

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC01-1415**

**THE STATE OF FLORIDA,**

Appellant/Cross-Appellee,

vs.

**ASKARI ABDULLAH MUHAMMAD, f/n/a THOMAS KNIGHT,**

Appellee/Cross-Appellant.

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

**REPLY BRIEF OF APPELLANT/ANSWER BRIEF OF CROSS-  
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## STATEMENT OF THE CASE AND FACTS

The State relies upon its statement of case and facts regarding the trial, the direct appeal and the post conviction claims regarding the sentencing issues contained in its initial brief in this matter.<sup>1</sup>

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<sup>1</sup> The symbols "R." and "T." will refer to the record on appeal and the transcript of proceedings from this appeal, respectively. The symbols "DAR." will refer to the record on appeal from Defendant's direct appeal. The transcript of the trial proceedings is not consecutively numbered, and the transcripts of the pretrial proceedings are contained in a number of individually paginated transcripts contained in the various supplemental records. As such, the State will refer to the transcript of voir dire as "DAT1." The transcript of the guilt phase will be referred to as "DAT2." The transcript of the evidentiary portion of the sentencing phase will be referred to as "DAT3." The transcript of the pronouncement of sentence will be referred to as "DAT4." The individual transcripts of the pretrial hearing will be referred to by the date on which the hearing was held.

## SUMMARY OF THE ARGUMENT

The trial court erred in finding that the State had committed a *Brady*<sup>2</sup> violation at the penalty phase. The evidence showed that the State did not have the inmates' testimony. The evidence also showed that the State disclosed incident reports, oral and written statements and transcripts of taped statements at the time of trial. Moreover, the information that was disclosed was cumulative to the information that allegedly was not disclosed.

The trial court properly denied relief regarding the guilt phase. Defendant did not prove that the State committed a *Brady* violation. Further, he did not prove that any alleged *Brady* violation would have affected Defendant's decisions that resulted in the lack of presentation of evidence. Moreover, there is no cumulative error, where as here, all of the alleged errors are procedurally barred or meritless.

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<sup>2</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

## ARGUMENT

### I. THE LOWER COURT ERRED IN FINDING THAT THE STATE HAD COMMITTED A BRADY VIOLATION AT THE PENALTY PHASE.

Defendant asserts that the trial court's finding that he was entitled to resentencing was proper. However, this finding was based on an improper application of the law and is contrary to the evidence presented. As such, the granting of penalty phase relief should be reversed.

Defendant asserts that the lower court's "finding" that the State had suppressed the alleged *Brady* material was proper. However, the trial court made no such finding. Instead, the lower court stated "Assuming that this evidence cited by Defendant is in fact newly discovered, the issue becomes what impact, if any this information would have had on the sentencing court's decisionmaking process." (R. 909) In fact, in discussing the elements that a defendant must prove to show that a *Brady* violation has occurred, the trial court only enumerated one element. (R. 908) However, there is more than one element that a defendant must prove to establish that a *Brady* violation occurred.

In order to establish that the State violated *Brady*, a defendant must show:

- [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;
- [2] that evidence must have been suppressed by the State,

either willfully or inadvertently; and [3] prejudice must have ensued.

*Way v. State*, 760 So. 2d 903, 910 (Fla. 2000)(quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Inherent in the requirement that the State suppressed the evidence is a requirement that the State actually possess the evidence and that the defendant could not have obtained it. See *United States v. Grintjes*, 237 F.3d 876, 880 (7th Cir. 2001) (holding *Brady* does not apply where evidence could have been discovered by defense with use of diligence); *United States v. Corrado*, 227 F.3d 528, 538 (6th Cir. 2000)(same); *High v. Head*, 209 F.3d 1257, 1265 (11th Cir. 2000) (finding *Strickler* has not abandoned due diligence requirement of *Brady*); *United States v. Maloof*, 205 F.3d 819, 827 (5th Cir. 2000)(same); *Johns v. Bowersox*, 203 F.3d 538, 545 (8th Cir. 2000)(defining "state suppression" component of *Brady* as "[t]here is no suppression of evidence if the defendant could have learned of the information through 'reasonable diligence'"); *United States v. Hotte*, 189 F.3d 462 (2d Cir. 1999)(same). In fact, this Court has acknowledged that a defendant cannot show that a *Brady* violation occurred if the defendant knew of the existence of the evidence or in fact had the evidence. *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000)(“Although the "due diligence" requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a *Brady* claim

cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.”)(quoting *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000)). In reviewing a trial court’s decision concerning a *Brady* violation, this Court makes an independent review of the trial court’s legal conclusions but gives deference to the trial court’s findings of fact. *Rogers v. State*, 782 So. 2d 373, 376-77 (Fla. 2001).

Here, Defendant urges this Court to ignore completely the elements of a *Brady* claim and the evidence presented at the evidentiary hearing and find that the trial court properly determined that a *Brady* violation occurred based on a statement by the prosecutor at the time of trial. The statement in question occurred during a hearing on Defendant’s motion for continuance. Defendant claimed that such a continuance was necessary because the State had not responded to a discovery request that he had made. (10/11/82. at 23-24) Defendant acknowledged that the State had previously responded to discovery requests that Defendant had made through counsel but claimed that since the theory of defense had changed, new discovery needed to be provided. (10/11/82. at 24-25) Defendant particularly pointed to a reference during Mr. Ball’s deposition to statements from prison employees. (10/11/82. at 25) The State responded that it had fully complied with discovery requests previously and had nothing new. (10/11/82. at 26) When asked about the statements, it responded that

certain statements were inadmissible because they were irrelevant and there were no statements by employees. (10/11/82. at 27)

While Defendant asserts that this statement shows that the State committed a *Brady* violation, this assertion completely ignores the prosecutors later statement that his understanding of this inquiry concerned only racial statements by Defendant. (DAT2. 432) As such, this statement does not show that the State committed a *Brady* violation.

Moreover, the record from direct appeal indicates that the State informed Defendant that it had oral and written statements for the witnesses in its initial discovery response. (DAR. 168) The record from the time of trial reflects that Defendant had received incident reports. State's Exhibit 5, Deposition of Leonard Ball at 5. (T. 182) While Bernstein initially testified that he had never seen any of the incident reports, he admitted on cross examination that the record from the time of trial indicated that he had received the reports. (T. 182-85) He also acknowledged that he had been provided with transcripts of the taped statements. (T. 189-92) Bernstein was not able to separate the documents that he acknowledged receiving at the time of trial from what Defendant now claims the State suppressed. While Defendant faults the State for not proving which documents Bernstein had, Defendant ignores that he had the burden of proving the elements of his post conviction claim. *Way; see Smith v.*

*State*, 445 So. 2d 323, 325 (Fla. 1983), *cert. denied*, 467 U.S. 1220 (1984)(burden on defendant to prove claim). As Defendant never proved that the State suppressed any statements by officers, the trial court erred in finding a *Brady* violation by assuming the State had suppressed evidence. It should be reversed.

Defendant also asserts that Bernstein's failure to include facts in his notes for opening and failure to provide information to experts shows that the State suppressed the statements. However, this assertion ignores Bernstein's own testimony on the issue from the evidentiary hearing. Bernstein stated that his notes for opening statement indicated that he was aware of a statement that Defendant's eyes were wide open from a deposition. (T. 192-93) The notes did not include the phrase blank expression. (T. 193) However, Bernstein admitted that he had been informed about blank looks and Defendant being calm during the deposition but did not include them in the notes. (T. 196-99) Bernstein admitted that he had not conveyed the information from the depositions to the experts because Defendant had already refused to cooperate with an insanity defense and the notice of insanity defense had already been stricken. (T. 199) As such, this assertion does not show that the State committed a *Brady* violation. The order granting a new penalty phase should be reversed.

