IN THE SUPREME COURT OF FLORIDA

JOEL DALE WRIGHT,

Appellant,

v. **CASE NO. SC00-1389**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR PUTNAM COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Joel Dale Wright appeals the denial of his Florida Rules of Criminal Procedure 3.850 motion after an evidentiary hearing held on March 3, 1997, March 7, 1997 and December 8, 1997 pursuant to remand from this Honorable Court on May 9, 1991 in *Wright v. State*, 581 So. 2d 882 (Fla. 1991). 581 So. 2d at 887. This Court ordered a hearing on a single issue, to-wit: "[W]hether Wright's public defender's service as a special deputy sheriff affected his ability to provide effective legal assistance." This remand issue will sometimes hereinafter be referred to as the Howard Pearl Special Deputy issue.

On September 1, 1983, Wright was convicted of the first degree murder of 75 year old Lima Page Smith on February 5, 1983 in her home in Putnam County, Florida. *Wright v. State*, 473 So. 2d 1277, 1278 (Fla. 1985). He was also convicted of sexual battery, burglary of a dwelling, and second-degree grand theft. *Id.* He was sentenced to death by Judge Robert Perry on September 23, 1983 subsequent to a nine to three death recommendation from his penalty phase jury. *Id.* at 1279. This Court upheld his convictions and sentences. *Id.* at 1282. Certiorari was denied on January 21, 1986. *Wright v. Florida*, 474 U.S. 1094 (1986).

On February 22, 1988, Wright filed his first Rule 3.850 motion for postconviction relief. He raised numerous claims, and an evidentiary hearing was held on some of them. Judge Robert Perry

denied the motion, and Wright appealed. 581 So. 2d at 882. This Court found "that the trial court properly denied relief on each of the claims made in Wright's initial rule 3.850 motion" with the exception of the Howard Pearl Special Deputy issue. *Id.* at 886.

The evidentiary hearing after remand began on March 3, 1997. Wright's first witness was retired Captain Clifford Miller, who had been with the Putnam County Sheriff's Office for about ten years at the time of the instant murder. (R 2220-21, 2223). He was the supervisor of the homicide department. (R 2221). He identified Taylor Douglas as the lead detective assigned to the case. (R 2221-22). He identified Sergeant David Stout as the evidence custodian, who worked the crime scene. (R 2229).

Collateral Defense Counsel McClain wanted to inquire about polygraphs given to various suspects. (R 2237). The prosecutor pointed out that the matter was an issue on appeal from the original Rule 3.850 proceeding, and therefore, "collateral counsel for Wright clearly knew that Jackson and Strickland had passed polygraph exams." (R 2243, 2246). He asserted that any demand for the production of the polygraphs "should have been litigated during the first Rule 3.850 proceeding, and such litigation is procedurally barred in this second successive motion." (R 2246). Judge Nichols ruled that the issue of "[w]ho was polygraphed?" was covered in the prior hearing." (R 2241).

Judge Nichols told Mr. McClain to limit his inquiry to "what

should have been asked and could have been asked in 1988 of this witness as to his involvement and what he did and what he didn't do." (R 2253-54). The judge ruled that the Defense should "start with . . . what you found in '91 that you hadn't had before and let's go from there." (R 2257). Captain Miller was dismissed subject to recall. (R 2260-61).

Wright called John Robinson, the evidence custodian at the Putnam County Sheriff's Office. (R 2261). Mr. Robinson found no records on Henry Jackson or William Strickland. (R 2262, 2263). He found "a game and fish case" from June of '96 on Charles Westberry. (R 2262). He related the results of searches on others also requested by the Defense. (R 2263). These records were "data entered" in 1990, and records from cases closed prior to 1990 were not included in the computer entries. (R 2264). The pre-computer case material "can only be referenced by case number." (R 2267). He did not search pre-computerization files for the listed persons, including Jackson, Westberry, and Strickland. (R 2281). An inventory number would be necessary to make any pre-computerization search. (R 2300).

On March 4, 1997, Defense Counsel informed the court that "Judge Perry is in the intensive care unit of the local hospital." (R 2347, 2348). He moved "for a continuation of that issue" because he felt it "inappropriate to try and drag him into court or put him through the stress of that questioning, even over there."

(R 2348). The court granted the continuance. (R 2348).

On March 5, 1997, Defense Counsel informed the court that the State and the Defense had "worked out a stipulation as to the Howard Pearl issue" and only Mr. Pearl would be called at the evidentiary hearing on that claim. (R 2351, 2853). He added that he also expected Mr. Pearl to testify to "other claims," specifying "Claim One and Claim Two of the 3.850 files (sic) back in 1992." (R 2353). Despite Defense Counsel's request to postpone the hearing even as to Mr. Pearl, the judge ruled that it go forward because he was "a little concerned about Mr. Pearl's health problems" as well as Judge Perry's.[1] The judge worried that "if we put this off we may never have it." (R 2360). So, he denied the Defense motion to continue as to Mr. Pearl. (R 2360).

On March 7, 1997, Defense Counsel argued that the evidentiary hearing was to encompass issues beyond the Howard Pearl Special Deputy issue, the Judge Perry Special Deputy issue, and the public records issue. (R 2364, 2369-81). Specifically, Defense Counsel wanted to have an evidentiary hearing on a previously made *Brady* claim and a newly discovered evidence claim. (R 2378). The State objected, pointing out that "the claims . . . appear to me to be just outgrowths of the earlier motion, which was denied and upheld

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[1] Apparently, the court and the parties had "thought Judge Perry was on the upswing," but his condition had turned for the worse. (R 2360).

on appeal." (R 2380). The judge said that his understanding was they were there to take up the Howard Pearl Special Deputy and "that's the only reason that we were here today." (R 2381. *See* R 2386).

The State agreed that the issue was broad enough to include the effect Howard Pearl's "status as a special deputy sheriff" had "on the representation he gave Mr. Wright." (R 2387). However, the State continued to object to any attempt at "raising it as a *Brady* violation itself . . .." (R 2388). The prosecutor asserted that any claims other than the special deputy status claim(s) were procedurally barred. (R 2389).

