

IN THE SUPREME COURT OF FLORIDA

ERNEST D. SUGGS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC16-576

ON APPEAL FROM THE CIRCUIT COURT  
OF THE FIRST JUDICIAL CIRCUIT,  
IN AND FOR WALTON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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RECEIVED, 07/11/2016 02:18:44 PM, Clerk, Supreme Court

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**PRELIMINARY STATEMENT**

Appellant, ERNEST SUGGS, the defendant in the trial court, will be referred to as appellant, the defendant, or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (2014), this brief will refer to a volume according to its respective designation within the Index to the Record of Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained.

### STATEMENT OF THE CASE AND FACTS

This is an appeal from the denial of a successive motion for post-conviction relief. Ernest Suggs murdered Pauline Casey. The facts surrounding the August 6, 1990 murder are set forth in this Court's opinion on direct appeal as follows:

Pauline Casey, the victim, worked at the Teddy Bear Bar in Walton County. On the evening of August 6, 1990, the bar was found abandoned, the door to the bar was ajar, cash was missing from the bar, and the victim's car, purse, and keys were found at the bar. The victim was missing. Ray Hamilton, the victim's neighbor, told police that he last saw the victim shooting pool with an unidentified customer when he left the bar earlier that night. Based on Hamilton's description of the customer and the customer's vehicle, police issued a BOLO for the customer. Subsequently, a police officer stopped a vehicle after determining that it matched the BOLO description. The driver of the vehicle was identified as the appellant, Ernest Suggs. Although he was not then under arrest, Suggs allowed the police to search his vehicle and his home. While searching Suggs' home, the police found, in a bathroom sink, approximately \$170 cash in wet bills, consisting of a few twenty-, ten-, and five-dollar bills and fifty-five one-dollar bills. Meanwhile, police obtained an imprint of the tires on Suggs' vehicle and began looking for similar tire tracks on local dirt roads. Similar tire tracks were found on a dirt road located four to five miles from the Teddy Bear Bar. The tracks turned near a power line, and the victim's body was found about twenty to twenty-five feet from the road. The victim had been stabbed twice in the neck and once in the back; the cause of death was loss of blood caused by these stab wounds. After the victim was found, Suggs was arrested for her murder.

In addition to the cash and tire tracks, police obtained the following evidence connecting Suggs to the murder: one of the three known keys to the bar and a beer glass similar to those used at the bar were found in the bay behind Suggs' home; the victim's palm and fingerprints were found in Suggs' vehicle; and a

serologist found a bloodstain on Suggs' shirt that matched the victim's blood. Additionally, after his arrest, Suggs told two cellmates that he killed the victim.

*Suggs v. State*, 644 So. 2d 64, 65-66 (Fla. 1994).

Based on the evidence presented at trial, Suggs was convicted as charged of first degree murder, kidnapping, and robbery. The jury recommended Suggs be sentenced to death by a vote of seven to five. *Id.*

The trial court followed the jury recommendation and sentenced Suggs to death. The trial court found the State had proven seven aggravating circumstances beyond a reasonable doubt: (1) The capital felony was committed by Suggs while under sentence of imprisonment; (2) Suggs was previously convicted of another capital felony and a felony involving the use or threat of violence to the person; (3) the crime for which Suggs is to be sentenced was committed while he was engaged in the commission of the crime of kidnapping; (4) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (5) the capital felony was committed for pecuniary gain; (6) the capital felony was especially heinous, atrocious, or cruel; (7) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The trial judge also found one statutory mitigator and two

non-statutory mitigators: (1) The capacity of Suggs to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (he had been drinking at the time of the incident); (2) Suggs' family background (he came from a good family); and (3) Suggs' employment background (he was a hard worker).

Suggs appealed. On September 1, 1994, this Court affirmed his conviction and sentence for first degree murder, kidnapping, and robbery. *Suggs*, 644 So.2d at 70.

Suggs filed a Petition for Writ of Certiorari with the United States Supreme Court. The United States Supreme Court denied review on April 25, 1995, in *Suggs v. Florida*, 514 U.S. 1083 (1995).

On January 24, 1997, Suggs filed a motion for post-conviction relief raising twelve claims. On February 27, 1998, Suggs filed an amended motion to vacate his convictions and sentence. Suggs raised fifteen claims in his amended motion for post-conviction relief. On August 28, 2001, Suggs filed a second amended motion for post-conviction relief raising seventeen claims.<sup>3</sup>

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<sup>3</sup> Between the time Suggs filed his first amended motion for post-conviction relief and his second amended motion for post-conviction relief, the trial judge (Judge Melvin) retired. Prior to her retirement, Judge Melvin held a *Huff* hearing on Suggs' first amended motion for post-conviction relief. On March 14, 2000, Judge Melvin issued an order granting Suggs an

On January 14, 2002, the trial court held a *Huff*<sup>4</sup> hearing on Suggs' second amended post-conviction motion. On May 14, 2002, the court summarily denied most of Suggs' claims and denied two others without prejudice to amend the motion to sufficiently plead these claims. The court granted an evidentiary hearing, however, on seven of Suggs' claims. After an evidentiary hearing conducted on January 23-24, 2003, the trial court entered an order on June 11, 2003, denying Suggs' motion for post-conviction relief. Suggs appealed the orders to the Florida Supreme Court on July 18, 2003. Simultaneously with the filing of the brief in that case, Suggs filed a Petition for Writ of Habeas Corpus. Suggs raised a *Ring v. Arizona*, 536 U.S. 584 (2002), claim for the first time in the petition.<sup>5</sup>

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evidentiary hearing on four of his claims and summarily denying nine others. Two claims she dismissed without prejudice.

Because Judge Melvin retired shortly after the *Huff* order was issued, a successor judge, Judge Lewis Lindsey, was assigned to the case. Shortly thereafter, however, Judge Lindsey granted a motion for his disqualification because he had testified as a witness during Suggs' trial. Additionally, Suggs' collateral counsel moved to withdraw from the case and new collateral counsel was appointed. Collateral counsel filed Suggs' second amended motion for post-conviction relief and subsequent *Huff* and evidentiary hearings were held by Judge Remington.

<sup>4</sup> *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

<sup>5</sup> Suggs did not seek to amend his Rule 3.851 motion prior to the evidentiary hearing held in January 2003 in order to

On appeal, of the post-conviction court's denial of post-conviction relief, Suggs raised twenty-eight issues. The court denied relief because Suggs, "...did not successfully prove any of his individual claims..." *Suggs v. State*, 923 So. 2d 419, 441-42 (Fla. 2005). Suggs habeas petition was also denied. *Id.*

Suggs then filed a federal petition for writ of habeas corpus on June 7, 2006. The State filed a response on July 21, 2006. On October 11, 2007, an amended petition for federal writ of habeas corpus was filed. The state filed a response on November 13, 2007. The district court rejected all claims, but granted a certificate of appealability on the question of whether counsel was constitutionally ineffective during the penalty phase for failing to investigate and present a mental health mitigation defense.

On April 10, 2009, Suggs filed a Motion to Alter Judgment. On April 16, 2009, Suggs filed a motion to amend his federal habeas petition based on new information he alleged to have received from another litigant's collateral proceeding. The motion to amend the petition and the motion to alter judgment were denied on April 20, 2009, and the court found that Suggs had not yet exhausted his state claims.

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raise a *Ring* claim. This claim could have, and should have, been raised in Suggs' motion for post-conviction relief.