Defendant next assails the State for asserting that it did not have statements by the inmates that he called at the evidentiary hearing in its possession. He contends that

the State did not point to any citation to the record to support this claim. However, a review of the State's initial brief belies this assertion. Initial Brief of Appellant at 31-32. The State cited to the testimony of inmates Hargrave and McCaskill that they had never revealed this information to the State and would not have done so. (T. 51-54, 58-59) The State also pointed out that inmate Jones was not mentioned in the alleged *Brady* material and that Defendant had presented no evidence that he was interviewed by the State. (T. 42-45) These citations show that Defendant did not prove that the State was in possession of this information. As such, Defendant did not prove that the State committed a discovery violation with regard to the inmates' testimony. *Maharaj*, 778 So. 2d at 954 ("There can be no *Brady* violation when the allegedly suppressed evidence is not in the possession of the State."); *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983), *cert. denied*, 467 U.S. 1220 (1984)(burden on defendant to prove claim).

While Defendant goes to great lengths to show that the State possessed the guards' statements, the State did not assert that it did not have the guards' statements. The State's contention that it did not have possession of the alleged *Brady* material was limited to the inmates' testimony. The State's position with regard to the guards' statements was that the record reflects that these statements were disclosed.

Defendant next asserts that the State's assertion that the trial court improperly

considered material that was disclosed as part of the *Brady* material was incorrect because a court must consider all of the evidence, both disclosed and undisclosed, in determining materiality. However, the State did not dispute that all evidence must be considered in determining materiality. *Kyles v. Whitley*, 514 U.S. 419 (1995). Instead, the State's position was, and is, that the trial court erred in considering the admittedly disclosed evidence as undisclosed evidence. A *Brady* violation is proven by showing that Defendant did not receive the information; not by showing that information that Defendant had was not presented to the trial court. *See Maharaj*, 778 So. 2d at 954; *Occhicone*, 768 So. 2d at 1042. When the depositions,<sup>3</sup> which were taken by Defendant and clearly disclosed, are considered as disclosed evidence, the allegedly undisclosed evidence is merely cumulative to the evidence that was disclosed. This Court has repeatedly held that where the allegedly undisclosed information was merely cumulative to the information that was disclosed, no *Brady* violation has been proven. *E.g., State v. Riechmann*, 777 So. 2d 342, 363 (Fla. 2000); *Ragsdale v. State*, 720 So. 2d 203, 208 (Fla. 1998); *Routly v. State*, 590 So. 2d 397, 399-400 (Fla. 1991);

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<sup>3</sup> To the extent that the trial court's finding is based on the alleged lack of filing of the deposition in the record (R. 910), this finding was clearly erroneous. The record from the time of trial shows that the deposition were filed with the trial court. (6/7/82. at 37, 7/19/82. at 37-38) As such, even if a *Brady* violation was judged by what was turned over to the trial court (which it is not), the deposition were in the court file.

*Cruse v. State*, 588 So. 2d 983, 988 (Fla. 1991).

While Defendant attempts to characterize the trial court's holding on materiality as a finding of fact, this Court has held that such conclusions are mixed questions of fact and law. *Rogers v. State*, 782 So. 2d 373, 376-77 (Fla. 2001) As such, the holding that the evidence was material is not entitled to the deference that Defendant asks this Court to afford it.

In an attempt to show that the alleged *Brady* material is not cumulative to the undeniably disclosed deposition, Defendant asserts that the difference between the statements and the depositions could have been used to impeach witnesses. However, Defendant does not explain how impeaching witnesses with this information would have been helpful to his case. Impeachment is only relevant to the credibility of the witness impeached and is not substantive evidence. *Morton v. State*, 689 So. 2d 259 (Fla. 1997). Defendant has not shown that these statements would have been admissible as substantive evidence, and generally such reports are not admissible. §90.803(8), Fla. Stat. As Defendant admits, attempting to discredit the eyewitnesses to show that the crime had not occurred, as Defendant tried at trial, would not have resulted in a reasonable probability of a different result at trial, and would therefore not be material. *Kyles*. As the use of the reports as impeachment would not have resulted in their admission as substantive evidence, they would not have assisted in assessing

Defendant's alleged mental state. As such, there is no reasonable probability that Defendant would not have been sentenced to death had the cumulative information from the alleged *Brady* material been disclosed, anymore than it already was. As such, the lower court erred in finding that the State had committed a *Brady* violation. It should be reversed.

