

In the Supreme Court of Florida

STEVEN EDWARD STEIN,

Appellant,

v.

CASE NO.: SC22-1787

CAPITAL CASE

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

No oral argument should be conducted in this appeal of a third successive postconviction motion involving a case where the conviction and death sentence became final in 1994. *Stein v. Florida*, 513 U.S. 834 (1994). This Court should *not* hold an oral argument to discuss a third successive postconviction motion involving claims that are untimely, procedurally barred, speculative, and meritless.

PRELIMINARY STATEMENT REGARDING THE RECORD

The record on appeal will be referred to by the year of the postconviction appeal, 2022, followed by the designation “3rd Succ PC” to denote it is a successive postconviction appeal, followed by the designation “ROA” to refer to the record on appeal, followed by the page number in the record on appeal. (2022 3rd Succ PC ROA at page).

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is an appeal from the trial court's summary denial of a third successive postconviction motion in a capital case raising a claim of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and a claim of newly discovered evidence of impeachment.

Facts of the murders

In 1990, Stein, White, and White's girlfriend, Sandra Sidas, moved from Phoenix, Arizona, to Jacksonville, Florida. Stein, Marc Christmas, and Kyle White were roommates. *Stein v. State*, 632 So.2d 1361, 1363-64 (Fla. 1994); *see also Christmas v. State*, 632 So.2d 1368, 1369 (Fla. 1994). Stein worked at the Lem Turner Pizza Hut and Christmas previously worked at the Edgewood Avenue Pizza Hut. *Stein*, 632 So.2d at 1363; *Christmas*, 632 So.2d at 1369. About a week before the murders, Stein and Christmas were discussing their plan to rob one of the Pizza Huts with White. Stein and Christmas acknowledged that they could be recognized by the other employees and agreed that there could be no witnesses.

On January 20, 1991, Stein and Christmas left home at 9:30 p.m. saying they were going to Christmas' father house to see about selling him Stein's rifle. Stein was carrying his Marlin .22 rifle. Christmas' father, however, testified that they did not go to his house that night and that he never bought a rifle from Stein. Instead, Stein and Christmas went to the Edgewood Avenue Pizza Hut. An employee, Ronald Burroughs, testified that on the night of the murders, when he left the restaurant at 11:15 p.m., only two customers remained and he identified the customers as Stein and Christmas. Stein and Christmas ordered the two shift supervisors, Dennis Saunders and Bobby Hood, into the men's bathroom and ordered both to sit on the floor. While Christmas held the two victims at gun point with a .38-caliber revolver, Stein shot the victims repeatedly with his rifle from a few inches away. *Stein v. State*, 995 So.2d 329, 342 (Fla. 2008). Stein shot Saunders four times and shot Hood five times. Christmas' fingerprint was on an unpaid guest check on the table in the restaurant. After his arrest, Stein confessed to the robbery but claimed the murders were a result of a robbery gone bad.

Stein, 632 So.2d at 1364; *Christmas*, 632 So.2d at 1369.

Procedural history

On June 20, 1991, the jury convicted Stein of two counts of first-degree murder and one count of robbery with a deadly weapon. *Stein*, 632 So.2d at 1364. At the penalty phase, Stein's sister and girlfriend testified on his behalf. The jury recommended a death sentence. The trial judge sentenced Stein to two death sentences for the murders and to life imprisonment for the armed robbery. *Id.* at 1364. The trial court found five aggravating circumstances but the Florida Supreme Court struck the heinous, atrocious, or cruel (HAC) aggravator on appeal but affirmed the death sentences based on the four remaining aggravators. *Id.* at 1367. The four remaining aggravators were: 1) prior conviction for a violent felony aggravator based on the contemporaneous murders of the two victims; 2) the felony murder aggravator based on the armed robbery; 3) avoid arrest aggravator; and 4) cold, calculated, and premeditated (CCP) aggravator.

In the direct appeal to the Florida Supreme Court, Stein raised nine issues. *Stein*, 995 So.2d at 332 n.1 (listing the direct appeal

issues in a footnote).¹ The Florida Supreme Court affirmed the three convictions and the two death sentences. *Stein v. State*, 632 So.2d 1361 (Fla. 1994).

Stein filed a petition for writ of certiorari from the direct appeal in the United States Supreme Court asserting the jury instruction on the HAC aggravator, which had been stricken, violated *Shell v. Mississippi*, 489 U.S. 1 (1990). On October 3, 1994, the United States Supreme Court denied the petition. *Stein v. Florida*, 513 U.S. 834 (1994) (No. 93-9144).

On November 15, 1995, Stein, represented by Capital Collateral

¹ The nine issues were: 1) erred in denying his motion to suppress the statements made to investigators; 2) erred in allowing a suppression hearing to proceed in the absence of Stein's counsel; 3) erred in failing to declare a mistrial after two witnesses made certain statements about Stein's character; 4) failed to find in mitigation that Christmas, rather than Stein, was the primary actor in the crimes at issue and that Stein was of good character; 5) erroneously found the aggravating circumstance of a previous conviction for a violent felony; 6) erroneously found both that the murders were committed to avoid arrest and that the murders were cold, calculated, and premeditated (CCP); 7) erred in finding that the murders were heinous, atrocious, or cruel (HAC); 8) erroneously admitted testimony during the penalty phase that Stein was carrying a concealed weapon at the time of his arrest and that the carrying of that weapon was a felony offense; and 9) erred in denying Stein's request for a mistrial after the prosecutor made certain statements to the jury in his closing argument.

Representative (CCR), filed his initial rule 3.851 motion for postconviction relief. On June 6, 1996, he filed an amended initial motion. On May 3, 2002, Stein, represented by Harry Brody and Jeff Hazen of CCRC-N, filed a second amended initial postconviction motion raising 12 claims. *Stein*, 995 So.2d at 332 (listing the 12 issues raised in the initial postconviction motion).² On October 18, 2002, the trial court held an evidentiary hearing on the second amended postconviction motion. On May 2, 2006, the state trial court denied

² The 12 issues were: 1) ineffective assistance of counsel because trial counsel failed to investigate and present sufficient mitigating circumstances; 2) the co-defendant's life sentence was newly discovered evidence of relative culpability; 3) an unsigned sentencing order discovered in the State's file and not in the defense's file indicated that the trial judge, Judge Wiggins, delegated his responsibility of drafting the sentencing order to the State; 4) ineffectiveness of trial counsel for conceding Stein's guilt to the armed robbery charge; 5) ineffectiveness of trial counsel for failing to present an intoxication defense; 6) the prosecutor made improper comments; 7) Florida's death sentencing scheme is unconstitutional; 8) the cold, calculated, and premeditated aggravating factor is unconstitutionally vague; 9) the trial court erred in instructing the jury on the HAC aggravator because this factor was overturned on direct appeal; 10) the rules prohibiting Stein from interviewing jurors is unconstitutional; 11) Stein's sentencing jury was misled by comments, questions, and instructions that diluted the jury's responsibility in sentencing in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985); and 12) cumulative error.

the initial postconviction motion.

Stein appealed to the Florida Supreme Court raising four issues: 1) the denial of his motion to disqualify the postconviction judge; 2) ineffectiveness of trial counsel for conceding the armed robbery to the jury; 3) ineffectiveness of trial counsel for failing to present numerous lay background mitigation witnesses at the penalty phase; and 4) newly discovered evidence of relative culpability based on the co-defendant's sentence being reduced to life. *Stein v. State*, 995 So.2d 329, 333 (Fla. 2008) (SC06-1505). On September 25, 2008, the Florida Supreme Court affirmed the denial of the initial postconviction motion. The Florida Supreme Court denied rehearing on November 19, 2008. The Florida Supreme Court issued the mandate on December 5, 2008.

On October 26, 2010, Stein, represented by registry counsel Linda McDermott, filed a first successive postconviction motion reraising a claim of ineffectiveness of trial counsel for failing to present mitigation based on *Porter v. McCollum*, 558 U.S. 30 (2009). The state trial court summarily denied the *Porter* claim. On April 26, 2012, the

Florida Supreme Court affirmed the summary denial of the first successive postconviction motion. *Stein v. State*, 91 So.3d 784 (Fla. 2012) (citing *Walton v. State*, 77 So.3d 639 (Fla. 2011)) (SC11-1400).

