motion. As such, Defendant has failed to prove that but for his counsel's advise he would have testified and his testimony would have affected the outcome. As such, the lower court properly rejected this claim. *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983), *cert. denied*, 467 U.S. 1220 (1984).

Further, even if Defendant had testified that he would have testified at trial if the advice had been different, the basis for challenging the advice is faulty. As shown in Section III. E, *supra*, the presentation of the evidence Defendant contends should have been presented would not have prevented cross examination on these subjects. Further, it would not have prevented the State from questioning Defendant regarding his reaction to the articles.

As such, counsel cannot be faulted for desiring to avoid this questioning.

G. THE LOWER COURT PROPERLY REJECTED DEFENDANT'S CLAIMS REGARDING THE GUN.

Defendant next asserts that the State suppressed evidence regarding his allegations that his gun was stolen, that his counsel was ineffective for failing to support this claim, that the State suppressed evidence that others owned this type of gun and that the State presented perjured testimony from Butler regarding the gun. The lower court rejected the claim, stating:

> Similarly, the court finds no merit to the claim that the prosecution suppressed the evidence that defendant's gun was taken or stolen on or between July 25 and July 26, 1986. This issue was fully presented before the jury for its consideration.

(R. 6635)

With regard to the allegation that the State suppressed evidence that Defendant's gun was stolen, it should be noted that the only thing the State knew was that Defendant alleged that his gun was stolen during a traffic stop in July 1986. (T. 548) Thus, the "evidence" was clearly known to the defense and cannot form the basis for a *Brady* claim. *Provenzano v. State*, 616 So. 2d 428, 430 (Fla. 1993)(no *Brady* violation where evidence available to defense); *see also McCleskey v. Zant*, 499 U.S. 467, 498-99

(1991)(knowledge of evidence determinative, not knowledge of report recording evidence).

Further, Defendant's claim was brought to the attention of the jury at trial and rebutted. The State presented the testimony of State Trooper Stephen Veltri and Plantation Police Officer Gregory Jensen, who were involved in the traffic stop. (D.A.R. 2324-43, 3383-88)) Veltri testified that the gun was returned to Defendant's possession at the end of the traffic stop. (D.A.R. 2337-43) As the assertions did not affect the jury's verdict when it was presented to them, it cannot be said to affect the jury's verdict now. Thus, the lower court properly rejected this claim.

With regard to the claim that counsel was ineffective for failing to present the testimony of Manuelos Stavros, counsel did investigate this testimony prior to trial. (T. 188-89) However, in his statement at the time, Stavros stated that Defendant had not complained of a gun being taken, only of money being taken. (T. 188-89) Given that the content of this pretrial statement, counsel could not have been deemed ineffective for failing to present testimony that would not have supported Defendant's claims.

With regard to the claim that the State suppressed evidence that others owned weapons that could have been the murder weapon, Defendant failed to present any evidence that the State did so. At

the evidentiary hearing, Defendant attempted to admit gun registrations in that the State's possession that showed that other individuals owned .38 caliber Smith & Wessons. (T. 532-33) However, the murder weapon was a .9 mm Smith & Wesson. (T. 532-33, D.A.R. 3346-48) While Defendant asserted that .38 caliber guns could have fired the fatal shots, he presented no testimony to support this assertion, despite having a ballistics expert available at the evidentiary hearing. (T. 980-81, 992-93) As such, Defendant failed to demonstrate that the evidence in the State's possession had any relevance whatsoever to these proceedings. Further, trial counsel did elicit testimony that at least 269,999 other guns could have been the murder weapon. (D.A.R. 3375) Thus, the lower court properly found that the State had not suppressed evidence.

Defendant next seems to allege that Butler must have lied because a silencer must have been used during the crime. However, this allegation ignores the unrebutted ballistic evidence that no silencer was used with the exception of a pillow through which two shots were fired. (D.A.R. 3357-65) Further, the issue was raised at trial. Defendant extensively questioned the maid who was the only person on the 12th floor at the time of the crime, and the maintenance supervisor who was overseeing the construction on the

11th floor about hearing shots. (D.A.R. 2405, 4212, 2434) As such, Defendant has failed to demonstrate any falsehoods in Butler's testimony regarding this area, and the claim was properly denied. *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991).