The trial judge emphasized that the Supreme Court "affirm[ed] the denial of relief on all grounds set forth in the initial motion," except whether the special deputy service affected Mr. Pearl's ability to provide effective assistance of counsel to Wright. (R 2396). Judge Nichols found this to be "a narrow issue, not a broad issue." (R 2397). The judge refused to accept Defense Counsel's characterization of that issue so as to include a determination of whether Mr. Pearl was ineffective in other regards. (R 2397). Defense Counsel sought to "proffer that evidence" as "relevant on Claim Two of the December, 1991 motion . . .." (R 2397). The judge reiterated his ruling that such was beyond the scope of the remand. (R 2398-99).

Defense Counsel recited the stipulation(s) regarding the

Howard Pearl Special Deputy issue and introduced some documentary exhibits related to the subject of the stipulation(s). (R 2399). The stipulation included that Mr. Pearl was appointed special deputy on January 4, 1973 in Marion County, reappointed on January 6, 1981, and reappointed again on January 1, 1991. (R 2399, 2400, 2401). He was so appointed by the Volusia County Sheriff's Office on March 11, 1974. (R 2400). On June 9, 1983, Mr. Pearl was appointed a special deputy in Lake County. (R 2400). The Volusia and Lake County appointments were "honorary . . . given out to anybody . . .." (R 2471). Mr. Pearl did not regard the honorary cards as conferring the right to carry a concealed firearm. (R 2472).

Letters invoicing Mr. Pearl for insurance premiums for his Marion County appointment from 1980 through 1988 were introduced into evidence. (R 2402). On May 1, 1989, Mr. Pearl resigned from his appointment under Sheriff Moreland in Marion County. (R 2402). The parties stipulated that the resignation was accepted. (R 2402). Excerpts from transcripts of depositions of Donald C. Jacobson, taken December 7, 1992, Ray Cass, taken December 7, 1992, and Judge E.L. Eastmoore, taken December 11, 1992 were admitted on this issue. (R 2403).

Wright called Howard Pearl to testify. (R 2404). Mr. Pearl had been employed as an Assistant Public Defender "[s]ince 1972." (R 2404-05). He was appointed to Wright's case "sometime in '83,

April, I think." (R 2405). Wright was charged with the first degree murder of "Ms. Smith, a school teacher." (R 2405). The victim's body had been found at approximately 4:15 in the afternoon on February 6, 1983. (R 2405). Appointment on April 25, 1983 was consistent with Mr. Pearl's recollection. (R 2406).

Mr. Pearl acknowledged a special deputy appointment from Marion County which was still effective at the time of Wright's trial. (R 2407-08). He distinguished the appointments "from Volusia County and Lake County," stating that they "had about the same value as a carnival ticket." (R 2408). Mr. Pearl never advised of his appointment in Marion County. (R 2409). Although he was sure that Judge Perry knew of it, he did not think that the judge had advised Wright of it. (R 2409).

Mr. Pearl said that Wright's case was "unusual" because it "was the only case . . . in which the prosecutor insisted on having a description of every piece of discovery he turned over; and he insisted on a signature . . . acknowledging receipt." (R 2409-10). Mr. Pearl "told him I would" abide by those conditions, and he regarded "that was a binding promise . . .." (R 2410). Defense Counsel presented documents which he represented were "the answer to the discovery demand that [the prosecutor] did along with all of the signed receipts for discovery . . .." (R 2410-11). Mr. Pearl said that either he, or his investigator, Freddie Williams, signed for everything he received from the State. (R 2412).

Mr. Pearl identified Charles Westberry as a witness against Wright who appeared at the trial. (R 2414). He recalled that the medical examiner had placed the time of death "earlier than he later testified to" because of "the contents of the stomach." (R 2414). Mr. Pearl recalled that Mr. Westberry testified that Wright "appeared at his house . . . about a mile from Mr. Wright's house. And that he had blood on him." (R 2415). Mr. Westberry was initially charged as an accessory after the fact. (R 2415-16).

Mr. Westberry and Wright had been involved "in the business of gathering up copper wire and selling it to one of the scrap dealers." (R 2416). At trial, Mr. Pearl contended that these men had "a falling out" in regard to this business. (R 2416). He did not recall obtaining any information from the State that it had granted Mr. Westberry immunity regarding the scrap metal business. (R 2417). He was, however, aware of a grant of immunity "with respect to the charge of accessory after the fact of murder." (R 2417).

Mr. Pearl recalled locating, and speaking with, Kim Holt, a grocery store clerk who indicated "that some suspicious person had come to the store and . . . frightened her" at a time "very, very close to the time when Ms. Smith's body was found." (R 2417-18). "[T]he controversy was whether . . . this person had said to . . . Ms. Holt, that Lima Page Smith was dead at a time when no one else would have known it." (R 2418). When he interviewed Ms. Holt, she

gave a time that Mr. Jackson was in the store as one when "the general public could have known about it." (R 2418). She told Mr. Pearl she had talked to sheriff's office personnel. (R 2418).

As a result, Mr. Pearl went to Captain Miller to see what report(s) had been made regarding Ms. Holt's statement. (R 2418-19). This occurred "very shortly before trial." (R 2419). Captain Miller produced to Mr. Pearl a "file about an inch and a half, two inches thick," and said those were investigation records of leads and persons eliminated as suspects. (R 2419). He explained that they were not sent to the State Attorney's Office, and those leads were regarded "closed." (R 2419-20). The captain told Mr. Pearl: "[I]f you want to read through this file, here it is, take it."[2] (R 2420). Mr. Pearl responded that he could not do that because he had a deal with the prosecutor that he had "to sign for everything I get." (R 2420). He refused to violate that agreement. (R 2420).

Mr. Pearl was friends with Captain Miller, but he did not have that same kind of relationship with Officer Perkins. (R 2463). Indeed, he "didn't particularly trust him." (R 2463). Mr. Pearl did not call "the family" to testify about the "controversy" with Perkins and some members of the Wright family because he "didn't think that this controversy meant anything much." (R 2464). His

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[2] Captain Miller was "an entirely honorable and competent law enforcement officer." (R 2462).

special deputy status had no influence on that decision. (R 2464).