Stein then filed a petition for writ of certiorari in the United States Supreme Court raising the *Porter* claim. On November 26, 2012, the United States Supreme Court denied the petition. *Stein v. Florida*, 568 U.S. 1034 (2012) (No. 12-6415).

On April 14, 2016, Stein, represented by registry counsel Linda McDermott, filed a state habeas petition in the Florida Supreme Court raising a claim based on *Hurst v. Florida*, 577 U.S. 92 (2016). On March 3, 2017, the Florida Supreme Court denied the state habeas petition ruling that *Hurst* did not apply retroactively to Stein. *Stein v. Jones*, 2017 WL 836806 (Fla. Mar. 3, 2017) (denying *Hurst* relief citing *Asay v. State*, 210 So.3d 1 (Fla. 2016)) (SC16-621).

On January 9, 2017, despite the Florida Supreme Court having already denied Stein any *Hurst* relief, Stein, represented by registry counsel Linda McDermott, filed a second successive postconviction motion in the state trial court raising four claims based on *Hurst v.*

Florida and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*). On January 31, 2018, the Florida Supreme Court affirmed the trial court's denial of the second successive *Hurst* claim again ruling that *Hurst* did not apply retroactively to Stein. *Stein v. State*, 237 So.3d 919 (Fla. 2018) (denying *Hurst* relief citing *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017)) (SC17-1547).

Stein filed a petition for writ of certiorari in the United States Supreme Court raising the *Hurst* claim. On October 1, 2018, the United States Supreme Court denied review. *Stein v. Florida*, 139 S.Ct. 191 (2018) (No. 17-9545).

Pending federal habeas litigation

On November 30, 2009, Stein, represented by then CJA counsel Linda McDermott, filed a federal habeas petition in the Middle District. *Stein v. Sec'y, Fla. Dep't of Corr.*, 3:09-cv-1162 (M.D. Fla.). On September 3, 2021, the State filed a mandamus petition in the Eleventh Circuit arguing the more than 11 year delay violated the federal priority statute. 28 U.S.C. § 1657(a). The mandamus was denied.

On July 21, 2020, after Linda McDermott joined the Capital Habeas Unit of the Federal Public Defender's Office of the Northern District of Florida (CHU-N), the CHU-N became counsel of record in federal habeas court. (Doc. #74). Approximately a year after that appointment, in July of 2021, an investigator with CHU-N spoke with Sandra Sidas which is the basis of the current *Brady* claim in state court. On December 1, 2021, the CHU-N filed a motion to stay the federal proceedings based on the state court proceedings regarding the current successive *Brady* claim. On July 6, 2022, the district court granted the motion to stay pending the state court litigation. (Doc. #112). As of today, the federal habeas proceedings are still stayed in the federal district court.

Current third successive postconviction litigation

On November 24, 2021, Stein, now represented by Capital Collateral Regional Counsel - Northern Region (CCRC-N), filed a third successive rule 3.851 postconviction motion raising a claim of a newly discovered evidence of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). (3rd succ. PC at 1-23). On December 10, 2021, the State filed

an answer that included the argument that the *Brady* claim failed to comply with the applicable rule of court, which requires an explanation why the *Brady* claim was not raised in the initial postconviction motion. Fla. R. Crim. P. 3.851(e)(2)(C). (3rd succ. PC at 25-50).

On February 2, 2022, the trial court struck the successive motion for being insufficiently pled citing rule 3.851(e)(2)(C). (3rd succ. PC at 51-52). The trial court allowed CCRC-N 60 days to file an amended successive postconviction motion to cure the pleadings deficiency.

On March 29, 2022, CCRC-N filed an amended successive postconviction motion raising the same claim of newly discovered evidence of a *Brady* violation but the amended motion again failed to comply with the rule. (3rd succ. PC at 53-91). On April 4, 2022, the State filed an answer to the amended motion which included an entire section on the deficient amendment. (3rd succ. PC at 98-123). The State asserted that *Bryant v. State*, 901 So.2d 810, 817 (Fla. 2005), should not apply to successive postconviction motions in capital cases

where defendants are represented by highly-experienced and specialized counsel.

On October 12, 2022, the postconviction court denied the third successive postconviction motion. (3rd succ. PC at 3899-4857). CCRC-N filed a motion for rehearing. (3rd succ. PC at 4858-61). On November 7, 2022, the postconviction court denied rehearing. (3rd succ. PC at 4862-63).

This appeal of the third successive postconviction motion follows.

SUMMARY OF THE ARGUMENT

ISSUE I

The postconviction court properly summarily denied the claim asserting a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Stein asserts the prosecution failed to disclose a deal with one of the State's key witnesses, Kyle White, to provide testimony against Stein in exchange for not charging him with any crime.

But Stein's attorney abused the amendment process. This Court should limit amendments to cure pleading deficiencies to initial postconviction motions. Amendments as of right should not be permitted in successive postconviction litigation in capital cases where all capital defendants are represented by counsel to prevent such abuses in the future.

The successive *Brady* claim is untimely due to Stein's lack of diligence. Stein was not diligent in seeking out Sidas' statement regarding a conversation that occurred between her and White circa 1991. The trial court properly summarily denied the successive *Brady* claim as procedurally barred. There was no explanation given

as to why the *Brady* claim was not raised in the prior postconviction motions. The postconviction court also properly found that the State did not suppress Sidas' statements and that any impeachment of White with a deal was not material in light of Stein's confession and therefore, there was no violation of *Brady*.

ISSUE II

The postconviction court properly summarily denied the claim of newly discovered evidence of impeachment of White with the deal. Stein fails both prongs of the test for newly discovered evidence of *Jones v. State*, 709 So.2d 512 (Fla. 1998). Stein was not diligent in seeking out Sidas' statement regarding a conversation that occurred circa 1991.

Alternatively, Stein would not be acquitted of the murders and armed robbery, regardless of any impeachment of White, in light of Stein's confession. Nor would Stein's death sentence be reduced to a life sentence based on any impeachment of White. While White's testimony helped to establish two of the four aggravators, the other

two aggravators did not depend in any manner on White's testimony. And one of the unaffected aggravators was the prior violent felony aggravator based on the contemporaneous murders of two victims.

The postconviction court properly summarily denied the third successive postconviction motion.

ARGUMENT

ISSUE I

WHETHER THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED THE SUCCESSIVE POSTCONVICTION CLAIM OF A VIOLATION OF *BRADY V. MARYLAND*, 373 U.S. 83 (1963), FOR FAILING TO DISCLOSE A DEAL WITH A KEY STATE WITNESS?
(Restated)

Stein asserts the postconviction court erred in summarily denying his successive postconviction claim of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Stein asserts the prosecution failed to disclose a “deal” with one of the State’s key witnesses, Kyle White, to provide testimony against Stein in exchange for not charging him with any crime. The *Brady* claim is untimely due to Stein’s lack of diligence in speaking with White’s girlfriend, Sidas, whose statement is the basis of the *Brady* claim. The claim also is procedurally barred, as the postconviction court found. Stein provided no reason for not raising the *Brady* claim earlier in the initial postconviction proceedings, as he is required to do under the rules of court. On the merits, as the postconviction court found, the State did not suppress Sidas’ statement because she was equally available to the defense and the

prosecution. Furthermore, as the postconviction court properly concluded, any impeachment of White with a deal was not material to the convictions or sentence. Based on the evidence against Stein, including a confession to law enforcement, the results of the proceedings would have been the same. The jury would have still convicted Stein of both first-degree murders and armed robbery and he still would have been sentenced to death, regardless of any impeachment of White. The postconviction court properly summarily denied the successive postconviction *Brady* claim.

Factual background of the current claims

The basis of the claims is a federal investigator with the Capital Habeas Unit (CHU-N) speaking with Sandra Sidas in July of 2021. At the time of the murders, Sidas was White's girlfriend. She is also the mother of White's children. She had moved with Stein and White to Jacksonville in 1990 and lived with them in the trailer until shortly before the murders. (2022 Amend. Succ. Motion at 7, ¶4 and at 8, ¶¶6-7). Sidas told the federal investigator that White told her shortly

after the murders in 1991 that he “wanted to make a deal” with the prosecution in which he would testify against Stein in exchange for not being charged with any crime. No affidavit from Sidas was attached to successive postconviction motion, so it is not clear whether Sidas stated that White told her that he had actually had a deal with the prosecution or merely that he wanted to make a deal.