With regard to the claim that the *Brady* material would have negated the finding of HAC, this claim is meritless. Intent is not an element of HAC. *Guzman v. State*, 721 So. 2d 1155, 1160 (Fla. 1998); *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998); *see also Mahn v. State*, 714 So. 2d 391, 399 (Fla. 1998). As this Court has noted, “[t]he HAC aggravating circumstance has been consistently upheld where the victim was repeatedly stabbed.” *Guzman v. State*, 721 So. 2d 1155, 1159 (Fla. 1998); *see also Bates; Brown; Mahn*. Here, Off. Burke was stabbed 13 times. As such, the presentation of the alleged *Brady* material would not have affected the finding of HAC.

Defendant also asserts that the presentation of the *Brady* material would have allowed the trial court to have found the duress mitigator based on Defendant's mental state. However, as this Court has noted, “‘Duress’ is often used in the vernacular to denote internal pressure, but it actually refers to external provocation such as imprisonment or the use of force or threats.” *Toole v. State*, 479 So.2d 731, 734 (Fla. 1985). Here, the alleged *Brady* material, statements regarding Defendant's demeanor

before, during and after the crime, had nothing to do with any alleged duress. As such, the *Brady* materials do not support a finding of the duress mitigator.

Defendant next asserts that Defendant's decision not to present mitigation and his decision to waive a sentencing jury was rendered invalid by the failure to disclose the alleged *Brady* material. However, where a claim is raised that a defendant would not have waived a right had *Brady* material been disclosed, a defendant must prove that but for the failure to disclose the *Brady* material, there is a reasonable probability that he would not have entered the waiver. *United States v. Avellino*, 136 F.3d 249, 256 (2d Cir. 1998); *see also Hill v. Lockhart*, 474 U.S. 52, 59 (1985)(applying same standard to ineffective assistance of counsel claims in the context of guilty pleas); *Strickland v. Washington*, 466 U.S. 668, 694 (1984)(noting that test for prejudice prong of ineffectiveness claims is drawn from *Brady* materiality standard). Here, Defendant presented no evidence that disclosure of the *Brady* material would have affected Defendant's decision-making process in any way. In fact, the only evidence regarding the alleged affect on Defendant's decision-making process from the disclosure of the *Brady* material was Bernstein's testimony that disclosure of the *Brady* material would not have done so. (T. 188-89) Defendant did not testify at the evidentiary hearing. As such, he did not say that he would have presented mitigation and have not waived a sentencing jury had he considered the alleged *Brady* material.

Because Defendant had the burden of proof on his *Brady* claim and did not carry that burden, the claim regarding the waiver does not support a finding that the trial court properly found a *Brady* violation. *Way; Smith*. The decision to grant a new penalty phase should be reversed.

Defendant also asserts that Defendant waived mitigation and that such waiver was invalid because the trial court was not informed of available mitigation before the purported waiver of mitigation was accepted. However, this claim that the allegedly waiver of mitigation was invalid because of the lack of a colloquy regarding available mitigation could have and should have been raised on direct appeal. As such, the claim is procedurally barred. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). Therefore, this assertion does not support affirmance of the lower court's order granting a new penalty phase, and it should be reversed.

Moreover, Defendant did not waive mitigation. Instead, he exercised his right to self representation and did not present mitigation. This Court has previously held that the procedure that Defendant asserts should have been followed is inapplicable in such situations. *Allen v. State*, 662 So. 2d 323, 328-29 (Fla. 1995). Moreover, this procedure was not established until after Defendant's 1982 trial and does not apply retrospectively. *Id.* As such, it does not provide a basis for supporting the trial court's order granting a new sentencing phase.

Defendant also asserts the lower court's order should be affirmed because of the cumulative effect of all of the claims that he has raised. However, this Court has held that claims that are procedurally barred or without merit are not included in a cumulative error analysis. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999). As such, Defendant's assertion of cumulative error based on claims that were procedurally defaulted or are without merit do not show that the trial court properly found a *Brady* violation. The order granting sentencing relief should be reversed.