On April 26, 2009, Suggs filed a Motion to Authorize Court-appointed counsel to exhausted claims in the course of his federal habeas representation. The state filed their response on May 11, 2009. The motion was denied by the court on July 3, 2009.

On May 29, 2009, Suggs filed a notice of appeal as to the order on the Motion to Alter Judgment. While the responses were pending, Suggs filed a motion for a certificate of appealability. On July 3, 2009, the court issued an order denying the Motion to Authorize Counsel to Pursue State Claims.

On August 10, 2009, the Court of Appeals denied Suggs motion for expansion of the certificate of appealability.

The Eleventh Circuit Court of Appeals affirmed the district court's denial of Suggs' petition for habeas corpus in *Suggs v. McNeil*, 609 F.3d 1218 (11th Cir. 2010), and the subsequently filed petition for writ of certiorari was denied by the United States Supreme Court. *Suggs v. Buss*, 131 S. Ct. 1809 (2011).

On May 27, 2014, Suggs filed a rule 60 (b) Motion for Relief from Judgment Denying a Petition for Writ of Habeas Corpus by a Person in State Custody, pursuant to the United States Supreme Court's decision in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). On October 21, 2014, the motion was denied. On October 21, 2014, the court also denied a Motion to Alter or Amend.

Capital Regional Counsel was appointed on October 28, 2014. Counsel then filed a successive motion to Vacate Judgment and Sentence on October 27, 2015. The motion was denied by written order of the trial court on February 29, 2016. Suggs filed a notice of appeal with this Court.

Thereafter, on June 20, 2016, Suggs filed his initial brief. This is the State's answer brief.

## SUMMARY OF ARGUMENTS

### **ISSUE I**

Suggs claims that the trial court erred in denying Claim I of his Second Successive Motion for Postconviction Relief, in which he alleged newly discovered evidence that Laura Johnson, the daughter of the victim Pauline Casey, had been raped, molested, and impregnated by stepfather Stephen Casey at the age of 13. Suggs argued this information could be used to show that Stephen Casey, had a motive to murder Pauline Casey. The trial court did not err; the claim is untimely, procedurally barred, and clearly refuted by the testimony of Laura Johnson at the evidentiary hearing for the first postconviction motion.

### **ISSUE II**

Suggs avers that the trial court erroneously denied Claim II of his Second Successive Motion for Postconviction Relief, in which he claimed that sheriff's office diver Wyatt Henderson was told by Captain Brad Trusty exactly where to search for additional evidence in the search of the Choctawhatchee Bay. Captain Trusty testified at trial that he was the one who asked the dive team to return and expand the search of the bay. The record refutes the idea that this is newly discovered. The trial court correctly summarily denied this claim because it was untimely, having been raised over a decade after his conviction became final; refuted by the record, and procedurally barred.

### **ISSUE III**

Suggs argues that the trial court erroneously denied claim III of his Second Successive Motion for Postconviction Relief that based on the contents of a 2013 memoir, the trial judge Laura Melvin felt required to sentence Suggs to death in line with the jury's death recommendation even though she does not approve of the death penalty. The trial court properly denied this claim because this information is not of a nature that would probably produce an acquittal on retrial.

### **ISSUE IV**

Suggs claims that the trial court erred in summarily denying Claim IV of his Second Successive Motion for Postconviction Relief, in which he argued that criticized analyst Michael Malone intentionally destroyed exculpatory evidence by virtue of him coming into contact. The trial court properly held that there was no *Brady* violation as the state cannot have suppressed evidence which came out after the trial, the absence of forensic testing alone does not constitute exculpatory or impeaching evidence, and the defendant cannot establish prejudice because he acknowledges that no evidence of pubic hair combings was offered by either party at trial.

## **ISSUE V**

Suggs claims that the trial court erred in summarily denying Claim V of his Second Successive Motion for Postconviction Relief, in which he argues Shirley Zeigler's testimony during defendant Gary Whitton's trial is *Brady* evidence of FDLE's investigation into the Walton County Sheriff's Office. The trial court correctly found that this claim was untimely, the mere existence of an investigation does not qualify as newly discovered evidence, and the existence of an investigation is not automatically exculpatory or impeaching.

None of the appellate issues merit any relief.

## ISSUE I

### **THE TRIAL COURT PROPERLY FOUND THAT SUGGS' CLAIM OF NEWLY DISCOVERED EVIDENCE REGARDING LAURA JOHNSON WAS UNTIMELY (RESTATED)**

Suggs submits that the trial court erred in denying, as untimely and procedurally barred, his Second Successive Motion for Postconviction Relief. He claims as newly discovered evidence, that a February 6, 2014, letter from Laura Johnson, the daughter of the victim, Pauline Casey, led to the discovery that Johnson had been raped, molested, and impregnated by stepfather Stephen Casey at the age of 13. Suggs further argues that Johnson, the daughter, planned to visit her mother in Florida to further discuss the sexual abuse but Pauline Casey was murdered prior to the visit. Suggs argues this information from Johnson could have been used to show the husband, Stephen Casey, had a motive to commit this murder. The trial court did not err in finding this claim untimely because during Suggs' first postconviction hearing Laura Johnson testified to the sexual relationship with Stephen Casey. This is not newly discovered evidence as the record reflects the information was disclosed in 2003. The trial court summarily denied this claim and was correct in doing so because it was untimely as having been raised over a decade after the 2003 evidentiary hearing at which this information was disclosed.

### Standard of Review

Where the trial court denies a postconviction claim without conducting an evidentiary hearing, this Court reviews the circuit court's decision *de novo*, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief." *Gore v. State*, 91 So. 3d 769, 774 (Fla. 2012) (quoting *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009)), *cert. denied*, --- U.S. ----, 132 S. Ct. 1904, 182 L.Ed.2d 661 (2012).

### Untimely

Allegations of newly discovered evidence are held to strict time limits. A motion for post-conviction relief must be filed within one year of the date the defendant's conviction and sentence becomes final. Fla. R. Crim. P. 3.851(d)(1). In this case, Suggs' conviction and sentence became final on April 24, 1995, when the United States Supreme Court denied certiorari review from Suggs' direct appeal. *Suggs v. Florida*, 514 U.S. 1083 (1995).

Suggs' second successive motion is untimely on its face having been filed more than twenty years after his conviction became final and over a decade after the initial evidentiary hearing in 2003.

The exception to the one-year time limit of Fla. R. Crim. P. 3.851(d)(1) is if "the facts on which the claim is predicated

were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." See Fla. R. Crim. P. 3.851(d)(2)(A); See *Long v. State*, 183 So. 3d 342, 345 (Fla. 2016) (citing *Jones v. State*, [ *Jones II* ] 709 So. 2d 512, 521 (Fla. 1998)). The facts alleged in this claim were known to Suggs at the January 2003 evidentiary hearing and could have been ascertained through simply reading the transcript. This claim does not meet the exception to the one-year time limitation for filing.

#### Procedural Bar

This claim is also procedurally barred because Suggs could have raised this claim during the first postconviction hearing which was held in 2003. *Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003) (explaining the Court "will not entertain a second appeal of claims that were raised or should have been raised, in a prior postconviction proceeding."); *Atkins v. State*, 663 So. 2d 624, 626 (Fla. 1995) (explaining that issues that were or could have been presented in a postconviction motion cannot be relitigated in a subsequent postconviction motion).