Abuse of the amendment process

Stein’s counsel abused the amendment process. Stein’s original third successive postconviction motion contained no statement as to why Sidas “was not previously available,” as required by the rule governing postconviction motion in capital cases. Fla. R. Crim. P. 3.851(e)(2)(C)(iv) (stating that any claim of newly discovered evidence or successive *Brady* claim must include a statement of the reason why the witness or document was not previously available”). Sidas was known to all before the trial in 1991.

The State’s first answer to the third successive motion pointed out that the successive postconviction motion contained no

explanation as to why Sidas was not interviewed prior to 2021 in violation of this Rule 3.851(e)(2)(C)(iv). (3rd succ. PC at 36).

The postconviction court struck the original successive postconviction motion for being insufficiently pled in violation of rule 3.851(e)(2)(C). (3rd succ. PC at 51). The postconviction court gave CCRC-N 60 days to cure the deficiency but the amended successive motion did not even attempt to cure the deficiency. Opposing counsel, however, simply ignored the rule in the amended motion. Now, in addition to failing to comply with the rule, the amended postconviction motion also failed to comply with the postconviction court's order. Despite being given 60 days to amend by the judge, the claims in the amended successive postconviction motion still did not comply with rule 3.851(e)(2)(C)(iv). There is no excuse for the original claims not complying with the rule, much less the amended claims.

Typically, under *Spera v. State*, 971 So.2d 754 (Fla. 2007), a defendant is entitled to file an amendment to cure any pleading deficiencies, but *Spera* should be limited to initial postconviction motions in capital cases. *But see Davis v. State*, 26 So.3d 519, 527 (Fla.

2009) (extending *Spera* to successive postconviction motions in a capital case). *Spera* should not extend to successive postconviction motions in capital cases, much less to third successive postconviction motions. Indeed, originally *Spera* was limited to initial postconviction motions, even in non-capital case. *Spera*, 971 So.2d at 755 (holding “that in dismissing a first postconviction motion based on a pleading deficiency, a court abuses its discretion in failing to allow the defendant at least one opportunity to correct the deficiency unless it cannot be corrected”); *id.* at 761 (stating that when the “initial rule 3.850 motion for postconviction relief is determined to be legally insufficient for failure to meet either the rule's or other pleading requirements, the trial court abuses its discretion when it fails to allow the defendant at least one opportunity to amend the motion”) (emphasis added). This Court’s holding in *Davis* simply encourages delays in successive postconviction litigation.

While it is understandable courts allow pro se petitioners, untrained in the law, to cure flaws even in successive postconviction motions, capital defendants in Florida are not pro se litigants. In

capital cases, defendants are not even permitted to represent themselves in state postconviction litigation. Fla. R. Crim. P. 3.851(b)(6) (“A defendant who has been sentenced to death may not represent himself or herself in a capital postconviction proceeding in state court”); *In re Amendments to Florida Rule of Criminal Procedure 3.851*, 351 So.3d 574 (Fla. 2022) (observing that rule 3.851(b)(6) “unequivocally provides that a capital defendant may not represent him or herself in state postconviction proceedings”). And CCRC-N attorneys are trained in Florida capital jurisprudence, especially the requirements of Rule 3.851. Moreover, two CCRC attorneys are assigned to every capital case and they work for institutions, CCRC-N, CCRC-M, and CCRC-S, that only handles Florida postconviction capital litigation and some federal capital habeas litigation. Experienced lead state postconviction counsel, who must meet the heightened prior capital experience requirements of rule 3.112(k), are well aware of the pleading requirements of rule 3.851 including that both *Brady* claims and newly discovered evidence claims must include a statement explaining why the witness or document was not

previously available, since that is what they do for a living. Fla. R. Crim. P. 3.851(e)(2)(C)(iv) (stating that any newly discovered evidence claim or any successive *Brady* claim must include “a statement of the reason why the witness or document was not previously available”). The requirement is literally in the rule itself. As the Florida Supreme Court observed in a case handled by CCRC-N no less, a “defendant cannot plead a claim of newly discovered evidence without alleging that the specific evidence at issue could not have been discovered” earlier “with due diligence.” *Brown v. State*, 304 So.3d 243, 272 (Fla. 2020), *cert. denied*, *Brown v. Florida*, 141 S.Ct. 2828 (2021). CCRC-N is well aware of this pleading requirement. This was intentional delay.

Opposing counsel on appeal simply ignores his failure to cure the deficiency in the amendment in violation of the rule and the trial court’s order. CCRC-N attorneys are intentionally not following the rules, relying on *Davis* to be able to amend their successive postconviction claims, for purpose of causing delay. *Burris v. Parke*, 95 F.3d 465, 471 n.1 (7th Cir. 1996) (stating that delay “is the name of the game in death penalty cases”). In this case, *Davis* resulted in

months of delay and required an additional round of briefing. And the delay in state court resulted in a delay in the federal habeas proceedings because the federal district court stayed the federal habeas proceedings, as they all too often do, to exhaust the claims in state court. *Stein v. Sec'y, Fla. Dep't of Corr.*, 3:09-cv-1162 (M.D. Fla.).

All of this amounts to an abuse of the amendment process. The opportunities for abuse from extending *Spera* to successive postconviction motions are too great, as this case demonstrates. All extending *Spera* to successive postconviction motions in capital cases accomplished in this case was to delay the successive postconviction proceedings for months. This Court should recede from *Davis* and limit amendments as of right to initial postconviction motions in capital cases to prevent such abuses in the future.

If this Court is serious about curtailing delays in capital cases, this Court must be willing to enforce the rules of court, trial courts' orders, and to recede from precedent that serves no purpose but to cause unwarranted delays, such as *Davis*. Art. I, § 16(b)(10)(b), Fla. Const. (requiring all collateral attacks in capital cases be completed

within five years for capital cases).

On this basis alone, the third successive postconviction motion was properly summarily denied.

Summary denials of postconviction motions

A postconviction court may summarily deny a postconviction claim that is conclusively rebutted by the existing record. Fla. R. Crim. P.3.851(f)(5)(B). It is also proper for a postconviction court to summarily deny postconviction claims that are not cognizable, not retroactive, procedurally barred, untimely, or meritless under controlling precedent. *Valentine v. State*, 339 So.3d 311, 313 (Fla. 2022) (stating a postconviction court may summarily deny a claim that is legally insufficient citing *McDonald v. State*, 296 So.3d 382, 383 n.2 (Fla. 2020)), *cert. denied*, *Valentine v. Florida*, 143 S.Ct. 378 (2022); *Bogle v. State*, 288 So.3d 1065, 1069 (Fla. 2019) (affirming the summary denial of a successive postconviction claim on non-retroactivity grounds), *cert. denied*, *Bogle v. Florida*, 141 S.Ct. 389 (2020); *Morris v. State*, 317 So.3d 1054, 1071 (Fla. 2021) (stating a court may

summarily deny a postconviction claim that is procedurally barred citing *Matthews v. State*, 288 So.3d 1050, 1060 (Fla. 2019)); *Rodgers v. State*, 288 So.3d 1038, 1039 (Fla. 2019) (affirming a summary denial of a successive postconviction claim as untimely), *cert. denied*, *Rodgers v. Florida*, 141 S.Ct. 398 (2020); *Dailey v. State*, 329 So.3d 1280, 1287 (Fla. 2021) (affirming the summarily denial of a successive postconviction claim as untimely), *cert. denied*, *Dailey v. Florida*, 143 S.Ct. 272 (2022); *Mann v. State*, 112 So.3d 1158, 1162 (Fla.2013) (noting because the claims were purely legal claims that have been previously rejected by the Florida Supreme Court, the lower court properly summarily denied relief).

Contrary to opposing counsel's assertion, no evidentiary hearing was necessary to deny the untimely, procedurally barred, and meritless *Brady* claim.

The postconviction court's ruling

The postconviction court summarily denied the *Brady* claim concluding that the claim was procedurally barred; the prosecution

did not suppress Sidas' statement; and the impeachment of White was not material. (3rd succ. PC at 3901-03).