Finally, Defendant asserts that his counsel was ineffective for failing to impeach Butler regarding the color of the gun. However, Butler's trial testimony was that the gun was "[w]hitish or silver, it was light color, off-bone, white, could have been silver." (D.A.R. 2806) As such, his prior statements where he described the color as white or silver would not have impeached his testimony, and counsel was not ineffective for failing to raise this meritless issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

H. THE LOWER COURT PROPERLY DETERMINED THAT COUNSEL WAS NOT INEFFECTIVE FOR THE MANNER IN WHICH HE INVESTIGATED AND CROSS EXAMINED TINO GEDDES.

Defendant next asserts that his counsel was ineffective for the manner in which he investigated and cross examined Tino Geddes. Defendant contends that had counsel investigated Geddes, he could have learned valuable information about the victims. He further asserts that he could have shown that Geddes' allegations about the use of the weapons found in Defendant's possession were false.

Defendant initially asserts that his counsel should have

deposed Geddes. However, counsel testified at the hearing below that he did in fact depose Geddes. (T. 427) As such, counsel cannot be deemed ineffective for failing to do what he in fact did.

Even if counsel had not deposed Geddes, Defendant does not show how the failure to do so prejudiced him. Defendant did not present any evidence at the hearing below to support the allegations regarding the valuable information or the weapons. Geddes was not called to testify,[7] nor were the two witnesses who could allegedly show that the weapons were not to be used to attack the victims. As such, Defendant failed to prove that counsel was ineffective, and the lower court properly denied these claims. *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983), *cert. denied*, 467 U.S. 1220 (1984).

Defendant also assails his trial counsel for failing to point out when Geddes purchased his gun. Defendant contends that this would show that the gun was not purchased in response to Defendant's actions. However, counsel did in fact cross examine Geddes on this subject and claim that he was lying. (D.A.R. 3666-

[7] It should be noted that counsel did elicit favorable information from Geddes at trial. Geddes testified regarding how the victims had taken Defendant's wife's car using the fact that it was registered in the company name. (D.A.R. 2211) Further, Geddes testified about threats Derrick Moo Young made against Defendant. (D.A.R. 2220)

69) As such, counsel cannot be deemed ineffective for failing to do what he in fact did.

Finally, Defendant asserts that his counsel should have presented evidence to show that there was no connecting door between Room 406 and 408 at the DuPont Plaza. Defendant alleges that this would have shown that Geddes' testimony about the dry run was false. However, Geddes never testified that the dry run occurred in Rooms 406 and 408. In fact, Geddes testified that he did not recall the room numbers or the name in which the room was registered. (D.A.R. 2254-55) Thus, the information about Rooms 406 and 408 would not have impeached Geddes' testimony and counsel could not be deemed ineffective for failing to present it. *Strickland*.

I. THE LOWER COURT PROPERLY DETERMINED THAT COUNSEL WAS NOT INEFFECTIVE FOR THE MANNER IN WHICH HE HANDLED DEFENDANT'S STATEMENT.

Defendant next asserts that his counsel was ineffective for not introducing Detective Romero's testimony to impeach Detective Buhrmaster's testimony regarding Defendant's statements, that the State suppressed alleged invocations of Defendant's rights and that counsel was ineffective for failing to move to suppress his statement. The lower court rejected the claims, stating:

> [T]he Court concludes that the testimony of

> Eric Hendon, former trial counsel, along with the other evidence presented at the hearing did not show that counsel committed any deficiency below the standards expected of counsel. The record shows that counsel deposed all essential witnesses, . . ., and that counsel made reasonable tactical or strategic trial decisions, based on facts known to him at the time and his extensive experience in handling murder cases. Further, the Court does not find that counsel was ineffective because there was no prejudice.

(R. 6630-31) These findings are supported by competent substantial evidence and must be affirmed.