Mr. Pearl looked at a statement of Kim Holt given to Detective Taylor Douglas of the Putnam County Sheriff's Office dated "28 February 1993." (R 2421). He said that he had not previously received that statement. (R 2421). Therein, Ms. Holt claims to have seen Mr. Jackson (whom she did not know by name) in the store speaking about Ms. Smith's death at 4:30, 15 minutes after the body was found by Ms. Smith's brother, who called the police. (R 2422). Mr. Pearl opined that this indicated that he could not have known "Ms. Smith was dead unless he was present at the time of her death," and said "if I had seen this statement during our investigation it would have been very important to me." (R 2422). Ms. Holt also stated that the man showed her some money, indicating he had "[j]ust been paid." (R 2423).

The prosecutor objected at this point, arguing that the defense was "getting back into the *Brady* argument" which "this court ruled . . . we wouldn't be getting into." (R 2423). Judge Nichols sustained the objection, but permitted the defense to proffer the testimony. (R 2424).

On proffer, Mr. Pearl added that Ms. Holt's statement to the police indicated that the man had "fresh scratch marks on his face," and was "in the store a lot," although she did not know his name. (R 2424). She later identified the man as Henry Jackson when "looking at a mug book." (R 2424).

Defense Counsel announced that his proffer was concluded and offered the statement into evidence. (R 2424). The State objected, reasserting that this had already been litigated in the prior 3.850 proceeding. (R 2425). Defense Counsel admitted that "this was presented in the 1988 evidentiary hearing," but argued that this Court had "agreed with me on appeal" that "the evidentiary hearing had to be reopened." (R 2425). Judge Nichols disagreed, and held to his ruling that this Court did not remand for anything but the narrow issue of the effect of Mr. Pearl's status as a special deputy on his ability to render effective assistance to Wright. (R 2425-26). He denied admission of the statement because it had "already been introduced and dealt with in the prior 3.850," but allowed it to be filed in proffer. (R 2426).

The court likewise ruled that the statements of Wanda Brown and Charlene Luce had been previously litigated. (R 2426). However, he allowed Defense Counsel to proffer the testimony regarding them. (R 2426).

On proffer, Mr. Pearl said the statement of Ms. Brown indicated that "Strickland and Jackson . . . lived together." (R 2427). "And Mrs. (sic) Strickland on this day was intoxicated . . ., and she got scared of him and left." (R 2427). "[I]t appeared that she was suggesting that he was making threatening -- or hostile gestures towards Ms. Smith who was standing there on the side of the road." (R 2427). This occurred on Saturday, February

5, 1983. (R 2427).

On proffer regarding the statement of Ms. Luce, Mr. Pearl said the statement "shows, particularly to me that Mr. Jackson appeared to be a violent person, was making threats and had a knife in his hand, when he came to her door." (R 2428-29). Ms. Luce lived next door, and "he told her she said between 4:30 and 5:00 that Ms. Smith was dead." (R 2429). Mr. Jackson had called out to her to inform her of Ms. Smith's death, and Ms. Luce asked Mr. Jackson "if he did it." (R 2429). Ms. Luce said that Mr. Jackson "turned red in the face and turned away." (R 2429). This was on Sunday, February 6, 1983. (R 2429). Mr. Pearl added that the statement "goes on to explain that he had in essence received gifts from Ms. Smith." (R 2429).

Mr. Pearl explained that the items of most interest in Ms. Luce's statement was that Jackson came to the door with a knife in his right hand and had thrown Strickland out of the house. (R 2429-30). This, he opined, would have shown Mr. Jackson was "apparently a man of violence and perfectly willing to threaten someone with that knife." (R 2430). This would have been "some ammunition to consider presenting at trial." (R 2430).

Mr. Pearl said that the victim's stab wounds were "on the left-side of her throat or neck." (R 2430). He indicated he might have developed this had he "known about that." (R 2430).

Being lead by Defense Counsel McClain, Mr. Pearl said that the

testimony of William Bartley indicating that Mr. Jackson and Mr. Stickland were on "the lot next to Ms. Smith's house," on Saturday, February 5th, combined with the statements of Ms. Brown and Ms. Luce was "starting to build a picture here of a man who is a little too close to the case." (R 2431). Mr. McClain asked "which man are you referring to," and Mr. Pearl replied: "Jackson." (R 2431).

The defense announced the conclusion of their proffer. (R 2432). However, Defense Counsel immediately proceeded into other questioning relating to the matters dealt with in the previous 3.850 proceedings, and upon objection, the judge ruled that same were inadmissible. (R 2433). The court permitted the matter to be proffered, noting that the defense was "trying to reopen the other issue that's already been closed." (R 2433). Judge Nichols stated the question before the court "is whether his service as a special deputy sheriff affected his ability to provide, not did he provide ineffective -- because that's not the question before me here today." (R 2434).

On proffer, Mr. Pearl testified that he had no information about any burglary of the home of the victim's brother, Earl Smith, by Mr. Jackson. (R 2434-35).

Mr. Pearl said that at *voir dire*, he inquires of prospective jurors about any connections between them and law enforcement. (R 2435). His purpose is "to find out if anyone is sympathetic to law enforcement and therefore would give greater weight to the

testimony of a law enforcement officer than to another witness who is a layman." (R 2435). Mr. Pearl said he "had no hesitation" to strike these potential jurors "if I felt it necessary." (R 2436). He made it clear that his moving to strike such jurors "was not automatic." (R 2457). The level of connection of the juror to law enforcement would impact the decision whether to move to strike the individual. (R 2457-58). Any decision would "have had nothing to do with my status as an honorary or special deputy sheriff for Marion County." (R 2459).

Mr. Pearl felt that the special deputy appointment had value to him. (R 2436). He was sure that Captain Miller knew he had it. (R 2436). He believed that all of the officers knew it as "[i]t was common knowledge." (R 2436).