The postconviction court concluded that the *Brady* claim was procedurally barred because the defense knew of Sidas before trial and could have addressed the issue then. *Id.* at 3901 (citing *Morris v. State*, 317 So.3d 1054, 1071 (Fla. 2021) ("A *Brady* claim is procedurally barred if the defense knew of the evidence prior to trial and could have addressed the discovery issue then" citing *Jimenez v. State*, 265 So.3d 462, 481-82 (Fla. 2018)).

The postconviction court found no suppression of the deal by the prosecution, explaining that if the information is equally accessible to both the prosecution and the defense there is no suppression and therefore, no *Brady* violation. *Id.* at 3901 (citing *Peede v. State*, 955 So.2d 480, 497 (Fla. 2007) (stating that there "is no *Brady* violation where the information is equally accessible to the defense and the prosecution" quoting *Provenzano v. State*, 616 So.2d 428, 430 (Fla.1993)). The postconviction court observed that the State cannot be said to have withheld evidence that is "equally known to both parties." *Id.*

at 3902). The postconviction court pointed out that Stein knew Sidas personally because she was engaged to his roommate, Kyle White. *Id.* at 3902-03. They had all lived together in the trailer at one point. *Id.* at 3903. Because Stein knew that White would be a key witness against him at trial, the postconviction court reasoned, the defense had every incentive to interview Sidas before the trial and, if he had done so, the defense would have been aware of White's statement to Sidas about a deal before trial. *Id.*

The postconviction court also ruled that the impeachment of White with the deal was not material because Stein confessed to the robbery claiming that it was a robbery "gone bad." *Id.* at 3902 (citing Ex. A at 718-21). The postconviction court relied on *Foster v. State*, 614 So.2d 455, 458-59 (Fla. 1992). *Id.* at 3902.

Standard of review

The standard of review of a trial court's order summarily denying a postconviction claim is de novo. *Dillbeck v. State*, 357 So.3d 94, 98 (Fla. 2023) (stating that because "the circuit court denied these

claims without an evidentiary hearing, our review is de novo” citing *Bowles v. State*, 276 So.3d 791, 794 (Fla. 2019)), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023); *Bogle v. State*, 322 So.3d 44, 46 (Fla. 2021) (noting the Florida Supreme Court reviews a postconviction court’s decision to summarily deny a successive postconviction motion de novo citing *Duckett v. State*, 231 So.3d 393, 398 (Fla. 2017)).

Untimely due to lack of diligence

Florida’s rule of court governing postconviction motions in capital cases, rule 3.851(d)(1)(B), requires that a postconviction motion be filed within one year of the conviction and death sentence becoming final in the direct appeal. Stein’s convictions and two death sentences became final when the United States Supreme Court denied review from the direct appeal, which was on October 3, 1994. *Stein v. Florida*, 513 U.S.834 (1994) (No. 93-9144). Stein then had one year to timely file any postconviction motion which would be October of 1995. So, the one year for Stein to timely file a postconviction motion expired in 1995 but the current successive postconviction motion was not

filed until 2021. The third successive postconviction motion was filed more than two decades late.

There is an exception to the one-year time limit for postconviction claims that involve “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.” *Dillbeck v. State*, 304 So.3d 286, 287 (Fla. 2020) (citing Fla. R. Crim. P. 3.851(d)(2)(A), and holding a claim of newly discovered evidence of mitigation was untimely because petitioner had not been diligent in discovering the new evidence of mitigation), *cert. denied*, *Dillbeck v. Florida*, 141 S.Ct. 2733 (2021). To be considered timely filed, a claim “is required to have been filed within one year of the date upon which the claim became discoverable through due diligence.” *Id.* at 288; *see also Mungin v. State*, 320 So.3d 624, 626 (Fla. 2020) (concluding a successive motion raising a claim of newly discovered evidence was untimely because the new evidence was “discoverable through due diligence more than a year before the motion was filed”).

Here, as in *Mungin*, the amended third successive postconviction

motion, “offers no explanation” as to why Sidas could not have been interviewed “long ago.” Sandra Sidas, who was White’s girlfriend, moved to Jacksonville with Stein and White and was living in the trailer with them before murders. She was known to all at the time of the trial. There is no explanation as to why Sidas was not interviewed prior to July of 2021. Opposing counsel never attempted to explain why it took nearly three decades to talk with Sidas.

Diligence is required. Any postconviction motion must be filed within one year of the evidence becoming “discoverable,” not when it is actually discovered. *Dillbeck*, 304 So.3d at 288 (using the word “discoverable”); *Mungin*, 320 So.3d at 626 (using the word “discoverable”); *Dailey v. State*, 283 So.3d 782,788 (Fla. 2019) (using the word “discoverable”), *cert. denied*, *Dailey v. Florida*, 141S.Ct. 234 (Oct. 5, 2020) (No. 19-1094).

And it is the defendant’s burden to establish that the successive postconviction motion is timely. *Mungin*, 320 So.3d at 626 (citing *Rivera v. State*, 187 So.3d 822, 832 (Fla. 2015)). But CCRC-N never attempted to establish the timeliness of the successive postconviction

motion despite the State asserting the motion was untimely in both its answers filed below. Stein does not meet the diligence requirements of the exception regarding timeliness in the rule, so the successive postconviction motion remains untimely. Fla. R. Crim. P. 3.851(e)(2) (“A claim raised in a successive motion shall be dismissed . . . if the trial court finds the claim fails to meet the time limitation exceptions set forth in subdivision (d)(2)(A), (d)(2)(B), or (d)(2)(C).”).

The successive *Brady* claim is untimely.

Procedural bar

Additionally, the *Brady* claim is procedurally barred. Not only could have trial counsel obtained Sidas’ statement before trial or but postconviction counsel could have also obtained Sidas’ statement before filing the initial postconviction motion in 1995 or in the 2002 amendment and raised the *Brady* claim in the first postconviction litigation. At no point, in any court, has opposing counsel explained why the *Brady* claim was not raised in the initial postconviction litigation. Sidas was just as available in 1995 and 2002 as she was in

2021. Indeed, original postconviction counsel had more than seven years to speak with Sidas but did not. *Foster v. State*, 614 So.2d 455, 459 (Fla. 1992) (concluding that a successive *Brady* claim was procedurally barred because the defendant failed even allege that the facts could not have been known to him at the time of his earlier postconviction motions). The postconviction court properly denied the successive *Brady* claim as procedurally barred.

Speculative nature of the claim

The entire basis for the *Brady* claim is speculative on two grounds. “Postconviction relief cannot be based on speculative assertions.” *Dillbeck v. State*, 357 So.3d 94, 103 (Fla. 2023) (citing *Jones v. State*, 845 So.2d 55, 64 (Fla. 2003)), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023).

First, Sidas, in one version, told the federal investigator that White “wanted to make a deal” in which he would testify in exchange for not being charged with any crime. But White’s unilateral desire to make a deal does not mean that a deal — formal or informal — was ever, in fact, made. White may have simply talked to law enforcement

and the prosecution about Stein's and Christmas' plans to rob a Pizza Hut in the hope that telling the authorities everything he knew up front would keep him from being arrested. It does not mean there was a "deal." White's statement to her could have been more of an expression of his motive in coming clean right from the start to the authorities than being evidence of an actual "deal" with the prosecution.

Second, opposing counsel has never identified what crime White could be charged with committing, that the prosecution would forego as the basis of any deal. There was independent eyewitness testimony that White was not directly involved in the murders. An employee of the Edgewood Pizza Hut, Ronald Burroughs, testified at trial that there were only two customers remaining at closing time at the Pizza Hut the night of the murders and identified them as Stein and Christmas. *Stein*, 632 So.2d at 1363. So, White was not present at the time of the murders. White also refused to be involved with any of preliminary preparations for the robbery either, including refusing to allow Christmas to borrow his motorcycle to case the Pizza Hut before

the actual robbery. There was no basis to charge White with any crime. “Mere speculation is not sufficient to form the basis for postconviction relief.” *Gonzalez v. State*, 253 So.3d 526, 528 (Fla. 2018) quoting *Ellerbee v. State*, 232 So.3d 909, 918 (Fla. 2017) (citing *Derrick v. State*, 983 So.2d 443, 462 (Fla. 2008)). The successive postconviction claims are based on nothing but speculation.