Defendant also asserts that he should be entitled to relief even if he did not prove that a *Brady* violation occurred because the trial court did not consider this evidence at the time of trial. Defendant cites no authority for this claim. However, at the time of trial, this Court considered Defendant's claim that the trial court did not find any mental mitigation despite having before it Defendant's extensive proffer regarding his insanity defense, which contained information about Defendant's mental health history. (DAR. 316-67) This proffer included Dr. Fisher's diagnosis of Defendant from his 1979 evaluation, which is essentially the same as the diagnosis that Dr. Fisher reached at the evidentiary hearing (Paranoid Schizophrenia). This Court rejected the claim. *Muhammad v. State*, 494 So. 2d 969, 976 (Fla. 1986). As such, any claim that the failure to find mental mitigation based on matters that were in the record at the time of trial is procedurally barred. *Francis v. Barton*, 581 So. 2d 583

(Fla.), *cert. denied*, 501 U.S. 1245 (1991). Moreover, this Court has refused to grant relief in cases where a recognized constitutional claim was presented on the basis that the expert's opinion had not changed. *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997)(no prejudice shown where experts opinions did not change); *Oats v. Dugger*, 638 So. 2d 20 (Fla. 1994). As such, Defendant's assertion of a "miscarriage of justice" is without merit. The trial court's order granting penalty phase relief should be reversed.

## **II. THE LOWER COURT PROPERLY FOUND THAT THE STATE HAD NOT COMMITTED A BRADY VIOLATION AT THE GUILT PHASE.**

Defendant asserts that the trial court erred in denying relief regarding the guilt phase based on the alleged *Brady* violation. He asserts that the trial court should have found that the alleged suppression of the *Brady* material was material to the guilt phase because it was relevant to an insanity defense. He also contends that the material may have affected the trial court's competency determination. He also contends that the alleged *Brady* material could have been used as impeachment. He alleges that the trial court should have considered the impact of other claims that had previously been found to be procedurally barred in determining the materiality of the alleged *Brady* material. However, the trial court properly denied relief regarding the guilt phase because the State did not commit a *Brady* violation.

Defendant asserts that this Court must accept the alleges Defendant makes as true because the trial court did not make findings regarding the materiality of the alleged *Brady* violations to the guilt phase. Defendant relies upon *Lightbourne v. State*, 742 So. 2d 238 (Fla. 1999) and *Young v. State*, 739 So. 2d 553 (Fla. 1999), for this proposition. However, these cases do not hold that a denial of a claim without a finding after an evidentiary hearing requires the acceptance of factual allegations. In *Young*, the trial court had not held an evidentiary hearing on the *Brady* violation. *Id.*

at 554. In *Lightbourne*, the trial court had also not held an evidentiary hearing regarding the information assumed true. *Id.* at 245. Because there had been no evidentiary hearing on the issue, the allegations on the issue were accepted as true, as they must be. Here, the trial court held an evidentiary hearing on the *Brady* claim. It also allowed Defendant to present evidence about other issues. Under these circumstances, there is no reason to presume that Defendant's allegations are true.

The proper law regarding an order with deficient or incorrect findings is that an appellate court will sustain a lower court's decision if there is any basis in the record to do so. *Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999). Here, there is amply basis in the record to sustain the denial of relief regarding the guilt phase.

First, the State would note that Defendant has not addressed the fact that the inmate witnesses at the evidentiary hearing testified that they had never told the State of their observation of the Defendant and would never have told the State of them. As such, the State was never in possession of this allegedly exculpatory information. (T. 42-45, 51-54, 58-59) Under *Brady*, the State has no duty to disclose information that was never in its possession. *Maharaj*, 778 So. 2d at 954 (“There can be no *Brady* violation when the allegedly suppressed evidence is not in the possession of the State.”) As such, there was no showing that the State committed a *Brady* violation

with regard to the inmates' statement. The trial court's denial of guilt phase relief should be affirmed.