His concern was to be able to carry a concealed firearm, and when the law was changed to permit that, he immediately obtained a permit under that law - October, 1987. (R 2461). He had renewed "it several times since" and had one at the time of the hearing. (R 2461). This law "substituted completely the need to have a permit from the sheriff." (R 2461-62). As a result, Mr. Pearl "was perfectly happy to resign when Mr. Gibson said he would like me to do so, because I already had my . . . concealed firearms permit." (R 2462).

Mr. Pearl said that "[a]s a criminal defense attorney," it was "incumbent on me to make friendships and to create trust and

cooperation with law enforcement officers . . .” and not be “abusive toward them . . ..” (R 2459-60). One way to do this was not to take too many depositions “because they resent depositions.” (R 2460). Instead, he “could go down to the sheriff’s office, sit down in the rec room with them with a cup of coffee and get more out of that deputy about what he did in the case than I could possibly do on depositions.” (R 2460).

Mr. Pearl said that he was aware of “some contention between Walter Perkins and a deceased brother of Mr. Wright . . ..” (R 2437). He had been made aware of this history with Detective Perkins and the Wright family by “the family.” (R 2437). Mr. Pearl asked Detective Perkins about it, and the detective “said . . . in essence whatever problems they have he didn’t have them with Jody Wright, he had them with somebody else.” (R 2437, 2438).

Defense Counsel, without even attempting to present evidence through Mr. Pearl, stated what he believed Mr. Pearl would indicate were deficiencies in his performance in Wright’s case. (R 2438-39). He proceeded to claim that Mr. Pearl would admit a “failure to present a family member to say that the glass jar . . . was a Wright family heirloom and was not from Ms. Smith’s house . . ..” (R 2439). He said Mr. Pearl would admit that there was “no strategic reason for it.” (R 2439). Mr. McClain said Mr. Pearl “would also indicate that he should not have called Paige Westberry as a witness” and should not have called Wright to testify. (R

2439). He claimed Mr. Pearl would have said his failure to present the information that caused the Medical Examiner to change his opinion of the time of death was deficient. (R 2440). The judge ruled that these matters all related to things covered in the prior 3.850 proceedings. (R 2440).

At that point, Mr. McClain offered "a separate proffer," that he be permitted to ask Mr. Pearl about Kathy Waters "who came forward at the end of the trial and indicated that she had seen Mr. Wright walking . . .." (R 2440). Mr. Pearl had tried to put this in at trial, the trial judge, Judge Perry, did not permit it. This Court regarded that to be an erroneous decision on the part of the judge, but found it harmless. (R 2441). Mr. McClain claimed it should be again considered as part of "the cumulative effect" of all errors. (R 2441). Judge Nichols sustained the State's objection based on the procedural bar. (R 2441).

Mr. Pearl said that "[a]s a lawyer," but not as a special deputy sheriff, he found it "very beneficial to make friends in law enforcement, because they tend to cooperate with you." (R 2442). Mr. Pearl added that he "never saw myself as a law enforcement officer," and he "was not one." (R 2442). He "had no authority." (R 2442). All Mr. Pearl wanted was "a gun-toters permit that would be run good throughout the state rather than having to go to every county commission . . .." (R 2446). So, he applied in Marion

County and became a special deputy.[3] (R 2446). Mr. Pearl "had a clear understanding with both sheriff's (sic) [Willis & Moreland] I certainly wasn't going to embarrass them by playing policeman." (R 2447-48). His concern in not displeasing, or embarrassing, the Marion County Sheriff was that he not do anything that would make "it seem as if I were a law enforcement officer of Marion County, Florida." (R 2474, 2475). The "idea of not displeasing the sheriff had absolutely nothing . . . to do with [his] status as an attorney or an assistant public defender." (R 2475).

Mr. Pearl testified that he did not solicit the Volusia County special deputy card. (R 2448). He "knew . . . that I could not possibly act as any kind of a deputy sheriff in Volusia County since I was working there as an assistant public defender." (R 2448). He just "put it in my pocket and forgot it. It had no value whatever." (R 2448).

Mr. Pearl was never an employee and never executed any employment and/or tax forms with the Marion County Sheriff's Department. (R 2448-50). He was never certified as a law enforcement officer and did not receive any such training from that organization, or the Volusia or Lake County Sheriff's Offices. (R 2449). He was never asked to act in any way for the Marion County

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[3] Mr. Pearl testified that there was a mistake made and his card indicated "regular" as opposed to "special" deputy, but he was always only a special deputy and everyone knew that. (R 2447).

Sheriff's Office. (R 2450-51). In fact, "[b]oth sheriff's (sic) made it clear to me . . . they did not want me to act as a deputy sheriff or as a law enforcement officer, . . . and I should refrain from it. And I replied that I had no interest in doing so." (R 2452-53). Mr. Pearl said the card was basically an honorary deputy's card. (R 2453). He "continue[s] to be a special deputy, doing the very same thing I had been doing which was to carry a concealed firearm when I wanted to." (R 2453).

Mr. Pearl testified:

> Well, I've been a lawyer now admitted to the bar for 38 years. I like my work. I like the kind of work I was doing at the time. My entire loyalty goes to my clients and to no one else. Nothing of my status as a special deputy sheriff had anything whatever to do with my work as a defense attorney. It's in another circuit, in another county. The county of my residence, Marion County, Florida. And nothing has ever happened in any of these cases has been enhanced or otherwise affected by my position as a special deputy sheriff.

(R 2456-57). Mr. Pearl was released. (R 2476). Defense Counsel announced that he "would call Judge Perry as to this issue if he were available, but he's not available." (R 2476). The defense had "nothing in addition" on the Howard Pearl Special Deputy issue. (R 2476).

The prosecutor offered to permit the defense "to proffer" anything it had "with regard to Judge Perry that related to the special deputy conflict issue." (R 2477). He was concerned that "the record" not "reflect that the defense was precluded from

calling a witness . . ..” (R 2477). Defense Counsel responded that Judge Perry “testified in the December 1992 hearing,” but he “would call him again.” (R 2478). The prosecutor again invited the defense to proffer what it is expected Judge Perry would say, and said he may well stipulate to it. (R 2478).