Merits

To establish a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), a defendant must demonstrate that (1) favorable evidence which is exculpatory or impeaching, (2) was suppressed by the State, and (3) because the evidence was material, he was prejudiced. *Hutchinson v. State*, 343 So.3d 50, 53 (Fla. 2022) (quoting *Sweet v. State*, 293 So.3d 448, 451 (Fla. 2020)), *cert. denied*, *Hutchinson v. Florida*, 143 S.Ct. 601 (2023). As the postconviction court found, Stein fails two of the three prongs of *Brady*.

No suppression

As the postconviction court correctly found, Sidas’ statement was not suppressed by the prosecution. The prosecution did not possess

Sidas' statement that was made in 2021 at the time of the trial in 1991. Sidas' statement did not exist at the time of the trial. Her statement was not made until decades later. The prosecution cannot suppress what it does not have. *Hutchinson v. State*, 343 So.3d 50, 53 (Fla. 2022) (affirming the summary denial of a *Brady* claim because there was no allegation the FBI records were in the possession of the State citing *Allen v. State*, 854 So.2d 1255, 1259 (Fla. 2003)).

In *Foster v. State*, 614 So.2d 455, 460 (Fla. 1992), this Court rejected a *Brady* claim regarding the mental health records of two witnesses who had testified at trial against Foster. A day before the resentencing, the defense filed a motion relying on *Brady* asking the trial court to require the prosecution to disclose the two witnesses' mental health records. *Id.* at 460. The prosecutor objected stating the State did not have the records and had no better access to the records than defense counsel. This Court noted that it was not the prosecution's obligation to investigate possible impeachment for the defense.

While opposing counsel characterizes the postconviction court's

reasoning as “bizarre,” what the postconviction court meant was that Sidas herself was available to both sides at the time of the trial as well at the time of the initial postconviction litigation. IB at 25. The postconviction court was pointing out that the defense could have obtained the statement from Sidas before trial, just as the CHU-N investigator did many decades later, simply by going to talk to Sidas.

As the postconviction court properly found, the prosecution did not suppress Sidas’ statement, and therefore, there was no violation of *Brady*.

Not material

Any marginal value of impeaching White with a “deal” to testify truthfully in exchange for little or no benefit would be “too little” and “too weak” to be material. *Turner v. United States*, 582 U.S. 313, 326 (2017); *Sweet v. State*, 293 So.3d 448, 451-52 (Fla. 2020) (concluding any discrepancy in the jail records was “simply too little and too weak to be material under *Brady* standards” and did not “put Sweet’s whole case in such a different light as to undermine confidence in the verdict), *cert. denied*, *Sweet v. Florida*, 141 S.Ct. 909 (2020); *Riechmann v. Fla, Dep’t of Corr.*, 940 F.3d 559, 582 (11th Cir. 2019) (affirming the

state courts' determination that the withheld witness' statements were not material under *Brady* because the statements came "nowhere close to undermining the state's powerful evidence of Riechmann's motive").

A court considering the materiality prong of *Brady* considers the withheld evidence in the context of the entire record. *Turner*, 582 U.S. at 326 (citing *United States v. Agurs*, 427 U.S. 97, 112 (1976)). As in *Sweet*, any impeachment of White would be "simply too little and too weak to be material under *Brady*" and cannot reasonably be taken to put Stein's whole case in such a different light as to undermine confidence in the verdict or the sentence. *Sweet*, 293 So.3d at 452.

As this Court observed, in the initial postconviction appeal, the case against Stein was "strong and un rebutted" and included "Stein's confession to the robbery." *Stein v. State*, 995 So.2d 329, 338 (Fla. 2008). Stein's confession to a "robbery gone bad" amounted to a confession not only to armed robbery but to felony murder as well. Confessions are "probably the most probative and damaging evidence" that can be admitted against a defendant and have a "profound impact" on the jury. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).

A jury would not be persuaded by any impeachment of White with a deal when deciding a case with a confession by the defendant; eyewitness testimony that Stein and Christmas were the only two customers remaining in the restaurant at closing time on the night of murders; and where the fingerprints of the co-perpetrator were located on the check inside the restaurant.

Nor would impeaching White with a deal be material to either the CCP aggravator or the avoid arrest aggravator. While White's testimony certainly helped establish both of those aggravators, the circumstances also established both of those aggravators. Another employee, Ronald Burroughs, testified at trial that when he left for the night at 11:15 p.m., the night of the murders, that there were only two customers remaining in the restaurant and he identified those customers as Steven Stein and Marc Christmas. *Stein*, 632 So.2d at 1363. Christmas was a former employee of the Edgewood Avenue Pizza Hut. So, either one or both of the shift supervisors, Dennis Saunders and Bobby Hood, would be able to identify Christmas as one of the robbers from his prior employment. Stein and Christmas

could not just rob the Pizza Hut without being identified as the robbers. Moreover, both victims had been ordered into the men's bathroom and were seated on the floor when they were shot multiple times. These were executions, not a "robbery gone bad," as Stein claimed in this confession. The circumstances of both Stein and Christmas being former or current employees of Pizza Hut and the manner of the killings support the conclusion that the original plan was to both rob and kill which support the CCP aggravator. And there was no way to avoid arrest other than to kill both of the shift supervisors. The jury would have found both the CCP and avoid arrest aggravators based on these facts and circumstances regardless of any impeachment of White.

Additionally, two of the other aggravators did not depend in any manner on White's testimony. Both the felony-murder aggravator based on the armed robbery which was established by Stein's own confession and the prior-violent-felony aggravator for the contemporaneous murder of the two victims would be unaffected by any impeachment of White. Neither of these two aggravators could be

undermined in any manner by impeaching White. And the prior violent felony aggravator, especially when it involves another murder, is one of the most serious aggravating factors. *Craft v. State*, 312 So.3d 45, 56 (Fla. 2020) (listing HAC, CCP, and prior-violent-felony aggravators as “three of the most serious and weighty aggravators in the capital sentencing scheme” citing *Bush v. State*, 295 So.3d 179, 215 (Fla. 2020)), *cert. denied*, *Craft v. Florida*, 142 S.Ct. 490 (2021). Two of the four aggravators, including one of the most serious aggravators, cannot be undermined at all with this impeachment.

Any deal with White was not material to either the convictions or death sentences and therefore, there was no violation of *Brady*.

The postconviction court properly summarily denied the *Brady* claim.

ISSUE II

WHETHER THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED THE SUCCESSIVE POSTCONVICTION CLAIM OF NEWLY DISCOVERED EVIDENCE OF IMPEACHMENT FOR LACK OF DILIGENCE AND FOR NOT BEING LIKELY TO RESULT IN A DIFFERENT OUTCOME? (Restated)

Stein also asserts a newly discovered evidence claim of a deal between the prosecution and White, based on Sidas' statement. Stein, however, fails both prongs of the test for newly discovered evidence of *Jones v. State*, 709 So.2d 512 (Fla. 1998). As the postconviction court found, Stein was not diligent in raising this claim which has been available since before the trial. White's girlfriend, Sandra Sidas, was known to all at the time of the trial in 1991. Nor would the impeachment of White with the "deal" at a retrial result in an acquittal in light of Stein's confession to committing the two murders. Nor would the impeachment result in a life sentence. As the postconviction court concluded, the "new" evidence of impeachment would not have produced a different outcome. The trial court properly summarily denied the successive newly discovered evidence of impeachment. The postconviction properly summarily denied the

newly discovered evidence claim.

The postconviction court's ruling

The postconviction court summarily denied the third successive postconviction motion. (3rd succ. PC at 3899-4857). The postconviction court addressed the newly discovered evidence claim finding again that Stein was not diligent and alternatively, that the testimony or cross-examination regarding the deal “would not produce a different outcome.” (3rd succ. PC at 3903).

Untimely due to lack of diligence

The newly discovered evidence claim regarding Sidas' statement is untimely. Stein had the burden of establishing the timeliness of the claim of newly discovered evidence. *Dillbeck v. State*, 357 So.3d 94, 101 (Fla. 2023) (citing *Mungin v. State*, 320 So.3d 624, 626 (Fla. 2020)), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023). But, as in *Mungin*, Stein “offers no explanation” as to why Sidas could not have been interviewed “long ago.” *Id.* at 626.