With regard to the incident reports, the record from the time of trial reflects that Defendant had received incident reports. State's Exhibit 5, Deposition of Leonard Ball at 5. (T. 182) While Bernstein initially testified that he had never seen any of the incident reports, he admitted on cross examination that the record from the time of trial indicated that he had received the reports. (T. 182-85) He also acknowledged that he had been provided with transcripts of the taped statements. (T. 189-92) In fact, the State's initial response to Defendant's discovery informed Defendant that it had oral and written statements from corrections officers. (DAR. 168) Defendant did not prove that there were incident reports and transcripts of statements in addition to the ones Bernstein acknowledged having received. *Way; Smith*. As such, he did not carry his burden of proving that the State had committed a *Brady* violation. The denial of guilt phase relief should be affirmed.

Moreover, a review of the depositions that were taken by Defendant and therefore disclosed to him and that were filed with the trial court and therefore disclosed to the trial court shows that the information regarding his demeanor that was in the State's possession shows that any information contained in the reports that allegedly were not disclosed would have been cumulative. Bernstein admitted that he

knew that Defendant's eyes had been described as being opened unusually wide. (T. 192-93) He knew that Defendant had been described as looking blankly and being calm. (T. 196-99) As counsel was aware of the information for the allegedly undisclosed material that Dr. Fisher considered to be important, the trial court properly denied relief regarding the guilt phase. *State v. Riechmann*, 777 So. 2d 342, 363 (Fla. 2000); *Ragsdale v. State*, 720 So. 2d 203, 208 (Fla. 1998); *Routly v. State*, 590 So. 2d 397, 399-400 (Fla. 1991); *Cruse v. State*, 588 So. 2d 983, 988 (Fla. 1991). It should be affirmed.

To the extent that Defendant asserts that the information was not cumulative because it could have been used for impeachment, this claim is without merit. Impeachment is only relevant to the credibility of the witness who is impeached and cannot be used as substantive evidence. *Morton v. State*, 689 So. 2d 259 (Fla. 1997).

Defendant has not shown that these statements would have been admissible as substantive evidence, and generally such reports are not admissible. §90.803(8), Fla. Stat; *see also State v. Riechmann*, 777 So. 2d 342, 363 (Fla. 2000)(failure of defendant to show that declarant would have testified to statement in police report that was withheld from defendant defeated *Brady* claim). As Defendant admits, attempting to discredit the eyewitnesses to show that the crime had not occurred, as Defendant tried at trial, would not have resulted in a reasonable probability of a different result at

trial, and would therefore not be material. *Kyles*. As the use of the reports as impeachment would not have resulted in their admission as substantive evidence, they would not have assisted in assessing Defendant's alleged insanity defense. As such, there is no reasonable probability that Defendant would not have been convicted had the cumulative information from the alleged *Brady* material been disclosed, any more than it already was. As such, the lower court properly denied relief regarding the guilt phase. It should be affirmed.

Moreover, Defendant's assertion that alleged *Brady* material would have supported an insanity defense ignores the fact that Defendant waived the insanity defense. Defendant presented no evidence that but for the failure to disclose the allegedly withheld material, he would not have waived any insanity defense. In fact, the only evidence on the subject was Bernstein's testimony that it would not have done so. (T. 187-88) In order to prove that an alleged *Brady* violation resulted in an invalid waiver, a defendant must prove that but for the failure to disclose the material, there is a reasonable probability that the defendant would not have entered the waiver. *United States v. Avellino*, 136 F.3d 249, 256 (2d Cir. 1998); *see also Hill v. Lockhart*, 474 U.S. 52, 59 (1985)(applying same standard to ineffective assistance of counsel claims in the context of guilty pleas); *Strickland v. Washington*, 466 U.S. 668, 694 (1984)(noting that test for prejudice prong of ineffectiveness claims is drawn from

*Brady* materiality standard). As Defendant did not prove such a reasonable probability, the trial court properly determined that Defendant was not entitled to any guilt phase relief.