#### Merits

Suggs' claim was summarily denied by the trial court. Florida Rule of Criminal Procedure 3.851(f)(5)(B) permits the denial of a successive postconviction motion if the "motion, files, and records in the case conclusively show that the movant is

entitled to no relief." *Hunter v. State*, 29 So. 3d 256, 261 (Fla. 2008). This Court noted that summary denials of newly discovered evidence claims will be upheld if the motion is legally insufficient or its allegations are conclusively refuted by the record. *Id.* at 261.

The timeliness of postconviction motions are governed by Florida Rules of Criminal Procedure 3.850 and 3.851. This Court noted that,

Florida Rule of Criminal Procedure 3.851(d)(1) specifically prohibits the filing of a postconviction motion in death cases more than one year after the judgment and sentence become final unless "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2)(A); *Glock v. Moore*, 776 So. 2d 243, 251 (Fla. 2001).

*Long v. State*, 183 So. 3d 342, 345 (Fla. 2016).

In making a newly discovered evidence claim, Suggs has to file a timely postconviction motion and meet the two prong test explained in *Jones v. State (Jones I)*, 591 So. 2d 911 (Fla. 1991). See *Long*, 183 So. 3d at 345.

The two prong test set forth in *Jones I*, is that first, a Defendant must show the evidence was not known by trial court, the party, or counsel, and it must appear that the defendant or defense counsel could not have known of it by the use of due diligence. *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). Second, the evidence "must be of such nature that it would

probably produce an acquittal on retrial." *Id.* (quoting *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991)). Newly discovered evidence will satisfy the second prong of the Jones test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Id.* at 526 (quoting *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996)).

In denying Suggs' claim, the trial court noted that the record refutes Suggs' claim that the information of Laura Johnson's sexual abuse by her stepfather was recently disclosed and could not have been discovered earlier. The court explained that the record reflects the nature of the relationship was raised at Suggs' postconviction evidentiary hearing held in January of 2003. The trial court attached the relevant portion of the record to his order. The trial court ruled that based on the record information, any claim based on Stephen Casey's relationship with Laura Johnson was untimely.

The postconviction record reflects that at the very least, Defense knew of the sexual relationship at the time of the January 23-24, 2003, evidentiary hearing. Laura Johnson, known as Laura Sexton back in 2003, testified to the sexual relationship with Stephen Casey. Johnson stated that two months after her mother Pauline Casey married Stephen Casey, she, Johnson, started having a sexual relationship with Stephen Casey. (PCR 9 77). She indicated the sexual relationship

occurred December of 1986 through February of 1987 when she was 13 years old. (PCR 9 79).

Suggs argues that the information was of a sensitive nature and Laura Johnson would not have disclosed it prior to an investigator questioning her in 2014. The record reflects that Laura Johnson had no problem disclosing on the stand at the evidentiary hearing that a sexual relationship occurred when she was 13. (PCR 9 77). Counsel could have determined the details of this sexual relationship prior to the 2015 filing of the successive postconviction motion through the use of due diligence by simply reading the evidentiary hearing transcript. Raising this claim in the 2015 successive motion for postconviction relief is untimely. The trial court properly denied the claim.

Additionally, Suggs is unable to show that this evidence, even if it were not time barred and was otherwise admissible, gives a reasonable doubt as to his culpability. See *Jones v. State*, 709 So. 2d 512, 526 (Fla. 1998).

Reviewing the evidence admitted at trial shows that even if this information were determined to be "newly discovered evidence," it does not provide a reasonable doubt that Suggs committed this crime. The evidence admitted included a description of the customer and car last seen at the bar with the victim Pauline Casey which led to Suggs' car; similar tire

tracks to those of Suggs' car on a dirt road four to five miles from the bar; the body located twenty to twenty five feet from the road where those tire tracks ended; one of the three known keys to the bar located in the bay behind Suggs' house; Pauline Casey's palm and fingerprints found in Suggs' vehicle; bloodstains on Suggs' shirt that matched Pauline Casey's blood; and testimony from two cellmates that Suggs said he killed the victim. *Suggs v. State*, 644 So. 2d 64, 65-66 (1994).

The wealth of evidence against Suggs, including his admission to a cellmate that he "murdered the victim because he did not want to leave a witness," is not overcome by this alleged new information. *Id.* at 66. The information that Suggs' is arguing should be heard is that although Laura Johnson had a sexual relationship with Stephen Casey at 13 years old and was sent to live with her father, when she is sixteen Stephen Casey kills Pauline Casey before Laura Johnson can further discuss the rape with her. There is no allegation or information to show that there was an intent to take action against Stephen Casey for the sexual relationship. This information is simply being used to discredit Stephen Casey, and is therefore cumulative to the information argued at trial. Especially as Suggs put forth the theory of Stephen Casey having a motive for murder at the trial by arguing that, "both Ray Hamilton and Steve Casey, the victim's husband, could have committed the murder (with Casey

having life insurance as a motive) . . .,” and the contention was rejected by the jury with a conviction for first-degree murder, kidnapping, and robbery. *Suggs v. State*, 644 So. 2d 64, 65-66 (1994).

In short, this claim should be denied as it fails to meet the timeliness requirements of Fla. R. Crim. P. 3.851 (d) and it also fails to meet the prongs of *Jones v. State*, 591 So. 2d 911 (Fla. 1991). The trial court's order should be affirmed.

## ISSUE II

### **THE TRIAL COURT PROPERLY FOUND THAT SUGGS' CLAIM OF NEWLY DISCOVERED EVIDENCE FROM WYATT HENDERSON IS UNTIMELY. (RESTATED)**

Suggs submits that the trial court erred in summarily denying his newly discovered evidence claim that Wyatt Henderson of the dive team was told by Captain Brad Trusty exactly where to search for additional evidence in the Choctawhatchee Bay. The trial court summarily denied this claim and was correct in doing so because the idea that this information is newly discovered is refuted by the record, the claim is untimely as having been raised twenty years after his conviction became final, and the information could have been obtained through due diligence.

Secondarily, the defense argues that this is instead a *Brady v. Maryland*, 373 U.S. 83 (1963), claim that Wyatt Henderson's statements were withheld by the state. Suggs' claim does not meet the prongs of *Brady*, as the record shows Trusty testified that he told the dive team to expand their search. There is no

suppression as the information was testified to at trial, and even if there were, the statements are not material.

#### Standard of Review

Where the trial court denies a postconviction claim without conducting an evidentiary hearing, this Court reviews the circuit court's decision *de novo*, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief." *Gore v. State*, 91 So.3d 769, 774 (Fla. 2012) (quoting *Walton v. State*, 3 So.3d 1000, 1005 (Fla. 2009)), *cert. denied*, --- U.S. ----, 132 S. Ct. 1904, 182 L.Ed.2d 661 (2012).

#### Untimely

A motion for post-conviction relief must be filed within one year of the date the defendant's conviction and sentence becomes final. Fla. R. Crim. P. 3.851(d)(1). In this case, Suggs' conviction and sentence became final on April 24, 1995, when the United States Supreme Court denied certiorari review from Suggs' direct appeal. *Suggs v. Florida*, 514 U.S. 1083 (1995). Suggs' second successive motion is untimely on its face having been filed more than twenty years after his conviction became final and over a decade after the initial evidentiary hearing in 2003.