In *Dillbeck v. State*, 357 So.3d 94, 100-02 (Fla. 2023), this Court found a claim of newly discovered evidence regarding the statements of five witnesses was untimely and affirmed the postconviction court's summary denial of the claim. Dillbeck raised a claim of newly discovered evidence based on the statements of five witnesses who recounted his "bizarre" behavior at the time of the shooting that he obtained decades after the shooting. *Id.* at 101. But three of the five witnesses had given statements to law enforcement at the time of the shooting and the fourth witness was married to one of those witnesses. *Id.* This Court explained that Rule 3.851(d)(2)(A) precludes filing a postconviction claim based on newly discovered evidence more than one year after the conviction and sentence of death become final unless due diligence in seeking the new evidence is established. *Id.* at 101. Dillbeck argued that due diligence only requires reasonable efforts. He claimed that the statements given at the time of the shooting did not alert him to the particular information about his mental state at the time of the shooting but this Court explicitly disagreed. But this Court concluded that the newly discovered

evidence claim was raised “decades late.”

The reasoning of this Court in *Dillbeck* regarding the untimeliness of the claim of newly discovered evidence applies equally to the claim of newly discovered evidence in this case. Like most of the witnesses at issue in *Dillbeck*, who were known before Dillbeck’s capital trial, Sidas was known prior to Stein’s trial. Stein may not wait over thirty years to speak with Sidas without having the claim being considered untimely due to his tardiness. He must be diligent in seeking the new evidence and he was not.

This claim of newly discovered evidence is untimely. Fla. R. Crim. P. 3.851(e)(2) (“A claim raised in a successive motion shall be dismissed . . . if the trial court finds the claim fails to meet the time limitation exceptions set forth in subdivision (d)(2)(A), (d)(2)(B), or (d)(2)(C).”).³

³ All of the State’s arguments regarding made in the *Brady* claim section of this brief, regarding the abuse of the amendment process, the procedural bar, and the speculative nature of the claims, apply equally to the newly discovered evidence claim, but, in the interest of brevity, the State focuses on the untimeliness of the newly discovered evidence claim and its lack of merit.

Merits

The claim of newly discovered evidence of impeachment of White is meritless. Stein fails both prongs of the test for newly discovered evidence.

The *Jones* test for newly discovered evidence

The test for newly discovered evidence, established by this Court in *Jones v. State*, 709 So.2d 512 (Fla. 1998), requires that: (1) the evidence be unknown at the time of the trial and not discoverable with diligence; and (2) the evidence would be likely to result in an acquittal at a retrial. *Hutchinson v. State*, 343 So.3d 50, 53 (Fla. 2022) (affirming the summary denial of a claim of newly discovered evidence), *cert. denied*, *Hutchinson v. Florida*, 143 S.Ct. 601 (2023). While a claim of newly discovered evidence may consist of new evidence of impeachment of a State's witness, that the new evidence is only impeaching weighs against granting a new trial. *Morris v. State*, 317 So.3d 1054, 1063 (Fla. 2021) (citing *Jones*, 709 So.2d at 521).

Stein asserts both that he would be acquitted of the three convictions and that his death sentence would be reduced to a life

sentence based on the new evidence of impeachment. The *Jones* test for newly discovered evidence also applies to the penalty phase and when the sentence is at issue, the second prong requires a determination of whether the newly discovered evidence would probably yield a less severe sentence at any resentencing, which, in a capital case, means a life sentence. *Brown v. State*, 304 So.3d 243, 273 (Fla. 2020) (citing *Swafford v. State*, 125 So.3d 760, 767 (Fla. 2013)).

There is a preliminary dispute between the parties regarding one aspect of claims of newly discovered evidence claims. A postconviction court is required to consider “all” newly discovered evidence which would be admissible and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial. *Brown*, 304 So.3d at 273 (quoting *Torres-Arboleda v. Dugger*, 636 So.2d 1321, 1324-25 (Fla. 1994)). But, contrary to opposing counsel’s argument, neither this Court striking of HAC aggravator in the direct appeal nor the co-perpetrator’s life sentence would be admissible evidence at any new penalty phase. IB

at 39.

While the State would certainly be precluded from seeking the HAC aggravator at any resentencing, an appellant court's decision is not "evidence." *Stein v. State*, 632 So.2d 1361, 1367 (Fla. 1994) (holding the murders were not HAC because they were "nearly instantaneous" and were the result of gun shots). This Court's direct appeal opinion is not a fact, especially not when the HAC aggravator would not be at issue at any new penalty phase and therefore, would not be relevant. The jury at any new penalty phase would not be told that the trial judge found the HAC aggravator at the first sentencing but the Florida Supreme Court later struck that aggravator.

And the co-perpetrator's sentence is not admissible at a penalty phase either. Penalty phases "are not evidentiary free-for-alls," as opposing counsel would have it. *United States v. Tsarnaev*, 142 S.Ct. 1024, 1036-41 (2022) (affirming, in a federal capital case, the district court's refusal to admit evidence of his older brother's involvement in a prior triple homicide as mitigation). The United States Supreme Court in *Tsarnaev* rejected as "extreme" any reading of *Lockett v. Ohio*,

438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982) as constitutionally requiring any evidence be admitted at a penalty phase if labeled as mitigation. *Tsarnaev*, 142 S.Ct. at 1037-38. A co-perpetrator's sentence does not meet the constitutional definition of mitigation. It is not an "aspect of a defendant's character or record and any of the circumstances of the offense." *Eddings*, 455 U.S. at 118 (1982); *Lockett*, 438 U.S. at 604 n.12 (explaining that "nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense"). Evidence that does not relate to the "defendant's character, prior record, or the circumstances of his offense" is not within the constitutional definition of mitigation. *Fauber v. Davis*, 43 F.4th 987, 1007-08 (9th Cir. 2022) (holding a plea offer of a life sentence was not constitutionally relevant mitigating evidence because a plea offer is not an "aspect of a defendant's character or record or any of the circumstances of the offense," which is the traditional definition of mitigation). A co-perpetrator's sentence has no actual connection to the defendant under the constitutional

definition of mitigation.

A co-perpetrator's sentence does not fall within the statutory definition either. § 921.141(1), Fla. Stat. (2022) (providing that at the penalty phase, "evidence may be presented as to any matter that the court deems relevant to the *nature of the crime* and *the character of the defendant.*") (emphasis added). While there is a minor accomplice mitigator, that mitigator concerns the defendant's own role and does not refer at all to a co-perpetrator's sentence. § 921.141(7)(d), Fla. Stat. (2022). A co-perpetrator's sentence has no actual connection to the defendant under either the constitutional or statutory definition of mitigation.

Christmas was originally sentenced to death. *Christmas v. State*, 632 So.2d 1368 (Fla. 1994). While Christmas' jury recommended a life sentence, the trial court overrode that recommendation which this Court then reversed and reduced his original death sentence to a life sentence. But that has little relevance to the appropriate sentence for Stein. § 921.141(1), Fla. Stat. (2022) (providing that at the penalty phase, "evidence may be presented as to any matter that the court

deems *relevant* to the nature of the crime and the character of the defendant.”) (emphasis added). Christmas’ sentence is not relevant to Stein’s sentence.

Nor does a co-perpetrator’s lesser sentence intrinsically mean the two defendants’ sentences are disparate. One of the two defendants may have been more culpable, such as being the actual triggerman, as was Stein in this case. *Stein*, 995 So.2d at 342 (noting there was “substantial evidence that Stein was the triggerman” and “the record reflects strong evidence that Stein was the triggerman”). And, even if the defendants were equally culpable, one defendant could have compelling mitigation that the other defendant lacks resulting quite justifiably in different sentences.

And admitting a co-perpetrator’s sentence as mitigation raises concerns about turning the penalty phase of one defendant into a penalty phase of the other defendant. If a defendant is permitted to introduce his co-perpetrator’s lesser life sentence as mitigation, the prosecution is entitled to explore the other possible explanations for the lesser sentence, such as the co-perpetrator having less

aggravation. The co-perpetrator may, for example, have no prior convictions whereas the defendant does have conviction for prior violent felonies. The co-perpetrator may have some combination of lesser aggravation and more mitigation. The result of allowing evidence of the co-perpetrator's sentence would be a penalty phase within a penalty phase. *Twilegar v. State*, 42 So.3d 177, 195 (Fla. 2010) ("To open the door to evidence about an unrelated case was to create a trial within a trial; there was a risk that the trial would be needlessly lengthened and that the additional evidence would obscure the discovery of the truth").