In an attempt to avoid this waiver, Defendant asserts that the alleged *Brady* material would have resulted in a reasonable probability that Defendant would not have been found competent. However, competency is dependent on whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him," at the time of trial. *Dusky v. United States*, 362 U.S. 402 (1960). The Court has cautioned that this is a time specific determination and may not need to be reevaluated even during trial if there is evidence of a change in Defendant's mental state. *See Drope v. Missouri*, 420 U.S. 162 (1975).

Here, the alleged *Brady* material concerned Defendant's demeanor on the day he killed Off. Burke. Defendant was not tried until 2 years later. Dr. Fisher, on whose opinion Defendant relies, states that he believed that this evidence supported a finding that Defendant had decompensated at the time of the murder because of alleged stress. (T. 74-75) Moreover, Dr. Fisher's diagnosis of Defendant is the same as the diagnosis that Dr. Fisher is reported as having given Defendant in Defendant's proffer of evidence regarding his insanity defense that was before both the trial court and this

Court when the issue of competency was decided at the time of trial and direct appeal. (DAR. 316-67) The trial court and this Court were aware of Defendant's history of mental health treatment at the time the competency determination was made. (DAR. 316-17) However, both this Court and the trial court also had Dr. Amin's report finding Defendant competent from May 1982. The trial court was able to observe Defendant's ability to understand the proceeding that were occurring. As review of the record from direct appeal shows that Defendant was fully aware of the nature of the charges against him and the penalty he faced. He was able to recall facts and relate them. He was also able to demonstrate appropriate courtroom demeanor. Under these circumstances, there is no reasonable probability that the disclosure of this material would have resulted in a finding of incompetence. *Kyles; Breedlove v. State*, 692 So. 2d 874 (Fla. 1997)(no prejudice shown where experts opinions did not change); *Oats v. Dugger*, 638 So. 2d 20 (Fla. 1994). The lower court properly denied relief in the guilt phase.

Additionally, Defendant appears to believe that a finding of incompetence would have resulted in denial of Defendant's right to represent himself only. However, the standard for competency to waive counsel and the standard for competency to be tried are the same. *Godinez v. Moran*, 509 U.S. 389 (1993). As such, the result of a finding of incompetency would not have been a trial at which Defendant was

represented by counsel who could have presented an insanity defense over Defendant's objection. It would have been a delayed trial. Fla. R. Crim. P. 3.212. Defendant presented no evidence that Defendant would not have still insisted that an insanity defense at such a delayed trial or that Defendant would not have still insisted that he be permitted to represent himself. As such, Defendant did not prove that but for the alleged failure to disclose the *Brady* material, there is a reasonable probability that he would not have waived the presentation of an insanity defense and counsel. *United States v. Avellino*, 136 F.3d 249, 256 (2d Cir. 1998); *see also Hill v. Lockhart*, 474 U.S. 52, 59 (1985)(applying same standard to ineffective assistance of counsel claims in the context of guilty pleas); *Strickland v. Washington*, 466 U.S. 668, 694 (1984)(noting that test for prejudice prong of ineffectiveness claims is drawn from *Brady* materiality standard).

In fact, Defendant was evaluated for competency in connection with the holding of the evidentiary hearing and was found competent. (R. 427-32) Defendant has not challenged that finding. Despite being competent, Defendant did not testify that his insistence that an insanity defense not be presented or that his decision to proceed pro se had changed. As such, the lower court properly denied relief regarding the guilt phase, and its decision should be affirmed.

Defendant next asserts that the alleged failure to disclose the *Brady* material

resulted in a deprivation of competent mental health assistance. However, Defendant did not want the assistance of mental health professionals at the time of trial, as demonstrated by Defendant's refusal to cooperate with the mental health professionals who were appointed to evaluate him. Defendant did not show that the disclosure of the *Brady* material would have affected Defendant's decision not to cooperate with the mental health professionals. As such, Defendant did not prove that but for the alleged failure to disclose the *Brady* material, there was a reasonable probability that he would not have refused the assistance of the mental health professionals. *United States v. Avellino*, 136 F.3d 249, 256 (2d Cir. 1998); *see also Hill v. Lockhart*, 474 U.S. 52, 59 (1985)(applying same standard to ineffective assistance of counsel claims in the context of guilty pleas); *Strickland v. Washington*, 466 U.S. 668, 694 (1984)(noting that test for prejudice prong of ineffectiveness claims is drawn from *Brady* materiality standard). As such, the lower court properly refused to grant guilt phase relief, and it should be affirmed.