Counsel McClain admitted that he “did question” Judge Perry “at that time.” (R 2478). Counsel preferred to “present him live,” but acknowledged that the judge’s “prior testimony is in the record.” (R 2479). He said that before Judge Driver, Judge Perry testified “that he never advised Mr. Wright of Mr. Pearl’s status as a special deputy.” (R 2479, 2480). He also said “he never knew that Mr. Pearl had the status of a special deputy.” (R 2479).

Mr. McClain further advanced that Judge Perry’s testimony went to “the separate issue of Judge Perry’s status as a special deputy . . . in various counties . . ..” (R 2479). However, on the Howard Pearl issue, the defense merely hoped to present Judge Perry’s “live testimony on those [two] facts.” (R 2480). The State had no objection to Judge Perry’s testimony before Judge Driver “being utilized today in lieu of live testimony.” (R 2480). Judge Nichols repeatedly asked Defense Counsel if there was “any reason that we could not do that in lieu of live testimony in view of . . . Judge Perry’s ill health?” (R 2482). Mr. McClain merely repeated his “preference . . . to do live testimony.” (R 2482). Judge Nichols agreed to try to obtain the live testimony of Judge Perry since it

seemed possible that "Judge Perry's memory . . . may have improved as to dates or times or places . . .." (R 2486).

Judge Nichols advised Defense Counsel to keep a check on "Judge Perry's health status," informing him that the ill judge "has two sons who have a law office here . . . and that might be a source of information." (R 2490). Mr. McClain acknowledged his understanding that Judge Perry was then "in intensive care . . .." (R 2490). The judge also offered to tell Judge Perry's wife that Mr. McClain might contact her, or her sons, about the judge's condition, and the defense had "no objection to that." (R 2491). The judge added that Judge Perry might not ever become available." (R 2491). The judge also suggested that Mr. McClain contact "Mr. Fields" or the judge's JA to get updated information on Judge Perry's availability. (R 2492, 2493).

On December 8, 1997, the evidentiary hearing continued. (R 2496). The defense called Mildred Thomas, a fifty-one year Palatka resident who was living there in 1983. (R 2505). Ms. Thomas began to recite hearsay statements from her daughter, Kim. (R 2506). The State objected, and the judge sustained the hearsay objection. (R 2506).

Defense Counsel asked "to continue on proffer . . .." (R 2507). Counsel claimed that "this is information that was not turned over to defense counsel, Howard Pearl, back at the time of the original trial and . . ." related "to another suspect in the

crime." (R 2507). The prosecutor consented to the proffer. (R 2508).

On proffer, Ms. Thomas testified that Kim was working at an area grocery store when a man she recognized as one usually "scrounging around for money" came through her checkout line, "and he had money." (R 2508). Kim noticed that he had "scratches on his hands and on his throat." (R 2508). Ms. Thomas suggested to Kim that she "tell the police about it, because we knew . . . that Ms. Page (sic) had been killed." (R 2508)

Ms. Thomas executed an affidavit regarding this matter "on July 13th, 1988." (R 2509). The prosecutor pointed out that "the affidavit obviously would be hearsay," and that it was "procedurally barred" since it has "already come up . . . as part of the original 3.850 motion" but did not object to admission as part of the proffer. (R 2510). The prosecutor added that procedural bar on this basis was "the state's primary argument with regard to all the things that are going to be raised in today's hearing . . .." (R 2510).

Defense Counsel admitted that Mr. Pearl "had the opportunity to talk to" Ms. Holt, but claimed that he did not see the original police report of their interview with Ms. Holt, and when she talked to Mr. Pearl, "her recollection of the events was not entirely clear." (R 2512-13). He further alleged that "Mr. Pearl, because of his special deputy status felt like he was getting all the

information he needed through the discovery process and his special relationship and he didn't realize that there was information that was being withheld from him, so that he was unable to do his job effectively." (R 2513).

Defense Counsel then indicated to the court that the depositions of certain potential witnesses would be used in lieu of live testimony. (R 2515). The State agreed "for purposes of saving time,"[4] but did not agree that everything there was admissible, and reserved the right to object to inadmissible matter. (R 2515-16). The prosecutor also made it clear that he did not agree that the information in the depositions "necessarily demonstrates that the defense has shown due diligence for any of the newly discovered evidence claims." (R 2517). The depositions were admitted pursuant to the stipulation. (R 2518-21).

The defense next called Freddie Williams, Mr. Pearl's investigator in Wright's case. (R 2523-24). Mr. Williams recalled Wright's case as the only one for which the defense "had to sign for all the discovery we got in the state attorney's office." (R 2524). Mr. Williams said he was not given a document about Wanda Brown prior to Wright's trial. (R 2526). However, he first saw that document at "[t]he first hearing we had" when they "were all in the state attorney's office." (R 2526).

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[4] There were "five volumes . . . that contain depositions." (R 2516).

The State objected, asserting that "the statements of Brown, Luce, and Holt" had been raised and decided in the first 3.850 hearing. (R 2526-27). Mr. McClain complained that Judge Perry was wrong in stating "in his order denying Mr. Wright a new trial" that the defense investigator "had testified that he had received this document [Wanda Brown's statement] before Mr. Wright's trial." (R 2527). He said "it's simply not true." (R 2527). Mr. McClain claimed this went to the issue of "whether or not Judge Perry should have disqualified himself and . . . whether or not a miscarriage of justice has occurred when 3850 relief was denied . . .." (R 2527-28).