This claim does not meet the exception to the one-year time limitation for filing as Captain Trusty's statements are contained in the trial transcripts and could have been located

through due diligence. See Fla. R. Crim. P. 3.851(d)(2)(A); See *Long v. State*, 183 So. 3d 342, 345 (Fla. 2016).

### Merits

In order to obtain a new trial based on newly discovered evidence, the Defendant must show that the evidence was not known by trial court, the party, or counsel, and it must appear that the defendant or defense counsel could not have known of it by the use of due diligence. *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). Also, the evidence "must be of such nature that it would probably produce an acquittal on retrial." *Id.*

Defense makes two claims within this argument. First, they allege that Captain Brad Trusty gave the Walton County Sheriff's Office a direct order to search a different area of the bay the second day of the search of the Choctawhatchee Bay behind Suggs' residence. (IB: 38). They argue that Captain Trusty had to have known where the key was located when he expanded the search and the defense could have used this information to cross-examine Trusty or bolster their defense. (IB: 40).

The record refutes the defense argument that they did not have this information. The bar where Pauline Casey was last seen was robbed. Investigator Steve Sunday testified at trial that after finding wet cash in Suggs' house, they called the Fort Walton Beach dive team to ask them to assist in the investigation. (R 16 2688). Sunday stated that the dive team was

looking for a murder weapon, or a key, as the key to the bar was missing and had not been located at the bar or on the victim's body. (R 16 2688-89). Captain Trusty testified that he was the one who requested the dive team come back on the second day to continue diving for evidence. (R 18 2999). The second morning is when the key to the bar was located in the bay. (R 18 2999). The statement was in evidence at the time of the hearing on second amended motion to vacate heard on January 23-24, 2003. This evidence is not newly discovered and there is no excuse for the lack of due diligence in presenting this issue previously. This claim fails to satisfy the newly discovered evidence exception to time limit. See Fla. R. Crim. P. 3.851 (d)(2)(A).

Additionally, while Suggs keeps intimating that Captain Trusty told the dive team exactly where to find the key to the bar in the midst of the bay. (IB: 40, 41), the record again refutes this statement. There was testimony at trial that the divers were searching in the bay and Henderson stated the second day they re-combed the area they did the day before and then expanded the search area. (R 18 2971-2975). The search area was in an arch sweep using a thirty-six-foot-long rope. (R 18 2971). The second day, another thirty-six feet of rope was added and after re-searching the first thirty-six feet, they then searched the second thirty-six feet for a total of seventy-two feet. (R 18 2973). Suggs has not presented any information showing

Henderson was told specifically to search one area of the bay. The record refutes the assertion and the record information could have been through reviewing the record.

In fact, Suggs simply states that Henderson, if asked, would have testified that before the search began on the second day Captain Brad Trusty "gave the dive team a direct order to search a different area." That is in keeping with Trusty's testimony at trial and therefore is simply an untimely raised assertion that is not newly discovered evidence.

#### Different Outcome

Suggs is unable to show that this evidence, even if it were not time barred and was otherwise admissible, provides evidence that would probably produce an acquittal on retrial. *Jones II*, 709 So. 2d at 521. These current claims by Suggs are at best cumulative, and would not have changed the outcome of the trial. Suggs was arrested, prior to the search of the bay, based on the evidence linking him to the murder. (R 18 2997). Captain Trusty is the one who requested the dive team come out and do an initial search, and he also requested they continue the search the next day. (R 18 2997-98). Prior to finding the key on the second day of the dive, police had already followed the tire tracks which were similar to Suggs' jeep, located the body near where Suggs' tire tracks ended, found the wet money in Suggs' house, and located the drinking glass resembling those from the

bar, in the bay behind Suggs' house. (R 18 2986-2999). A wealth of information was obtained prior to the second day of the dive when the key to the bar was located. *Suggs*, 644 So. 2d at 65. Finding additional evidence linking Suggs to the crime, i.e. the key located on the second day of the dive, does not provide evidence that would reasonably result in an acquittal upon retrial. Alleging new evidence that Captain Trusty told the dive team where to search would not change the outcome as Captain Trusty testified that he is the one who asked the team to come out. As defense noted in their initial brief, they explored the issue of someone planting keys in the water with Investigator Sunday on the stand. (IB: 40). Not only would this information if as alleged, be cumulative it would also be duplicative as it is not in contention that Captain Trusty is the one who asked the dive team to return.

Suggs also presented a sub argument that Wyatt Henderson's statements were a *Brady* violation. Suggs claims that statements by Wyatt Henderson show that Captain Brad Trusty noticed a visible waterline on defendant Suggs' pants and therefore decided to search the bay.

As *Brady* claims present mixed questions of law and fact, this Court applies a mixed standard of review, deferring to the trial court's factual findings that are supported by competent, substantial evidence and reviewing the application of the law to

the facts *de novo*. *Wickham v. State*, 124 So. 3d 841, 852 (Fla. 2013) (citing *Sochor v. State*, 883 So. 2d 766, 785 (Fla. 2004)).

To show a *Brady* violation, Suggs must prove that, (1) the evidence is favorable to him, either because it is exculpatory or because it is impeaching; (2) the State willfully or inadvertently suppressed it; and (3) that the suppression resulted in prejudice. *Jones v. State*, 998 So. 2d 573, 579-80 (Fla. 2008). Evidence is prejudicial or material under *Brady* if there is a reasonable probability that had the evidence been disclosed, the result of the trial would have been different. *Id.* (citing *United States v. Bagley*, 473 U.S. 667, 678, 105 S. Ct. 3375 (1985)).

There is no *Brady* violation as a statement of a visible waterline would not be exculpatory or impeaching. At trial, Detective Mann testified that as an explanation for the wet money in his house, Suggs told the detective that after he left the Teddy Bear bar he was working out on the dock behind the house that extended into the waters of the bay and somehow got the money in his pocket wet or muddy. (R 16 2756). Suggs' own statement was that the night before he was arrested he was out getting wet or muddy, a waterline on his pants would be in keeping with his statements, not exculpatory. See *Jimenez v. State*, 997 So. 2d 1056, 1065 (Fla. 2008) (finding no *Brady* violation where the defendant failed to allege how the testimony

would impeach any of the evidence presented by the State during trial).

The State did not suppress evidence as Brad Trusty testified he was aware of Suggs statement about doing work and getting muddy or wet on the dock subsequent to leaving the Teddy Bear Bar the night Pauline Casey went missing on August 7th. (R 21 3625). Prior to the arrest, Trusty testifies he reviewed the dock behind the house and did not find any evidence of any stage of work on the dock. (R 21 3624-25). Trusty also testifies he requested the dive team who began searching the bay on August 8th. (R 18 2997-98). He subsequently testifies he requested the team to come back and expand the search on August 9th. (R 18 2997-98). The information was not suppressed.

Even if this Court parsed the statements and found that Trusty said there was a waterline on Suggs' pants and that statement was suppressed, there is no prejudice. Upon a consensual search of Suggs' house, the police located money in Suggs' bathroom sink that was wet. (R 18 2989). A statement that Henderson said he was told there was a waterline on Suggs' pants falls in line with Suggs' statements that he was repairing the dock behind the house, and the money was wet because he fell in the water while working on the dock. *Suggs*, 644 So. 2d at 66. A statement regarding a waterline on pants would also support the State's argument that Suggs may have washed the blood off in the

bay. At best, this information would be cumulative to the evidence presented to the jury in support of the argument that Suggs' may have discarded evidence in the bay behind the house and that is why the bay was searched. See *Davis v. State*, 26 So. 3d 519, 529 (Fla. 2009) (concluding that the trial court correctly concluded recanted testimony would not alter the outcome of the trial because it was then cumulative to evidence already presented to the jury.) It is not information that provides any reasonable doubt as to Suggs' culpability. As there is no reasonable probability the result of the trial would have been different with a statement that there was a waterline on Suggs' pants, there is no *Brady* violation.