With regard to using Romero to impeach Buhrmaster, counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue. *Kokal v. Dugger*, 718 So. 2d 138 (Fla. 1998); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla.), *cert. denied*, 516 U.S. 965 (1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). Defendant attempts to make Romero's testimony regarding what Buhrmaster reported about Defendant's statement inconsistent by inserting "in Room 1215" after "there." Appellant's corrected brief at 80. However, Romero himself clarified at his pretrial deposition that Buhrmaster had never indicated Room 1215 when he said there. (R. 175) In fact, Romero testified at the evidentiary hearing that "there" only referred to being at the hotel. (T. 661-67) This statement was consistent with Buhrmaster's trial testimony that Defendant

admitted to being at the hotel the morning of the murders but denied going inside or ever being in the room. (D.A.R. 3453-54) As the statements were consistent, Romero's testimony would not have impeached Buhrmaster's testimony. *See Morton v. State*, 689 So. 2d 259, 262 (Fla. 1997)(to be admissible as impeachment, statement must be inconsistent); *Alexander v. Bird Road Ranch & Stables*, 599 So. 2d 229 (Fla. 3d DCA 1992)(same). Thus, the lower court properly denied this claim.

With regard to the alleged invocations of Defendant's rights, Defendant was surely aware of whether he had invoked his rights. As such, the State could not be guilty of a *Brady* violation. *Provenzano*, 616 So. 2d at 430(no *Brady* violation where evidence available to defense); *see also McCleskey*, 499 U.S. at 498-99 (knowledge of evidence determinative, not knowledge of report recording evidence).

Further, the evidence presented at the evidentiary hearing was unrebutted that one of the alleged invocations of rights occurred four days after his arrest and statement. (T. 794-95) After this invocation, the police did not question Defendant. (T. 795) As such, this subsequent invocation would have had no bearing the suppression of Defendant's previous statement. *See Melendez v. State*, 718 So. 2d 746, 748 (Fla. 1998)(alleged coercion of second

confession does not affect admissibility of first confession). Thus, Defendant has also failed to show that disclosure of the alleged invocation would have affected the outcome, and no *Brady* violation occurred. *Id.*

The other alleged invocation consists of a notation in trial preparation materials reading "That's all I have to say about today's activities." However, Detective Buhrmaster testified that Defendant never made such a statement. (T. 749-51) Defendant claims that the fact that this line was crossed out clearly shows that he had made the statement. Appellant's corrected initial brief at 82 n.128. In fact, it shows that the statement was never made and was therefore deleted. Further, in *State v. Owen*, 696 So. 2d 715 (Fla. 1997), this Court held that similar statements were not sufficiently unequivocal to invoke one's rights and did not render a confession inadmissible. Thus, the alleged statement by Defendant would not have affected the admissibility of his statements. Finally, the context of the note shows that if the alleged statement had been made, it was made at the end of Defendant's statement. (R. 2033-34) As such, it would not have rendered the statement made before it inadmissible, it would not have affected the outcome, and no *Brady* violation occurred. *Melendez*, 718 So. 2d at 748.

With regard to the claim that counsel was ineffective for failing to move to suppress the statement, Defendant's trial counsel testified that he made the strategic decision not to do so. (T. 409-10) Defendant assails this strategic decision asserting that counsel did not determine that he had no legal basis for filing such a motion. However, the only legal basis that Defendant presently asserts is that he had invoked his rights, which would not have formed a basis for suppression of his statement, as argued *supra*. As such, the lower court properly determined that counsel was not ineffective for failing to move to suppress. *Haliburton*, 691 So. 2d at 471(strategic decisions do not constitute ineffective assistance of counsel); *see also Kokal*, 718 So. 2d at 143(counsel not ineffective for failing to raise a meritless claim); *Groover*, 656 So. 2d at 425(same); *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11(same).

J. THE LOWER COURT PROPERLY REJECTED DEFENDANT'S CONTENTION THAT HIS COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS THE IDENTIFICATION.

Defendant next alleges that his counsel was ineffective for failing to move to suppress the witness identifications of him. The lower court denied this claim, finding that counsel made a strategic decision not to move to suppress the identification. (R.

6583-85) This finding is supported by the record and should be upheld.