And, even if a co-perpetrator's sentence would be admissible as mitigation in general, it would not be considered as part of any newly discovered evidence claim in this particular case. Any such argument regarding the co-perpetrator's sentence is precluded by the law-of-the-case doctrine. *Zeigler v. State*, 116 So.3d 255, 258 (Fla. 2013). Stein raised Christmas' life sentence in the amended initial postconviction motion he filed in 2002 and the denial of the claim of newly discovered evidence of Christmas' life sentence was affirmed by this Court in

2008. *Stein*, 995 So.2d at 332 (listing claims raised in the 2002 amended postconviction motion); *Stein v. State*, 995 So.2d 329, 341-42 (Fla. 2008) (rejecting a claim of newly discovered evidence of the life sentence). This Court stated that there was “substantial evidence that Stein was the triggerman in this case” and therefore, more culpable. *Stein*, 995 So.2d at 342. This Court concluded that the newly discovered evidence of the codefendant’s life sentence “would not entitle Stein to a life sentence.” *Id.* at 342. Stein may not include in “all” the evidence that should be taken into consideration by this Court in deciding the current claim of newly discovered evidence, a claim that has been previously rejected by this Court. A claim of newly discovered evidence may not be employed as a means to relitigate prior findings of fact or prior determinations of law. This Court’s rejection of the first claim of newly discovered evidence regarding Christmas’ life sentence was both a finding of fact, *i.e.*, Stein was the triggerman and a determination of law, *i.e.*, Stein was not entitled to a life sentence based on Christmas’ life sentence. The aspect of the current claim of newly discovered evidence regarding the

co-perpetrator's sentence may not be considered by this Court.

What opposing counsel leaves out of his arguments regarding considering “all” admissible evidence is that a court considering a claim of newly discovered evidence must also consider the newly discovered evidence of guilt. As this Court has explained, in rejecting a claim that the trial court erred by considering new evidence of guilt of mitochondrial DNA (mDNA), a postconviction court addressing a claim of newly discovered evidence is required to consider “all admissible evidence and evaluating whether a new trial is warranted” which “includes new evidence of guilt.” *Green v. State*, 975 So.2d 1090, 1100-01 (Fla. 2008); *cf. Bogle v. State*, 288 So.3d 1065, 1069 (Fla. 2019) (stating that a court determining the second prong of *Jones* regarding a possible acquittal must evaluate the importance of the newly discovered evidence “in the broader context of any admissible evidence that could be introduced at a new trial” citing *Duckett v. State*, 231 So.3d 393, 399 (Fla. 2017). The admissible evidence that could be introduced at any new trial includes newly discovered evidence of guilt as well as newly discovered evidence of impeachment.

On the night of the murders, at about 9:30 p.m., Stein and Christmas left the trailer they shared with White. They took Stein's Marlin .22 caliber rifle with them saying that they were going to sell the rifle to Christmas' father. *Stein*, 632 So.2d at 1363; *Christmas v. State*, 632 So.2d 1368, 1369 (Fla. 1994) (stating at about 9:30 p.m. Christmas and Stein left, taking with them Stein's .22 caliber rifle). Christmas' father, however, testified that he did not buy the rifle from Stein that night. *Stein*, 632 So.2d at 1363 (noting Christmas' father testified that Stein and Christmas did not come to his house on the night of the murders). At Stein's trial, a ballistic expert testified that the casings from the Pizza Hut's bathroom where the murders occurred matched the casings recovered from outside the trailer that Stein, Christmas, and White shared. *Id.* But the actual murder weapon had not been recovered at the time of Stein's trial but the .22 Marlin rifle was recovered by the time of Christmas' trial and would now be available at any retrial in Stein's case. At Christmas's trial, FDLE Analyst Warniment testified that the cartridges and casting collected from the murder scene matched Stein's Marlin rifle.

Christmas, 632 So.2d at 1369 (noting a “ballistics expert testified that the casings found at the scene and the casings found at the residence were fired from the same firearm”). In other words, the prosecution would now have the actual murder weapon at any retrial of this case which it did not have at the first trial. There is new additional evidence of Stein’s guilt.

While this new evidence is not of particular significance given the other ballistic evidence already presented at the first trial, it is additional evidence of guilt. The State’s ballistics evidence of guilt would be stronger at any retrial. So, the weak impeachment of White must be balanced with the additional evidence of Stein’s guilt in the form of the murder weapon being recovered, that the State could present at any retrial.

While this Court must consider all of the admissible evidence when addressing a claim of newly discovered evidence that includes newly discovered evidence of guilt as well.

The defendant must meet both prongs of the *Jones* test for claims of newly discovered evidence. *Matthews v. State*, 288 So.3d 1050, 1058

(Fla. 2019). Stein, however, fails both prongs. He was not diligent and the new evidence of impeachment of White would not result in an acquittal or a life sentence.

Not diligent

The first prong of the *Jones* test for newly discovered evidence requires that “the evidence must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known of it by the use of diligence.” *Matthews*, 288 So.3d at 1058. But White’s girlfriend, Sandra Sidas, was well known to Stein and the defense at the time of the trial. Sidas had moved to Jacksonville with Stein and White in 1990, shortly before the murders, and she had lived with Stein and White at first after moving to Jacksonville. Stein was not diligent in speaking with Sidas before the trial, much less in the decades since the trial.

Opposing counsel admits that Sidas was listed as White’s girlfriend on a police report but then argues that they had no reason to believe she had relevant information. IB at 35-36. But Sidas was

not just some random unknown person in a police report. Sidas had moved to Jacksonville with Stein and White shortly before the murders and she had lived with them after moving to Jacksonville. And the conversation that White testified to at trial regarding Stein and Christmas planning to rob a Pizza Hut occurred at that same residence. Furthermore, a defense attorney or a postconviction attorney who receives a police report cannot just assume a person listed in the report has no relevant information without speaking to that person and be considered diligent.

Opposing counsel's reliance on *Waterhouse v. State*, 82 So.3d 84, 103 (Fla. 2012), is misplaced. IB at 34. *Waterhouse* involved a police report that stated a witness did not remember when the defendant or the victim left a lounge. *Id.* at 90. But the witness later said that the police report, which defense counsel relied on, did not accurately reflect his statement to the police. This Court reasoned that diligence is not required if defense counsel relied on an inaccurate police report. But the holding in *Waterhouse* depended on inaccuracies being present in the reports. *Rivera v. State*, 187 So.3d 822, 833-34 (Fla. 2015)

(distinguishing *Waterhouse* on the basis that the reports did not contain incorrect information). Here, there is no misleading police report. So, *Waterhouse* does not apply.

Opposing counsel's reliance on *Aron v. United States*, 291 F.3d 708, 712 (11th Cir. 2002), for the proposition that diligence only requires reasonable efforts, is misplaced. IB at 35. The State agrees that diligence only requires reasonable efforts, not extraordinary efforts. But not talking to a person known to have moved to Jacksonville with the defendant and who had lived with both him and her boyfriend is not making reasonable efforts. Here, Stein simply did not bother to talk to Sidas until thirty years after the trial. Stein was required to be diligent and he was not.

As the postconviction court found, Stein was not diligent in seeking out Sidas and discovering the new information regarding White's statements to her. Stein fails the first prong of the *Jones* test for newly discovered evidence.

Not result in an acquittal or a life sentence

The second prong of *Jones* requires that the newly discovered

evidence would probably result in an acquittal or a life sentence. *Brown v. State*, 304 So.3d 243, 274 (Fla. 2020) (noting the second prong of *Jones* is “whether the newly discovered evidence would probably result in an acquittal or a lesser sentence on retrial” citing *Jones*, 709 So.2d at 521). Stein asserts both that he would be acquitted of the three convictions and that his death sentence would be reduced to a life sentence.

First, any deal would not function as powerful impeachment of White. *Marshall v. State*, 854 So.2d 1235, 1248-51 (Fla. 2003) (rejecting a *Brady* claim where the alleged undisclosed deal was a promise to house the two witnesses together in exchange for their testimony because of its “limited impeachment value”). If White was impeached with a deal, the prosecutor could rehabilitate him with the fact that White could not be charged with any crime. This is weak tea impeachment, at best. *Morris*, 317 So.3d at 1063 (stating that the new evidence is only impeaching weighs against granting a new trial).