Suggs has to show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 1952 (1999) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555 (1995)). These statements simply place Suggs in or on the bay behind his house where evidence from the bar was found. The subclaim of a *Brady* violation should be denied.

Suggs argued at trial that the Walton County police were biased against him and implied that anyone could have planted the key. *Suggs*, 644 So. 2d at 66. This evidence was rejected by the jury and Suggs was convicted of first-degree murder. *Id.*

This claim should be denied as it is untimely and the trial court's order affirmed.

### ISSUE III

#### **THE TRIAL COURT PROPERLY DENIED SUGGS' CLAIM OF NEWLY DISCOVERED EVIDENCE REGARDING JUDGE LAURA MELVIN AS PROCEDURALLY BARRED (RESTATED)**

Suggs argues the trial court erred in summarily denying his claim that based on the contents of a 2013 memoir, the trial judge Laura Melvin felt she was required to sentence Suggs to death in line with the jury's death recommendation. The trial court properly denied this claim because Suggs provided no information that was of a nature that would probably produce an acquittal on retrial. Additionally, an opinion published in a memoir is not newly discovered evidence. *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

#### Standard of Review

Where the trial court denies a postconviction claim without conducting an evidentiary hearing, this Court reviews the circuit court's decision *de novo*, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief." *Gore v. State*, 91 So.3d 769, 774 (Fla. 2012) (quoting *Walton v. State*, 3 So.3d 1000, 1005 (Fla. 2009)), *cert. denied*, --- U.S. ----, 132 S. Ct. 1904, 182 L.Ed.2d 661 (2012).

#### Merits

In order to obtain a new trial based on newly discovered evidence, the Defendant must show that the evidence was not known by trial court, the party, or counsel, and it must appear that the defendant or defense counsel could not have known of it by the use of due diligence. *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). Also, the evidence "must be of such nature that it would probably produce an acquittal on retrial." *Id.*

The trial court noted in the sentencing order that, "the personal reflections of a sentencing judge written many years after the defendant's sentencing do not automatically weaken the case against the defendant so as to give rise to a reasonable doubt as to his culpability." (PCR 2 574-575). The trial court determined that the contents of such memoir and letter would not "probably produce an acquittal on retrial." (PCR 2 574-575) (quoting *Jones*, 709 So. 2d at 521). The trial court properly found that the contents of the memoir do not satisfy the prongs of *Jones* and therefore do not qualify as newly discovered evidence.

The personal opinion of a judge, written in a book for sale to the general public, is not newly discovered evidence. *Davis v. State*, 142 So. 3d 867, 875 (Fla. 2014) (citing *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007) (stating that "this Court has not recognized 'new opinions' or 'new research studies' as newly discovered evidence). In addition to failing to meet the

due diligence requirement of *Jones II*, Suggs is unable to show that this evidence, even if it were not time barred and was otherwise admissible, would result in an acquittal on retrial.

Suggs has to show that the evidence would probably produce a different result on retrial. See *Johnston v. State*, 27 So. 3d 11, 18 (Fla. 2010) (quoting *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998)).

This Court has determined that a claim that information learned from a book is newly discovered evidence entitling the Petitioner to a new trial are properly summarily denied if refuted by the record. See *Foster v. State*, 132 So. 3d 40, 65 (Fla. 2013) (finding that a claim that information learned from a book where a juror indicated she saw photos in the newspaper and they were not as detailed as the photos in court did not show that the juror compared in court and out of court evidence, or negated her statement that she could remain fair and impartial). Even if Judge Melvin's personal concerns regarding the death penalty are explained in a book, there are no facts alleged to suggest that she did not make an independent judgment of whether the death penalty should be imposed in Suggs' case.

Judge Melvin found seven aggravating factors and only three mitigating factors in the case. As one of the aggravators, Judge Melvin found the murder to be heinous, atrocious and cruel and she noted that "[t]he Defendant acted with utter indifference to

the suffering of this victim. The murder was accompanied by such additional acts which sets this crime apart from normal capital felonies. It was a conscienceless, pitiless crime which was unnecessarily torturous to the victim." *Suggs*, 644 So. 2d at 70. She also found the murder was cold, calculated and premeditated and noted that "the entire criminal episode reflects the Defendant's careful plan to rob [the victim], kidnap her, kill her, and hide her body, all with the aim of avoiding detection." *Id.* *Suggs'* convictions and sentence were upheld on direct appeal. *Id.* at 66. Even if tried today, Melvin would have to follow the law and analyze the aggravating and mitigating circumstances in making a determination to depart downwards after a jury finding of death, rather than impose some sort of judge nullification based on a personal opinion.<sup>1</sup>

In the attached letter to the Governor, Judge Melvin explains that she thinks a life sentence better serves the citizens of Florida, as defendants' remain on death row for a lengthy period of time and as well as other "realities of imposing the death penalty." (PCR 2 177-179). At no point does she state that she

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<sup>1</sup> *Suggs* was sentenced to death in 1995. The United States Supreme Court has since determined that aggravating circumstances necessary for the imposition of the death penalty must be found through a jury's fact-finding. See *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016) (finding that a death sentence must be based on a jury's verdict not a judge's fact-finding.)

failed to make an independent judgment of whether the death penalty should be imposed in Suggs' case. Judge Melvin's opinion on the realities of the death penalty based on her time on the bench, is simply her opinion. Personal opinions are just that, opinions, not facts. Claims of newly discovered evidence must be premised on facts, not opinions. *Schlup v. Delo*, 513 U.S. 298, 324 (1995) (defining newly discovered evidence as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence). A memoir is none of these things.

Judge Melvin's opinion in no way negates her conclusion that the death penalty was appropriate here based on analysis of the factors of the case. In fact, in the excerpt from the book listed in Defense motion page 52, Melvin says, "I have no question of Suggs' guilt, or that if anyone legally qualifies for the death penalty, it's him." (IB: 52). This is in direct contradiction to Suggs' argument that Melvin felt the wrong sentence had been imposed and acted in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (vacating a sentence of death where the prosecutor's comments in closing sought to minimize the jury's sense of responsibility for determining the appropriateness of death). Her next sentence, "[B]ut will killing Suggs make the world a better place," illustrates Judge Melvin's issue is with the death penalty not a finding that the sentence was inappropriate in this case. (IB: 52).

Suggs argues that *Caldwell v. Mississippi*, 472 U.S. 320 (1985) is relevant to this case because Judge Melvin believes a life sentence is appropriate and therefore she denied Suggs his right to a fair determination of the appropriateness of his death. (IB: 54). However, *Caldwell* holds that it is, "impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that responsibility for determining appropriateness of a defendant's death rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). Judge Melvin's statements do not show that she felt the responsibility rested elsewhere. She notes that as to her decision in Suggs' case, the place from which she made the decision was "...a place from which my job description required that I act decisively." (IB: 52). As to the ruling she wrote that, "nothing was wrong, legally wrong, "and also... "I'd been well trained and did a good job." (IB: 52). This is not indication that Judge Melvin believed the appropriateness of a death sentence rested with the jury. *Caldwell* is inapplicable to this case.