At the evidentiary hearing, counsel testified that he decided not to move to suppress the identifications. (T. 401-02) He based this decision on the fact that the State had other evidence showing Defendant was at the hotel and reserved the room. (T. 399-402) In fact, the State had phone records and witness testimony showing that Defendant reserved the room other than the identification evidence. (D.A.R. 2768, 2692-93) As such, the lower court properly found that counsel made a strategic decision and was not ineffective. *Strickland*.

Further, even if counsel could be deemed ineffective for failing to move to suppress the identification, Defendant would still have failed to show prejudice. The State did have phone records and other witness testimony to show Defendant was at the hotel. Further, the lack of identification testimony from the desk clerk and sales manager would not have affected the fact that Defendant's fingerprints were found at the crime scene. They were found on items that entered the scene and were moved around the scene at the time of the murders. The suppression of the identification would not have changed Butler's eyewitness account of the murders, the fact that Defendant arranged a false alibi, or

the fact that he owned a gun of the type used to murder the victims. As such, the outcome of the trial would not have been affected even if counsel had moved to suppress the identifications and been successful. Thus, Defendant failed to prove that his counsel was ineffective. *Strickland*.

K. THE LOWER COURT PROPERLY FOUND THAT DEFENDANT'S WAIVER OF THE RIGHT TO PRESENT ALIBI WITNESSES WAS VOLUNTARY.

Defendant next faults the lower court for finding that his waiver of the right to present alibi witnesses was voluntary. The lower court rejected this claim, stating:

> Regarding the defendant's right to present an alibi defense and to testify, counsel testified that he frequently consulted with the defendant to discuss his right to testify and present witnesses, and did so almost daily when the trial commenced. Counsel developed and presented possible questions to the defendant. They discussed all aspects of the case and counsel filed defendant's Notice of Alibi along with a defense witness list. Counsel also testified that he advised the defendant that his alibi defense was not reliable and would be harmful to his case. The Notice of Alibi was filed because the defendant strongly advised counsel to do so. Subsequently, after the prosecution deposed the defense witnesses, it adopted the defense witness list, later calling one of those witnesses (Tino Geddes) to testify at trial. The record shows that this witness did not support defendant's alibi defense. . . .
> The Court finds trial counsel's testimony worthy of belief. Further, the Court finds

> that the defendant chose not to testify, and therefore, he did not offer any evidence to refute trial counsel's testimony of effective assistance of counsel provided the defendant.

(R. 6632-33) The record supports the lower court's findings, and they should be affirmed.

At the evidentiary hearing below, Defendant's trial counsel testified that he obtained a list of potential alibi witnesses from counsel. (T. 330-31) Affidavits of these witnesses were obtained, counsel personally spoke to some of the witnesses and evaluated their testimony in light of the State's case. (T. 331-32) Further, after Geddes recanted his alibi testimony and decided to testify for the State, counsel decided that presentation of this evidence would not be helpful. (T. 424-28) Additionally, counsel testified that Defendant freely and voluntarily concurred in this decision and waived his right to present these witnesses. (T. 427-30) This testimony supports the finding that the decision not to call alibi witnesses was strategic and does not support a claim of ineffective assistance of counsel. *Strickland*.

Defendant now faults his counsel for failing to personally interview every alleged alibi witness. However, counsel is only required to conduct such investigation as is reasonable under the circumstances. *Strickland*, 466 U.S. at 690-91; *Armstrong v. Dugger*, 833 F.2d 1430, 1432-33 (11th Cir. 1987); *see also Mitchell*

v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985), *cert. denied*, 483 U.S. 1026 (1987)("attorney's decision not to investigate must not be evaluated with the benefit of hindsight but accorded a strong presumption of reasonableness."). Here, counsel reviewed affidavits from the witnesses and spoke to some of them. Despite his feeling that their testimony would appear contrived, he did not elect not to call them until the State presented evidence that Defendant had in fact attempted to fabricate an alibi. (D.A.R. 3615-20, 3690-91) Under these circumstances, counsel's investigation and decision were reasonable, and the lower court properly denied the claim.