The prosecutor pointed out that this matter had already been raised and litigated in the prior Rule 3.850 proceeding and that the disposition of the issue in that proceeding was affirmed by this Court.[5] (R 2528). He explained that Judge Perry's "reasoning for finding no violation of *Brady* went far beyond that one possibly out-of-context statement, in that he also said that the defense was aware of these individuals . . .." (R 2528). Moreover, "whether the statements were exculpatory in nature were (sic) highly speculative . . .." (R 2528). Mr. McClain admitted that he had, indeed, argued

[5] Indeed, "this very argument that's being made now about Judge Perry being mistaken about his interpretation of what this witness said, was argued by the defense in their briefs, and the supreme court apparently did not find it very noteworthy, because they adopted Judge Perry's order." (R 2530-31).

the issue to this Court. (R 2532). Judge Nichols found that the defense had already presented that argument, "or at least had the opportunity" to do so. (R 2532). Indeed, in their appellate presentation, the defense had "explained the portion [of the record] that Judge Perry attached to his order" and argued it was "incorrect." (R 2533). He upheld the State's objection. (R 2532, 2533).

In regard to "a statement by Charlene Luce," Mr. Williams said he did not remember it. (R 2534). Judge Nichols sustained the State's objection to this statement on the same procedural bar as the Wanda Brown statement. (R 2534-35). The State agreed to a proffer of the matter. (R 2535).

Mr. McClain proceeded to ask on proffer about a statement of Kim Holt. (R 2535). Mr. Williams remembered talking to Ms. Holt, but did not recall having her statement. (R 2535). Neither did Mr. Williams recall seeing a report recounting that a correctional officer had called Mr. Williams and told him "that Mr. Wright had injured himself" in "an apparent suicide attempt." (R 2535-36).

Wright's next witness was Tammy Marjenhoff, who was "born and raised here" in Putnam County. (R 2536-37). Regarding the incident referred to in a police report dated September 9, 1980, Ms. Marjenhoff said she "[v]aguely" recalled it. (R 2538). Ms. Marjenhoff said she saw "someone standing at my bedroom window," and her sister "called the cops." (R 2539). This happened several

times in a two-month period. (R 2539-40). Ms. Marjenhoff did not know who the person standing silhouetted in her window was, and she did not get a good look at his face. (R 2540-41). In fact, she could not even say if the person silhouetted during that period was the same person each time. (R 2541). The police report was admitted to show that it was made, but not for the truth of the matters asserted therein. (R 2542-43).

The defense next called Walter Williams to discuss a police report he made in the past. (R 2543-44). Mr. Williams recalled "a bunch of people fighting out there . . . beside my place . . .." (R 2545). He called the police, and the fighting stopped. (R 2546). The police report was admitted on the same basis as the previous one. (R 2547).

Glenna Fox was called next. (R 2547). She lived with her sister, Ms. Marjenhoff, in 1980. (R 2548). She called the police because she believed "there was someone trying to break-in to the house" through her "sister's window." (R 2548-49). She saw "footprints in the dirt . . . under each one of the windows . . .." (R 2550). Ms. Fox was dozing in a chair one afternoon when she heard someone shake the latch on the screen door. (R 2552). The man asked her for a light for his cigarette, but she refused. (R 2552). The man was Henry Jackson. (R 2553). Ms. Fox was "[a] little" afraid of Mr. Jackson because he would walk across her yard when walking in their neighborhood. (R 2553-54). On cross, Ms. Fox

admitted that she did not know who it was that appeared at her sister's window, although she suspected it may have been Mr. Jackson. (R 2554-55).

Wright next called Wanda Brown. (R 2557). She was "a substitute mail carrier" in 1983 and knew the victim, Ms. Smith. (R 2558). The day before her body was found, Ms. Brown "was on the mail route," and "noticed she was standing in her front yard . . . talking to" two men. (R 2558). Ms. Brown recognized the men as Henry Jackson and Clayton Strickland. (R 2558-59).

Mr. Strickland "walked across the road in front of me, and he like threw his hands up for me to stop." (R 2559). He asked her if she had his check, and she said, "no." (R 2560). She did not know what checks he was referring to. (R 2560). She asked him to step away from her vehicle, and she "could tell he was intoxicated." (R 2560). He told her he "need[ed] some money," and she "drove on off." (R 2560). Ms. Brown finished her route "to the end of the road and came around to come back," and "noticed Ms. Smith was doing like that, (indicating), making a motion like that for them to go off." (R 2560).

The prosecutor objected because "the substance of what she's testifying to was raised in the previous 3.850 motion regarding a *Brady* claim" and a newly discovered evidence claim. (R 2561). It was rejected by Judge Perry and the matter was affirmed by this Court. (R 2561).

Mr. McClain conceded that "[t]he issue that the Florida Supreme Court remanded to this court was whether Pearl's status as a special deputy sheriff affected his ability to provide effective legal assistance." (R 2561). He opined that "under *State v. Gunsby*, Your Honor is obligated to hear accumulative (sic) analysis of all potential errors in the case." (R 2561). The State and the postconviction judge agreed that everything previously presented should be considered with anything new presented in the instant hearing, however, no testimony on the previously decided matters should be re-presented. (R 2567). Ms. Brown identified "page 301 of the ROA" as the handwritten statement she had given. (R 2571).

Wright next presented Leon Wells, Sr., who was working at Miller's Handy-Way in Palatka at the time of Ms. Smith's murder. (R 2571-73). Mr. Wells well knew the Jackson family, and he saw Henry "[o]nce or twice a week." (R 2573-74). Mr. Wells had "several occasions to have problems" with the Jackson family, having "arrested them." (R 2574). He said that Henry would fight or argue with other members of his family while at the store, and he had seen Henry fight "probably 30 or 40" times during his lifetime. (R 2575). He also claimed that Mr. Jackson "and Leroy both liked knives." (R 2575).

Mr. Wells had "no problem with the Jackson's (sic) very much, because I went to school with Leroy . . .." (R 2575). He and Henry Jackson would "box all the time," and Mr. Wells felt like "I came

out on the better end every time we fought . . ..” (R 2575).

Mr. Wells identified a January 29, 1981 incident report from the Putnam County Sheriff’s Office. (R 2577). That report concerned an incident where members of the Jackson family “were arguing amongst one another and just wouldn’t leave the store.” (R 2577). According to Mr. Wells, the Jacksons “were terrible bad boys,” but “I was just as bad as they was.” (R 2575-76, 2578).