Regardless of any impeachment of White, Stein would still be convicted of the two murders and armed robbery based on his own

confession to law enforcement. Stein admitted to committing the murders during what he described as a “robbery gone bad” which amounts to a confession not only to armed robbery but to both counts of felony murder as well. There is little, to no, probability that a jury would acquit Stein at a retrial in light of his confession. Stein would have been convicted of both of first-degree murders and armed robbery without White’s testimony. Stein’s own confession was more than sufficient to convict him. *State v. Murray*, 262 So.3d26, 37 (Fla. 2018) (denying a claim of newly discovered evidence based on impeachment of a state witness concluding that the additional impeachment evidence would not produce an acquittal on retrial)

Nor would the impeachment of White result in a life sentence. White’s testimony certainly helped establish both the CCP and the avoid arrest aggravators but there were strong reasonable inferences establishing both aggravators too. Another employee, Ronald Burroughs, testified at trial that when he left for the night at 11:15 p.m., the night of the murders, that there were only two customers remaining in the restaurant and he identified the customers as Steven

Stein and Marc Christmas. *Stein*, 632 So.2d at 1363. Christmas was a former employee of the Edgewood Avenue Pizza Hut. So, either one or both of the shift supervisors, Dennis Saunders and Bobby Hood, would be able to identify Christmas as one of the robbers from his prior employment. Stein and Christmas could not just rob the Pizza Hut without being identified as the robbers. Moreover, both victims had clearly been ordered into the men's bathroom and were seated on the floor when they were shot multiple times. These were executions, not a "robbery gone bad," as Stein claimed in this confession.

The circumstances of both Stein and Christmas being former or current employees of Pizza Hut and the manner of the killings support the conclusion that the original plan was to both rob and kill the employees which support the CCP aggravator. And there was no way for Christmas to avoid arrest other than for them to kill both of the shift supervisors. The jury would have found both the CCP and avoid arrest aggravators based on these facts and circumstances regardless of any impeachment of White.

Furthermore, there were two other aggravators supporting the

death penalty which did not depend in any way on White's testimony. Both the felony-murder aggravator based on the armed robbery which was supported by Stein's own confession and the prior-violent-felony aggravator for the contemporaneous murder of the two victims existed due to the actual circumstances of the crime. Neither of these two aggravators could be undermined in any manner by impeaching White. And the prior violent felony aggravator, especially when it involves another murder, is one of the most serious aggravating factors. *Craft v. State*, 312 So.3d 45, 56 (Fla. 2020) (listing HAC, CCP, and prior-violent-felony aggravators as "three of the most serious and weighty aggravators in the capital sentencing scheme" citing *Bush v. State*, 295 So.3d 179, 215 (Fla. 2020)), *cert. denied*, *Craft v. Florida*, 142 S.Ct. 490 (2021). Two of the four aggravators, including one of the most serious aggravators, cannot be undermined at all with this impeachment. Impeaching White would not have resulted in a life sentence.

As the postconviction court concluded, any impeachment of White would not result in a different outcome. Stein also fails the

second prong of the *Jones* test.

Stein fails both prongs of *Jones* and therefore, the claim of newly discovered evidence of impeachment is meritless.

Failure to hold a *Huff* hearing

Opposing counsel asserts this Court should remand this case for a *Huff* hearing. IB at 25; *Huff v. State*, 622 So.2d 982 (Fla. 1993). No remand is necessary because *Huff* hearings are not mandatory in successive postconviction litigation.

The rule of court governing postconviction motions in capital cases requires a case management conference to allow counsel to present oral argument regarding which claims, if any, should be explored at an evidentiary hearing, commonly referred to as a *Huff* hearing. Fla. R. Crim. P. 3.851(f)(5)(B) (stating: within “30 days after the state files its answer to a successive motion for postconviction relief, the trial court shall hold a case management conference.”). But the failure to hold a *Huff* hearing in connection with a successive postconviction motion is either not error at all or is harmless error.

As this Court has noted, this Court’s “holding in *Huff* was limited

to initial death penalty postconviction motions.” *Groover v. State*, 703 So.2d 1035, 1038 (Fla. 1997) (citing *Huff*, 622 So.2d at 983) (emphasis in original). So, while it may be the “better practice” to conduct a *Huff* hearings in successive postconviction litigation, a *Huff* hearing is “not required” in the successive context. *Groover*, 703 So.2d at 1038; see also *Taylor v. State*, 260 So.3d 151, 157 (Fla. 2018) (discussing *Groover*); *Boyd v. State*, 324 So.3d 908, 913 (Fla. 2021) (stating the requirement of a *Huff* hearing “‘applies only to initial, not successive postconviction motions” citing *Taylor*). No *Huff* hearing was required before summarily denying this third successive postconviction motion.

Alternatively, this Court has repeatedly held the failure to hold a *Huff* hearing in successive postconviction litigation is harmless error.⁴ In *Boyd v. State*, 324 So.3d 908, 913 (Fla. 2021), this Court

⁴ *Marek v. State*, 14 So.3d 985, 999 (Fla. 2009) (concluding the failure to hold a *Huff* hearing on a successive postconviction motion that was “legally insufficient” and “without merit” was harmless); *Archer v. State*, 151 So.3d 1223 (Fla. 2014) (concluding the failure to conduct a *Huff* hearing on a successive postconviction motion that was “insufficiently pleaded, facially insufficient, and untimely” was harmless); *Taylor v. State*, 260 So.3d 151, 157-58 (Fla. 2018) (observing that “we have repeatedly emphasized that the failure to hold a *Huff* hearing on legally insufficient or meritless successive postconviction motions is harmless error” and concluding the failure to hold a *Huff* hearing on a second successive postconviction motion was harmless); *Rivera v. State*, 260 So.3d 920, 926

noted that the Court had previously held “that any error in failing to hold a *Huff* hearing on a successive postconviction motion is harmless if the motion is legally insufficient to warrant either relief or an evidentiary hearing.” *Id.* at 913 (citing *Taylor*, 260 So.3d at 157-58). This Court then explained this means a postconviction court’s failure to hold a *Huff* hearing on a successive postconviction motion “is not reversible error in itself.” *Boyd*, 324 So.3d at 913. And whether a capital defendant is entitled to relief depends on whether his successive postconviction motion was sufficient to require either an evidentiary hearing or a new trial. Because Boyd’s successive postconviction motion did not require an evidentiary hearing or a new trial, the trial court summarily denying the successive claims without a *Huff* hearing was not reversible error. *Id.* at 913.

While the State filed a motion to conduct a *Huff* hearing, it did so based on its concern about the delay. (3rd succ. PC at 124-127). The State had filed its answer to the original successive motion many months earlier and had also filed its answer to the amended

(Fla. 2018) (same in a second successive postconviction motion).

successive motion four months before it filed the motion to hold a *Huff* hearing. The State's motion explicitly stated its concern was that the federal habeas litigation was stayed until resolution of the successive postconviction litigation in state court. (3rd succ. PC at 126). The State's concern was to complete the state court litigation as quickly as possible, not particularly that a *Huff* hearing be held. The State filing a motion to attempt to keep a capital case on track, especially one where the federal habeas litigation is stalled based on the state court litigation, does not amount to the State taking inconsistent positions on whether *Huff* hearings are mandatory in successive postconviction litigation. They are not and the State did not say they were in its motion.

No *Huff* hearing was required before summarily denying the third successive postconviction motion and alternatively, because no evidentiary hearing was required for either of the two issues, any error in failing to conduct a hearing was harmless.

Accordingly, the trial court properly summarily denied the third successive postconviction motion.

CONCLUSION

The State requests that this Court affirm the trial court's summary denial of the third successive postconviction motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via the e-portal to DAWN A. MACREADY, Assistant CCRC-N, 1004DeSoto Park Drive, Tallahassee FL 32301; phone: (850) 487-0922 ext. 111; email:Dawn.Macready@ccrc-north.org and DREW A. SENA, Assistant CCRC-N, 1004DeSoto Park Drive, Tallahassee, FL 32301; phone: (850) 487-0922; email:Drew.Sena@ccrc-north.org this 5th day of June, 2023.

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