The cases relied upon by Defendant are distinguishable. In *Hadley v. Groose*, 97 F.3d 1131 (8th Cir. 1996), counsel never questioned a defense alibi witness regarding his alibi. Here, counsel obtained and reviewed statements from the alibi witnesses. In *State v. Garmise*, 408 So. 2d 732 (Fla. 3d DCA 1982), counsel did not testify that he had made a strategic decision not to call the witness. Here, counsel did. As such, these cases are inapplicable here.

L. THE LOWER COURT PROPERLY REJECTED DEFENDANT'S CLAIMS REGARDING HIS COUNSEL'S EFFORTS TO INVESTIGATE OTHER SUSPECTS.

Defendant next faults his counsel for failing to investigate

and present evidence that Adam Hosein and Jamie Majais were involved in the killings. However, counsel testified that he did investigate Hosein and Majais and was unable to find any evidence linking them to the murders or linking Majais to drug trafficking. (T. 310-17) As such, counsel cannot be deemed ineffective for failing to do what he in fact did.

Even if counsel had not investigated Hosein and Majais, he could still not be deemed ineffective because Defendant has shown no prejudice. Defendant contends that he was prejudiced because Hosein was involved in several corporations in which the victims were involved. Defendant alleges that these companies must have been involved in drug trafficking. However, Defendant never presented any evidence that these companies were involved in drug trafficking. All Defendant presented was that the victims were involved in a loan deal, of which he was fully aware at trial and which he has yet to show was improper. *See* Issue III.B & C.

Defendant also alleges that Hosein was a drug trafficker because one of the companies allegedly shared an address with Nigel Bowe's law office, and Bowe was convicted of money laundering. However, Defendant never proved this allegation at the evidentiary hearing below. Further, even if the allegation was true, simply having a lawyer's office as an address for a corporation does not

show that the corporation was criminal. As such, this claim was properly rejected.

Defendant also alleges that the State suppressed evidence of a phone message that was left in Hosein's name for the murder room. While Defendant contends that the message was left for the victims, the record only reflects that he left a message for the murder room; it does not reflect whom Hosein was trying to reach. (R. 2041) Defendant presented no evidence at the evidentiary hearing below regarding whom the message was for. Without such a showing, it is impossible to know if the message was material or favorable.[8] As such, Defendant failed to prove his allegation that the failure to divulge this note violated *Brady*.

M. THE LOWER COURT PROPERLY DETERMINED THAT DEFENDANT WAS NOT ENTITLED TO THE GRAND JURY TRANSCRIPT.

Defendant next asserts that the lower court abused its discretion in refusing to order the disclosure of the grand jury transcripts. Defendant asserts that he needed to inspect these transcripts to determine if they contained statements inconsistent with Butler's trial testimony. However, in making this argument, Defendant ignores the fact that he was fully aware of the

[8] If Hosein had been trying to reach Defendant, with whom Hosein was friends, the evidence would certainly not be favorable.

inconsistencies in Butler's testimony. Further, he neglects to mention that the trial court conducted an in-camera inspection of the grand jury transcripts and determined that they had no additional impeachment value. (T. 44-46, 62-63, 82, 91-92) As this is the trial court's duty under *Keen v. State*, 639 So. 2d 597 (Fla. 1994), and the trial court performed this duty and determined that the ends of justice did not require an invasion of grand jury secrecy, this Court should affirm.

N. THE LOWER COURT PROPERLY DETERMINED THAT CERTAIN EVIDENCE WAS NOT RELEVANT AND ADMISSIBLE.

Defendant finally asserts that the lower court improperly restricted his ability to present evidence at the evidentiary hearing below. However, the record amply demonstrates that the lower court's rulings were correct.

With regard to the allegation that Defendant was restricted in presenting evidence that the State doubted Damas' veracity, no such evidence was offered. (T. 538-43) The question that was asked was, "Why did you think it was important to reinterview Dames and Prince?" (T. 538) However, this Court has held that the State retains a work product privilege regarding its attorneys' thoughts and trial preparation. *See Johnson v. Butterworth*, 713 So. 2d 985, 986 (Fla. 1998). As such, the evidence was properly excluded.