Wright’s next witness was Kim Holt Holliman. (R 2579). The prosecutor objected to Ms. Holliman’s testimony on the same procedural bar basis as previously made in connection with Ms. Brown and Ms. Luce. (R 2579-80). Ms. Holliman identified page 304 of the ROA of the first Rule 3.850 proceeding. (R 2580).

Ms. Holliman said that she did not recall the incidents described in the report “very clearly, because it happened 15 years ago,” but when “Jeff,” the CCRC investigator recently brought it to her she did “remember the day” and “the man.” (R 2581). She said she remembered the man’s “face distinctly,” but “couldn’t tell you the date or the time.” (R 2581).

Ms. Holliman said that a man who was “always scroungy looking” came through her line and she learned of Ms. Smith’s death from him. (R 2582). The man had scratches and “what appeared to be . . . fresh blood” on him. (R 2583). The man’s “shirt was torn,” and although “he always paid with food stamps or bottles,” that time “he paid with a $100 bill” and “had another $100 bill in his

wallet." (R 2583).

Ms. Holliman talked to "two men" who "came to my mama's house" and "wanted to talk about the case." (R 2584). This was "in 1988 if I recall correctly." (R 2584).

Bobbi Mixon, Wright's sister, testified next. (R 2585). She was asked about Walter Perkins, who was an officer with the Putnam County Sheriff's Office. (R 2585). She recalled, as Mr. McClain phrased it, "bad blood" between her family and Mr. Perkins. (R 2586). An incident occurred "in the winter-time" before Ms. Smith was killed. (R 2586). According to Ms. Mixon, Mr. Perkins told her mother "one of my brother's was seeing one of his stepsisters, so both my brother's would go do (sic) down." (R 2587). Ms. Mixon's mom replied that she would tell them if Mr. Perkins' step-father told her to. (R 2587). Mr. Perkins replied: "[W]ell, if you can't keep those two boys from down there at my sister's house, my dad's house, I'm going to make you sorry you ever had them two boys." (R 2587). Her mother responded with anger and told Mr. Perkins to "get off her property and not to come back . . . unless he had a search warrant." (R 2587).

Mr. McClain asked the court to "take judicial notice of the opinion and the file regarding inquiry concerning a Judge Robert R. Perry dated October 3rd, 1991." (R 2590). He admitted that it "was pled in the 1991 3850." (R 2590). Mr. McClain then decided the claim was "filed in the amended 3850 . . . on February 19th, 1993,"

being "[c]laim four . . . regarding Judge Perry's status as a special deputy, and a reprimand from the Florida Supreme Court . . .." (R 2591). The judge took judicial notice, reserving a determination of "[r]elevance and weight" until later. (R 2592).

Mr. McClain also asked the court to take judicial notice of "two orders from the Florida Supreme Court regarding James Dunning." (R 2592). One was dated September 6, 1988, and the other was September 2, 1988. (R 2592). Mr. Dunning was suspended from the practice of law "about a month before the evidentiary hearing in 1988 . . .." (R 2592). Mr. McClain complained that "Mr. Dunning did not discuss this during his testimony in 1988, and I was unaware of it in 1988." (R 2592). However, he admitted that this "was pled . . . in 1991 . . . Claim Two . . .." (R 2593). They were admitted as a composite exhibit over the State's relevancy objection. (R 2594).

Wright's next witness was CCRC investigator Jeffrey Walsh. (R 2597). He said he sent "a public records request letter . . . to the Putnam County Sheriff's Department" on "July 22nd, 1991." (R 2599). He was interested is "some polygraph tests" that had been administered. (R 2599). Captain Miller responded quickly and "invited me to come to Palatka and . . . review materials." (R 2600). Captain Miller provided Mr. Walsh with some documents which he had seen before. (R 2600). According to Mr. Walsh, Captain Miller told him that these documents had not been previously

provided. (R 2601). However, these documents did not include polygraph records. (R 2601). Mr. Walsh said he was never able to obtain polygraph records. (R 2602).

Mr. Walsh also identified a May 15, 1996 letter to the same agency again asking for public records. (R 2602). In late November, 1996, he received some additional records which were not in CCRC's files. (R 2603, 2604).

Charlene Luce, a forty-one year resident of Putnam County, was Wright's next witness. (R 2609, 2610). Ms. Luce lived in Ms. Smith's neighborhood at the time of her murder. (R 2610). She lived "right next door to" Henry Jackson. (R 2611).

Ms. Luce was given a Sheriff's Department report "dated June 15, 1983" which was "an undisclosed police report that was attached to our 1991 3850." (R 2613). She said that it could be one she filed, but did not know because such reports were common. (R 2614). According to Ms. Luce, the Jackson family mistreated Mrs. Jackson, abusing her physically and verbally. (R 2614-15).

Ms. Luce began relating a "confrontation" between her father and Mr. Jackson's father about which she had been told. (R 2615). The prosecutor objected, and the judge sustained the objection to this testimony. (R 2615-16).

Ms. Luce said that Henry Jackson was in prison "[f]or shooting his brother-in-law" at some undisclosed time. (R 2616).

Ms. Luce gave the police a statement following Ms. Smith's

murder. (R 2617). The prosecutor objected to testimony on the matter of "her seeing Strickland and Jackson . . . and Jackson bringing a short knife out" since it "all came out in the original 3.850 hearing." (R 2618). Defense Counsel admitted that the testimony the witness would give was "different only in the sense that it's a living witness . . . rather than a statement . . .."[6] (R 2619). The judge permitted the testimony. (R 2619). There was an affidavit prepared in connection with the December, 1991 3.850 proceeding which included the statement as an attachment. (R 2620).