Suggs also argues this case is akin to *Roberts v. State*, 840 So. 2d 962 (Fla. 2002) and *Card v. State*, 652 So. 2d 344 (Fla. 1995) where sentencing orders were improperly drafted. There is no claim that the sentencing order was improperly drafted, and the *Roberts* case is not relevant to the issue alleged in this

claim. Additionally, Suggs argues that *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992) has bearing on this case. *Scott* is factually inapplicable. In *Scott*, an equally culpable co-defendant received a life sentence and the trial judge recused herself from 3.850 proceedings based on her feeling that Scott should receive the same sentence. *Id.* at 469. This is not a case where an equally culpable person received a lesser sentence allowing the death sentence of the other to be subject to collateral review. *Id.* Additionally, here the trial judge did not attempt to recuse herself related to any feelings on sentencing, and even noted in her memoir regarding Suggs that... "if anyone legally qualifies for the death penalty its him (IB: 52)." The *Scott* case and result are not comparable to this case.

To the extent that Suggs is arguing that the realities of imposing the death penalty are "newly discovered evidence," Melvin's letter references a 2010 Florida Bar news article discussing the real cost of the death penalty. The March 2010 article being utilized as support for this claim is not newly discovered evidence. *Tompkins v. State*, 994 So. 2d 1072, 1082-83(Fla. 2008) (holding an ABA report, *Evaluating Fairness and Accuracy in the State Death Penalty System: The Florida Death Penalty Assessment Report* is not newly discovered evidence)(citing *Power v. State*, 992 So. 2d 218, 222-23 (Fla. 2008); *Schwab*, 969 So.2d at 325 (concluding that "two recent

scientific articles regarding brain anatomy and sexual offense" did not constitute newly discovered evidence). This claim should be denied and the trial court's order affirmed.

#### ISSUE IV

##### **THE TRIAL COURT PROPERLY DENIED SUGGS' CLAIM OF BRADY EVIDENCE REGARDING MICHAEL MALONE (RESTATED)**

Suggs' fourth claim is that FBI analyst Michael Malone intentionally destroyed exculpatory evidence by virtue of him coming into contact with it, and references the FBI analysis result of pubic hair combings from the victim in this case and pubic and hair samples of the victim and of Suggs. (IB: 60). Suggs references a 1996 letter from a department of Justice investigation that identifies Michael Malone as a criticized examiner. (IB: 59). But Malone did not testify in this case, and in fact no pubic hairs linking Suggs to the victim were found or testified to in this case. The trial court properly held that there was no *Brady* violation as the criticized examiner notices were not sent until after the case became final in 1995. The state cannot have suppressed evidence which came out after the trial, the absence of forensic testing alone does not constitute exculpatory or impeaching evidence, and the defendant cannot establish prejudice because no evidence of pubic hair combings was offered by either party at trial.

Additionally, the trial court held that as the initial reports were issued in 1996 and 1997, even if a new letter was

issued in 2013, defense could have discovered the evidence through due diligence and presented it during the initial postconviction motion. The claim is untimely and procedurally barred and was properly denied.

#### Standard of Review

Where the trial court denies a postconviction claim without conducting an evidentiary hearing, this Court reviews the circuit court's decision *de novo*, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief." *Gore v. State*, 91 So. 3d 769, 774 (Fla. 2012) (quoting *Walton v. State*, 3 So.3d 1000, 1005 (Fla. 2009)), *cert. denied*, --- U.S. ----, 132 S. Ct. 1904, 182 L.Ed.2d 661 (2012).

As *Brady* claims present mixed questions of law and fact, this Court applies a mixed standard of review, deferring to the trial court's factual findings that are supported by competent, substantial evidence and reviewing the application of the law to the facts *de novo*. *Wickham v. State*, 124 So. 3d 841, 852 (Fla. 2013) (citing *Sochor v. State*, 883 So. 2d 766, 785 (Fla. 2004)).

#### Untimely

A motion for post-conviction relief must be filed within one year of the date the defendant's conviction and sentence becomes final. Fla. R. Crim. P. 3.851(d)(1). In this case, Suggs' conviction and sentence became final on April 24, 1995, when the

United States Supreme Court denied certiorari review from Suggs' direct appeal. *Suggs v. Florida*, 514 U.S. 1083 (1995). Suggs' second successive motion is untimely on its face having been filed more than twenty years after his conviction became final and over a decade after the information was publicly available in 1996 and 1997.

This claim also does not meet the exception to the one-year time limitation for filing as the Department of Justice report criticizing Malone's work and indicating that he testified falsely in an unrelated court proceeding was issued in 1996 and 1997. The information could have been obtained through the use of due diligence. See Fla. R. Crim. P. 3.851(d)(2)(A); See *Long v. State*, 183 So. 3d 342, 345 (Fla. 2016).

#### Procedural Bar

This claim is also procedurally barred because Suggs could have raised this claim the first postconviction hearing which was held in 2003. *Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003) (explaining the Court "will not entertain a second appeal of claims that were raised or should have been raised, in a prior postconviction proceeding."); *Atkins v. State*, 663 So. 2d 624, 626 (Fla. 1995) (explaining that issues that were or could have been presented in a postconviction motion cannot be relitigated in a subsequent postconviction motion).

#### Merits

Suggs' filing of this claim is outside the Fla. R. Crim. P. 3.851(d)(2)(A) time limitations. In making a newly discovered evidence claim, Suggs has to file a timely postconviction motion and meet the two prong test explained in *Jones v. State (Jones I)*, 591 So. 2d 911 (Fla. 1991). Suggs has failed to make a timely claim as the Department of Justice reports could have been found through the use of due diligence in the seven years between the time of its issuance and the first postconviction hearing, or the nineteen years since the postconviction hearing and the filing of the second successive motion for postconviction relief.

Even if this Court determined the claims were newly discovered, Suggs cannot meet the second prong of *Jones II* to show that the "newly discovered evidence" weakens the case against Suggs so as to give rise to a reasonable doubt as to his culpability. See *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996). Testimony by Michael Malone has previously been addressed by this Court.

In the case of *Duckett v. State*, 148 So. 3d 1163, 1167 (Fla. 2014), Duckett contended that a 2011 report by an independent expert regarding Michael Malone's work was newly discovered evidence. In *Duckett*, Michael Malone testified at Duckett's trial regarding the pubic hair found in the victim's underpants. *Id.* at 1166. Duckett received the 1997 report issued by the

Department of Justice questioning the forensic examinations of some agency analysts, including Malone. *Id.* at 1166. In August of 2011, an independent analyst reviewed many of the case in which Malone offered expert testimony and issued a report. *Id.* at 1167. The analyst report noted:

[N]o written protocols prescribing the scientifically acceptable examination and testing procedures for hair analysis existed until a decade after Malone's work in this case was done. Accordingly, the independent analyst could not determine whether Malone's work conformed to the standards or analytic techniques applicable at the time Malone worked on this case. Second, Malone's laboratory reports were not adequately documented in the laboratory bench notes, as there was no abbreviation key, small portions of notes were illegible, and some notes were undated. Finally, Malone's testimony at trial was not consistent with the laboratory reports, the bench notes, or Malone's area of expertise.