Further, the proffered relevance depended on new testimony from Damas and Ellis, whom Defendant did not intend to call at the evidentiary hearing, and the State's knowledge of the insurance investigator's conversation with Nagel, which was not proved. As such, the evidence was properly excluded.

With regard to the evidence about Damas and Butler, Defendant was attempting to show that the victims and Damas had spoken because of a notation on the victims' pad of a phone number and the name "Ed." As noted earlier, this number was inconsistent with Damas' phone number. (D.A.R. 2295) As such, this evidence was properly excluded as irrelevant.

With regard to the exclusion of the fact that Hosein and Nigel Bowe were friends, Defendant never showed any relevance to this line of inquiry. Regardless of whether they were friends, it does not show that Hosein was a drug dealer, that the victims were involved in drug dealing or that the murders were related to drug dealing. Whether or not Hosein and Bowe were friends has no effect on the fact that Defendant owned the type of gun used in the murder, that Defendant's fingerprints were found objects that were placed in the room at the time of the murder, that Defendant's fingerprint was found on the bloody do-not-disturb sign that was moved during the murder, that Defendant concocted a false alibi or

that Butler saw Defendant commit the murder. As such, this evidence was properly excluded.

With regard to the allegation that the lower court refused to consider Detective Waldman's report, the record simply does not support that allegation. The question that was excluded was one to Buhrmaster in which he was asked to testify to Waldman's conclusion. (T. 801) This was clearly inadmissible. Further, the lower court expressly considered this claim in its order. (R. 6633, 6636-37) As such, the lower court's ruling was proper.

With regard to the alleged exclusion of the note regarding Carberry's credibility and the Caribbean Times, Defendant was attempting to get the prosecutor to testify regarding the relevance of these documents. However, the relevance of these documents was a proper subject of argument to the lower court and not testimony by the prosecutor. As such, these questions were properly precluded.

Next, Defendant alleges that the lower court acted improperly in refusing to allow a question to one of the prosecutors about whether Buhrmaster had told him of Defendant's allegation that the gun was taken from him during the traffic stop. However, Defendant was properly precluded from asking this question because regardless of whom from the State knew Defendant had made the allegation,

Defendant knew he had made the allegation as did his counsel. As such, the question was properly found to be irrelevant.

Finally, Defendant contends that he should have been allowed to ask the prosecutors and defense counsel about the significance to them of the notes in the victims' briefcase. However, these questions were properly excluded as irrelevant. As the Supreme Court made clear in *Wood v. Bartholomew*, 516 U.S. 1 (1995), the point of a *Brady* claim is that a defendant must show that admissible evidence was suppressed; not that extraneous information was not revealed. Regardless of what counsel may have thought of the information, Defendant was required to show that the notes would have revealed admissible evidence. As pointed out in Issue III.B., *supra*, Defendant did not do so. As such, the questions were properly precluded.

IV. THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIM THAT HIS RIGHTS UNDER THE VIENNA CONVENTION WERE VIOLATED.

Defendant next contends that his rights under the Vienna Convention were violated because he was not advised of his rights at the time of his arrest. However, Defendant did not assert this claim until his amended motion for post conviction relief. (R. 6305-14) This motion was filed on May 15, 1997. (R. 5962) Defendant's conviction became final on January 11, 1993, when his petition for writ of certiorari was denied. *Maharaj v. Florida*, 506 U.S. 1072 (1993). This claim does not relate to any of the claims that Defendant originally filed. As such, this claim was properly denied as time barred.

Even if the claim was not time barred, Defendant does not explain why he could not have asserted this claim at the time of trial and on appeal.[9] As such, this claim is barred as a claim that could have and should have been raised on direct appeal. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991).

Even if the issue was not barred, counsel would still not have

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[9] Defendant did not assert below and does not assert here that his trial counsel was ineffective for failing to raise this issue.

been ineffective for failing to raise the issue because it is meritless. Defendant does not have standing to assert an alleged violation of the Vienna Convention on Consular Relations and has not shown any prejudice from the alleged violation.