Moreover, Dr. Fisher, the only mental health professional presented at the evidentiary hearing, testified to the same diagnosis of Defendant the proffer of evidence regarding the insanity defense reflected that he had given Defendant in 1979. (DAR. 316-67) The Court has held that prejudice is not demonstrated regarding a claim based on lack of information being provided to a mental health professional

where the mental health professional reaches the same diagnosis both before and after receiving the information. *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997)(no prejudice shown where experts opinions did not change); *Oats v. Dugger*, 638 So. 2d 20 (Fla. 1994). As such, the claim based on the alleged deprivation of mental health assistance does not demonstrate that the trial court erred in denying relief regarding the guilt phase. It should be affirmed.

Defendant also contends that the failure to disclose the alleged *Brady* material rendered his counsel ineffective. However, Defendant does not explain how counsel was rendered ineffective. As such, the issue is insufficiently brief and does not merit reversal. *See Anderson v. State*, 27 Fla. L. Weekly S580 (Fla. Jun. 13, 2002); *Duest v. Dugger*, 555 So. 2d 849, 952 (Fla. 1990). Moreover, for a *Brady* violation to exist, counsel must not have known of the allegedly undisclosed material. *Maharaj*, 778 So. 2d at 954; *Occhicone*, 768 So. 2d at 1042. Since counsel could not have had or known of the alleged *Brady* material, he could not have used it. As such, he cannot be deemed ineffective for failing to use it. *See State v. Riechmann*, 777 So. 2d 342, 357 (Fla. 2000). This assertion should be rejected.

Defendant next asserts that the alleged *Brady* violation caused Defendant's decision to waive counsel involuntary. However, Mr. Bernstein testified at the evidentiary hearing that Defendant's decision regarding the insanity defense that lead

to his decision to discharge counsel would not have been affected by any documents. (T. 187-88) Defendant did not testify at the evidentiary hearing. Where a claim is raised that a defendant would not have waived a right had *Brady* material been disclosed, a defendant must prove that but for the failure to disclose the *Brady* material, there is a reasonable probability that he would not have entered the waiver. *United States v. Avellino*, 136 F.3d 249, 256 (2d Cir. 1998); *see also Hill v. Lockhart*, 474 U.S. 52, 59 (1985)(applying same standard to ineffective assistance of counsel claims in the context of guilty pleas); *Strickland v. Washington*, 466 U.S. 668, 694 (1984)(noting that test for prejudice prong of ineffectiveness claims is drawn from *Brady* materiality standard). Here, the only evidence presented on this issue was that disclosure of the alleged *Brady* material would not have affected Defendant's decision to waive counsel. (T. 188-89) As such, the lower court's denial of guilt phase relief should be affirmed.

Defendant also asserts the lower court's order should be affirmed because of the cumulative effect of all of the claims that he has raised. However, this Court has held that claims that are procedurally barred or without merit are not included in a cumulative error analysis. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999). As such, Defendant's assertion of cumulative error based on claims that were procedurally defaulted or are without merit do not show that the trial court properly

found a *Brady* violation. The order denying guilt phase relief should be affirmed.

## CONCLUSION

For the foregoing reasons, that portion of the trial court's Rule 3.850 order granting a new sentencing proceeding should be reversed, and Defendant's sentence reinstated. The portion of the trial court's order denying a new trial 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 Heidi Brewer, Assistant CCR, 1533 S. Monroe Street, Tallahassee, Florida, this 16th day of August, 2002.

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SANDRA S. JAGGARD  
Assistant Attorney General

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief is type in Courier New 12-point font.

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SANDRA S. JAGGARD  
Assistant Attorney General