*Id.* at 1167. The analyst also explained that hair analysis does not support a higher degree of analytic certainty as microscopic hair analysis can show consistency but not absolute identity. *Id.*

The issue addressed in *Duckett* does not apply to this case. There was no hair attributed to Suggs, and no indication that the victim Pauline Casey had been sexually assaulted prior to her death. Malone did not testify in this case. There is no pubic hair link to Suggs and in fact there was no hair testimony that linked Suggs to Pauline Casey. Suggs admitted this in his brief. (IB: 57).

Doretha Mungen testified at trial that she was an FDLE analyst trained in comparison and identification of fibers, fabric marks, and fractured materials. (R 23 3949). She was given carpet sweepings from Suggs' car, as well as Suggs' shirt. She also received items from the victim including a t-shirt, shoe, socks, bags that were used to cover the hands, and sheets. (R 23 3953). She testified she located no standards from the victim on Suggs' items, and none from Suggs on the items from the victim. (R 23 3957).

Lonnie Ginsberg, forensic serologist with FDLE, tested the jeans of Pauline Casey to look for the presence of any fluids. (R 19 3154, 3169). He also tested anal and vaginal swabs from Pauline Casey. (R 19 3171). He testified that there was semen on the jeans but he was unable to tell the blood type of the person the semen came from. (R 19 3170). He also testified there was no semen found in the anal or vaginal swabs, only some blood in the swab from the mouth which could have been from the trauma of death. (R 19 3171).

Suggs' case is wholly different from *Duckett*. Suggs is unable to show that any contact by Malone with this case would result in a different outcome as Malone provided no testimony regarding hair analysis in this trial. There is also no indication that Malone played any significant role in testing items in this case. Malone did not testify at Suggs' trial. The analyst who

did testify presented evidence that no fibers matched Suggs, which the jury heard. Additional evidence that no hairs of Suggs' were found on the victim would be cumulative to what was already presented at trial. Additionally, the evidence would not contradict, or negate the state's argument that Suggs swam in the bay behind the house to clean off any blood and that is how he got the wet money, as well as the finding of the key and the bar glass in the bay. The testimony that was presented overwhelmingly tied Suggs to the crime. As Suggs is unable to meet the second prong of *Jones* to show that "the evidence would probably produce an acquittal on retrial," this claim should be denied. *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998).

Additionally, in *Johnston v. State*, 27 So. 3d 11 (Fla. 2010), the defendant in that case tried to argue that a report showing blood was not found on his clothes warrants a new trial. The court agreed with the state that the trial court must consider all admissible evidence and make the determination in the light of all the now available and admissible evidence. *Id.* at 19.

In this case, the admissible evidence includes the findings that "...the victim's palm and fingerprints were found in Suggs' vehicle and a serologist found a bloodstain on Suggs' shirt that matched the victim's blood." *Suggs*, 644 So. 2d at 66. Even if the trial court agreed that Michael Malone being named in a letter as a criticized laboratory analyst tied to the case was

"newly discovered evidence", the record refutes the claim that the "newly discovered evidence" would probably result in a lesser sentence or acquittal on retrial." *Johnston*, 27 So. 3d at 20. Relief should be denied on this claim.

Suggs tries to argue that if the hairs do not match Suggs they have to match someone. This presupposes the fact that there were unidentified hairs located. The report does not state that unidentified hairs were located. (PCR 2 181-182). It indicates that the hair combed from the victim's pubic hair do not match the standards supplied by Suggs to compare to the combing.

(PCR 1 181-182). Hairs from Suggs were not located on the victim's body, her pubic hair was combed to determine if any of Suggs' hairs were lodged within. No hairs which did not belong to the victim were located. As there is no claim that the victim was sexually assaulted, it is not inconsistent with the testimony that no untoward hairs at all were found. The trial court correctly denied this claim.

Suggs argues that the letters about the results of an FBI investigation are *Brady* evidence. There is no *Brady* issue as the FBI did not release letters stating that the work of Malone was one who fell below professional standards until after Suggs' trial in 1992. The state is not deemed to have suppressed evidence that was not in existence. See *Duckett v. State*, 918 So. 2d 224, 235 (Fla. 2005) (finding Duckett failed to establish

the state "willfully or inadvertently" suppressed information in a 1997 report that did not exist when Duckett was tried in 1988 or when the conviction was affirmed).

#### ISSUE V

**THE TRIAL COURT PROPERLY DENIED SUGGS' CLAIM OF BRADY EVIDENCE OF  
FDLE'S INVESTIGATION INTO THE WALTON COUNTY SHERIFF'S OFFICE.  
(RESTATED)**

Suggs' fifth claim is that Shirley Zeigler, former FDLE criminal analyst, was involved in the investigation and trial of Gary Whitton, and she testified that the Walton County Sheriff's office threatened her in order to suppress evidence favorable to the defense. (PCR 2 269-270,272). Suggs argues that the cases of *Whitton* and Suggs were investigated and prosecuted by the same individuals. (IB: 62). The trial court correctly found that the analyst's testimony regarding her involvement with an unrelated defendant provides no *Brady* information related to this case, the claim is untimely, and an investigation of the Sheriff's office does not show a reasonable probability that the outcome of the proceeding would have been different.

#### Standard of Review

Where the trial court denies a postconviction claim without conducting an evidentiary hearing, this Court reviews the circuit court's decision *de novo*, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief." *Gore v.*

*State*, 91 So. 3d 769, 774 (Fla. 2012) (quoting *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009)), *cert. denied*, --- U.S. ----, 132 S. Ct. 1904, 182 L.Ed.2d 661 (2012).

As *Brady* claims present mixed questions of law and fact, this Court applies a mixed standard of review, deferring to the trial court's factual findings that are supported by competent, substantial evidence and reviewing the application of the law to the facts *de novo*. *Wickham v. State*, 124 So. 3d 841, 852 (Fla. 2013) (citing *Sochor v. State*, 883 So. 2d 766, 785 (Fla. 2004)).

#### Untimely

A motion for post-conviction relief must be filed within one year of the date the defendant's conviction and sentence becomes final. Fla. R. Crim. P. 3.851(d)(1). In this case, Suggs' conviction and sentence became final on April 24, 1995, when the United States Supreme Court denied certiorari review from Suggs' direct appeal. *Suggs v. Florida*, 514 U.S. 1083 (1995). Suggs' second successive motion is untimely on its face having been filed more than twenty years after his conviction became final and over a decade after the first postconviction hearing January 23-24, 2003.

#### Procedural bar

This claim is also procedurally barred because Suggs could have raised this claim the first postconviction hearing which was held in 2003. *Wright v. State*, 857 So. 2d 861, 868 (Fla.

2003) (explaining the Court "will not entertain a second appeal of claims that were raised or should have been raised, in a prior postconviction proceeding."); *Atkins v. State*, 663 So. 2d 624, 626 (Fla. 1995) (explaining that issues that were or could have been presented in a postconviction motion cannot be relitigated in a subsequent postconviction motion).

### Merits

Suggs failed to establish the facts underlying this claim were not established with the one-year limitation period provided for in Rule 3.851(d) or could not have been discovered by the exercise of due diligence. Rather, a defendant must bring a claim of newly discovered evidence within one year of the time he discovered the evidence or with due diligence could have discovered it. *Glock v. Moore*, 776 So. 2d 243, 251 (Fla. 2001) ("Any claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence."). Suggs argues that at an evidentiary hearing in the case of Gary Whitton revealed misconduct on the part of the Walton County Sheriff's Office. (IB: 62). The hearing that Suggs is referencing occurred on November 3, 2005. (PCR 2 255). This information could have been discovered through the use of due diligence.