Because treaties are contracts between governments, only the contracting governments have standing to complain of violations of the treaties. *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir.), *cert. denied*, 498 U.S. 878 (1990); *United States v. Rosenthal*, 793 F.2d 1214, 1432 (11th Cir. 1986); *United States v. Reed*, 639 F.2d 896, 902 (2d Cir. 1981). Defendant is not a governmental party to the Vienna Convention, and England has not filed a complaint on Defendant's behalf. As such, he does not have standing to raise this claim.

Even if Defendant did have standing to assert a violation, Defendant did not prove this claim. He did not testify at the evidentiary hearing below. Further, he never asked Buhrmaster, the officer who arrested him, if he advised Defendant of his rights under the Vienna Conventions. As such, Defendant failed to show that his rights under the Convention were violated.

Moreover, Defendant must show prejudice arising from the alleged violation. *See Breard v. Greene*, 118 S. Ct. 1352, 1355-56 (1998); *Faulder v. Johnson*, 81 F.3d 515 (5th Cir.), *cert. denied*,

117 S. Ct. 487 (1996). To do so, Defendant must show that he was unaware that he could have contacted the consulate, that he would have availed himself of the opportunity to do so had he known and that the consulate could have provided some assistance. *United States v. Esparza-Ponce*, 7 F. Supp. 2d 1084, 1097 (S.D. Cal. 1998).

Here, Defendant did not testify that he was unaware of his rights under the Convention or that he would have availed himself of the opportunity to do so if he had been given the chance. Further, the affidavit of the British consulate did not assert any specific assistance that it could have provided to Defendant. (S.R. A[10]) As such, the lower court's denial of this claim should be affirmed.

[10] Concurrent with the filing of this brief, the State has moved to supplement the record with this document.

V. DEFENDANT IS NOT ENTITLED TO ANY RELIEF FROM HIS CONVICTION.

Defendant next asserts that not only should the trial court have vacated his conviction but that he should have been ordered discharged. However, Defendant did not even prove that he was entitled to any relief from his convictions. Thus, Defendant is surely not entitled to be discharged.

Even if Defendant had shown that he was entitled to relief, Defendant would not be entitled to discharge. Defendant has shown no outrageous government conduct. In fact, Defendant's theory is that everyone was duped by a group of people intent on framing him. Further, none of the cases upon which Defendant relies support a claim that a Defendant is entitled to discharge because he received ineffective assistance of counsel.

The only case upon which Defendant relies that is based upon a *Brady* violation is *Farrell v. State*, 317 So. 2d 142 (Fla. 1st DCA 1975). However, in that case, the State stipulated that it had destroyed evidence that was favorable to the defense. As such, the favorable evidence would never be available at a retrial. Here, Defendant does not allege, much less prove, that the State has destroyed evidence that was favorable to him and that would not be available at a retrial. As such, Defendant has not shown an entitlement to discharge under *Farrell*.

Further, the Double Jeopardy cases upon which Defendant relies, *United States v. Dinitz*, 424 U.S. 600 (1976) and *United States v. Jorn*, 400 U.S. 470, actually militate against discharging him. In those cases, the Court held a defendant must show that the trial court or the state acted in bad faith in goading a defendant into requesting a mistrial before the defendant is entitled to discharge. If the necessity for a mistrial merely arises from error, a retrial is permissible. Here, Defendant has not shown that the State intentionally denied him a fair trial as a result of bad faith. Thus, he is not entitled to discharge.

In *United States v. Bogart*, 783 F.2d 1428 (9th Cir. 1986), *United States v. Lard*, 734 F.3d 1290 (8th Cir. 1984) and *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), the courts found that the defendants had shown that the police entrapped him because the police initiated the crimes and the defendants had no predisposition. Here, Defendant does not claim he was entrapped; Defendant contends that he was framed by private individuals. As such, these cases are inapplicable.

CONCLUSION

For the foregoing reasons, the trial court's order denying Defendant post conviction relief from his convictions should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **Benedict P. Kuehne**, Sale & Kuehne, NationsBank Tower #3550, 100 S.E. 2nd Street, Miami, Florida 33131-2154, and **Clive A. Stafford-Smith**, 636 Baronne Street, New Orleans, Louisiana 70113, this ____ day of July, 1999.

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