Suggs was keeping track of the *Whitton* case prior to Whitton's 2005 evidentiary hearing. Suggs' Second Amended Motion to Vacate Convictions and Sentences, filed on August 31, 2001, uses Gary Whitton, on page 7, as an example of alleged inequitable treatment of Suggs. Counsel did not exercise due diligence regarding this issue because as early as 2001, Suggs was following the *Whitton* case and using it as an example in his own case. However, Counsel does not raise the arguments from the 2005 hearing until a decade later in 2015. Counsel was not diligent as it regards this issue and does not meet the first prong of *Jones II*. Counsel also fails to explain how any allegations of wrongdoing in the *Whitton* case, would apply to this case. This claim was properly denied by the trial court as it is insufficiently pled, untimely, and procedurally barred. See *Duest v. State*, 12 So. 3d 734, 735 (Fla. 2009) (quoting *Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008) ("postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record").

#### Different Outcome

Suggs has to show that the "newly discovered" evidence would probably produce a different result on retrial. See *Johnston v. State*, 27 So. 3d 11, 18 (Fla. 2010) (quoting *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998)). To reach this conclusion the trial

court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial. *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998).

To establish a *Brady* violation, a defendant must show: (1) evidence favorable to the accused, because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) prejudice ensued. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The burden is on the defendant to demonstrate the evidence he claims as *Brady* material satisfies each of these elements. *Wright v. State*, 857 So. 2d 861, 870 (Fla. 2003). The prejudice prong is not satisfied unless the defendant shows the withheld evidence is material. Under *Brady*, the undisclosed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The mere possibility that undisclosed items of information may have been helpful to the defense in its own investigation does not establish the materiality of the information. *Wright v. State*, 857 So. 2d 861, 870 (Fla. 2003).

Suggs argues that this is a *Brady* claim that the State withheld information regarding an investigation because within her testimony, Zeigler indicates that investigations of the Sheriff were going on at the time that she was being threatened not to attend trial. (IB: 64; PCR 2 269-270). Suggs' trial concluded June 4, 1992. Whitton's trial, and the incident testified to by Zeigler, took place in July of 1992. Zeigler stated she knew of investigations going on during Whitton's case, not during the time of Suggs' trial. (PCR 2 269-270). The State cannot have suppressed evidence that did not exist. See *Mungin v. State*, 932 So. 2d 986, 998 n. 10 (Fla. 2006) ("The State could not suppress information that was not available.").

The arguments or alleged behavior in the *Whitton* case do not show prejudice in this case. In *Whitton*, blood was found on Whitton's boots in two different locations. *Whitton v. State*, 161 So. 3d 314, 324 (Fla. 2014). Lonnie Ginsberg typed the blood on the inside of the boots and it was consistent with the victim's blood type. *Id.* He then swabbed the blood on the boot and sent it to be tested by FDLE. (PCR 2 261-262). Zeigler received the samples at FDLE, tested the blood stains and determined the DNA matched neither Whitton nor the victim. (PCR 2 262-263). There was no testimony in the postconviction hearing as to whether the blood that was tested by Zeigler was the same swab that came from the inside of the boot or the outside of the

boot. (PCR 2 261,278). Either way, *Whitton* admitted to walking through the victim's blood in his boots and also admitted that the blood on his boots would belong to the victim. *Whitton v. State*, 161 So. 3d 314, 324 (Fla. 2014). While Zeigler alleged that she felt threatened by the actions of the Walton County Sheriff, she still went to court and testified truthfully as to her results. *Id.* There was no exculpatory evidence that was suppressed.

The trial court denied *Whitton's* claim that this information was either *Brady* or *Giglio*<sup>23</sup>. *Id.*

The Florida Supreme Court affirmed and determined the claim was without merit because,

*Whitton* does not allege that the State either presented false testimony or suppressed evidence, but rather alleges that the State attempted to suppress evidence or coerce Ziegler into testifying falsely about her laboratory results. Even if we were to address this claim on the merits, the record demonstrates that defense counsel was aware of the alleged threats during trial. Further, Ziegler testified at the evidentiary hearing that she testified truthfully and did not withhold any information. Accordingly, *Whitton's* claim is refuted by the record and without merit.

*Whitton v. State*, 161 So. 3d 314, 324 (Fla. 2014).

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<sup>2</sup> *Giglio v. U.S.*, 405 U.S. 150, 92 S. Ct. 763 (1972).

Not only is the situation in this case different than that of *Whitton*, the Florida Supreme Court, on addressing the postconviction claims of *Whitton*, noted that:

Zeigler testified at trial that the blood sample in question did not match that of *Whitton* or the victim. Further, *Whitton* admitted that the victim's blood was on his boots because, according to *Whitton*'s version of events, he walked through the victim's blood in his hotel room after he had been murdered. *Whitton*'s admission makes it impossible for him to demonstrate prejudice. Likewise, *Whitton* has not established that any false evidence was presented at trial. Accordingly, the postconviction court properly denied this claim.

*Whitton v. State*, 161 So. 3d 314, 324 (Fla. 2014).

If there was no relief granted in *Whitton*, Suggs' claim that the events of the *Whitton* case would satisfy *Jones* or *Brady* in his case is unfathomable. This information from the *Whitton* case, that the FDLE analyst testified truthfully to her results and the results contradicted the defendant's own testimony that he walked through the victim's blood, is not information that would change the outcome in Suggs' case. The comparison fails to show attempts to suppress exculpatory evidence when in fact the evidence was presented and the defendant in *Whitton* is the one who contradicted said results.

Even if Suggs could somehow contravene the rules of evidence to present testimony of actions which occurred after his trial took place, the evidence would have to "reasonably be taken to put the whole case in such a different light as to

undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. Presentation of this information would simply be cumulative to what was presented at trial.

Suggs argued at trial that the Walton County police were biased against him and he was the only suspect they were interested in. *Suggs*, 644 So. 2d at 66. That information still does not address the tire tracks which were similar to Suggs' jeep, the body found near where Suggs' tire tracks ended, the wet money in Suggs' house after the bar was robbed, the drinking glass resembling those from the bar found in the bay behind Suggs' house, and the key from the bar also in the bay. (R 18 2986-2999). Suggs is unable to meet the prongs of *Brady* and the trial court's denial of this claim should be affirmed.

#### **Evidentiary Hearing**

Suggs requests an evidentiary hearing on the claims raised in his motion. However, all of Suggs' claims may be decided as a matter of law or from the record in this case because all of his claims are time-barred or refuted by the record. Claims in successive motions may be denied without an evidentiary hearing "[i]f the motions, files, and records in the case conclusively show that the movant is entitled to no relief." Fla. R. Crim. P. 3.851(f)(5)(B). Under this standard, Suggs is not entitled to an evidentiary hearing on this motion. This Court should deny Suggs' request for an evidentiary hearing.

**CONCLUSION**

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Suggs' convictions and sentence of death.

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Notice of Appearance has been furnished via the eportal to Dawn Macready, Assistant Capital Collateral Regional Counsel - North, dawn.macready@ccrc-north.org; on this 11th day of July, 2016.

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief was computer generated using Courier New 12-point font.

Respectfully submitted,

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