Ms. Luce said that Henry Jackson told her "that Ms. Smith was killed" on the Sunday following the woman's death. (R 2621). Mr. Jackson went on to tell her that Ms. Smith "had given him probably one of the best Christmases he ever had, and he gave her a box of chocolate covered candies for Christmas." (R 2621). They "chit-chatted for a few minutes," and she asked him "did you do that?" (R 2622). Mr. Jackson "turned real red in the face, and he looked at me real funny, and he turned and walked away." (R 2622). Ms. Luce called out that she "was just kidding," but the man did not respond. (R 2622). She identified her affidavit and said there was nothing in it that she remembered differently at the time of her testimony. (R 2623).

Ms. Luce recounted the subject of the affidavit which was that

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[6] The statement appears at page 302 and 303 of the ROA. (R 2620).

Henry Jackson and Mr. Strickland had a "[m]ostly verbal" argument over storage of some meat when they had no electricity to their home. (R 2626). "Henry had a pocket knife . . . a little blade . . . about three or four inches long." (R 2626). "Once in a while, you know, they would get in a little shoving match, you know, but I didn't pay attention too much." (R 2627).

Wright's next witness was Ella Doris Hill, a resident of the relevant neighborhood in 1983. (R 2629-30). Ms. Hill said "one time," Henry Jackson "was in prison." (R 2631). She explained that there "was a gunshot, the law was called and they took him off . . . and the brother-in-law was dead." (R 2633).

Ms. Hill was shown a police report dated September 19, 1983. (R 2635). She did not recall the incident described therein. (R 2636). The court sustained the prosecutor's objection to Wright's inquiry whether she thought the incident was true because she was the only Hill living at that address at the time. (R 2636-37). The court admitted the report since it was "attached to the 1991 3850 as the prior reports . . . allowed in . . .." (R 2639).

Joel Dale Wright testified next. (R 2639). He was present at the evidentiary hearings held in 1988, 1992, and in March of 1997. (R 3640).

Wright said he did not know Mr. Pearl was a special deputy sheriff at the time of his trial. (R 2640). He said he would have objected or complained about it if he had known. (R 2640). He did

not know that Judge Perry had such a card, and being lead by Mr. McClain, he said that had he known that he would have had Mr. McClain do a motion to disqualify the judge. (R 2641). He also said he would have asked Mr. Pearl to do such a motion in 1983 had he known of the card the judge carried. (R 2641).

The judge noted for the record that Judge Perry had passed away "during the summer months." (R 2649). Mr. McClain responded that "it was in early September, he passed away . . .." (R 2649). The defense called no other witnesses, and the State called none. (R 2649).

On June 5, 2000, Judge Nichols entered his order denying Wright's post convictions motions, as amended. (R 1140). Therein, Judge Nichols points out that this "case was remanded for an evidentiary hearing on the 'Howard Pearl' claim as the trial judge did not hear specific testimony on that issue, but adopted another circuit judge's findings in a different case." (R 1137). Regarding that claim, Judge Nichols said in pertinent part:

> (b) Mr. Pearl . . . testified . . . he was not a regular deputy and that the only benefit he was interested in was the ability to carry a firearm--a 'gun-toter's' permit. He had no authority to act as a deputy . . . never held himself out as a law enforcement officer, never used his special deputy status to obtain information and never received any information due to this status. In 1987 when he could legally obtain a concealed weapons permit . . . he did so. He resigned his status as special deputy in 1989. Mr. Pearl emphathically (sic) stated that his entire loyalty was to his clients and to no one else and that his practice was the same through the time he carried the 'gun-toter's' permit as a special deputy and after . .

.. He denied that his efforts, actions and representation of this Defendant was affected by his special deputy's status. This Court finds that Mr. Pearl's service as a special deputy sheriff did not affect his ability to provide effective legal assistance to Joel Dale Wright.

2. As to the additional claims . . . most are simply untimely or could have been discovered prior to trial or prior to the filing of the initial post-conviction motion and are thus barred. However, in the interest of thoroughness, all have been considered. Claim I was a Chapter 119 claim. Except for the . . . polygraph results, which apparently have been destroyed, it seems everything possible has been disclosed. The Defendant took the deposition of numerous persons and did not produce any proof of prejudice in whatever violations did occur.

3. Claim II as to "no adversarial testing", and Claims VII and VIII are premised on the disclosure of additional documents since the trial and the initial 3.850 hearing in 1991 are related. There is just no evidence that the outcome of the Defendant's trial would be different. There is only mere speculation on the Defendant's part as to these claims.

4. Claim III . . . newly discovered evidence, i.e., police reports of incidents involving Henry Jackson and Clayton Strickland. Both . . . were initially interviewed . . . and were eliminated as suspects early on. The defense team knew of these gentlemen well before trial. The fact that police reports existed on these persons . . . could have been discovered by the trial team. There is simply no newly discovered evidence. The defendant has only speculation, but no evidence, that the results of this trial would have been different.

5. Claim IV is a claim that the trial judge (now deceased) was himself a 'special deputy' and that he should have disqualified himself. There was testimony that the trial [judge] may have been issued a card of some sort by the Putnam County Sheriff. However, there was no proof submitted that his name appeared on a list kept by the Sheriff's Office. Additionally, if one had been issued, it carried no privileges and meant nothing. There is not even a suggestion in the record that the

> trial judge ever used any such card in any manner, even if he had one. There is also nothing to even suggest that having any such card affected his rulings or conduct in any manner. As to the trial judge's disciplinary problems, there is absolutely nothing to show his work or his status had any bearing on the 3.850 hearing and his ruling herein.
>
> 6. The undersigned has considered all of the file--trial, initial 3.850, and all claims, documents and arguments made since in an effort to evaluate and weigh all of these matters to see if the cumulative effect could have resulted in a different outcome in this case. After much deliberation this court finds that the result would have been the same. The basic evidence that convicted the Defendant has not been tainted nor changed in any way. . . ..

(R 1138-39). Wright filed his notice of appeal of this order on June 20, 2000. (R 1134-40).

SUMMARY OF THE ARGUMENT

POINT ONE: Wright failed to carry his burden to prove that the State did not disclose material and exculpatory evidence. Neither did he establish that any misleading evidence was presented, or that his counsel was ineffective in regard to either claim. This issue is procedurally barred because it is beyond the scope of the remand. It is also barred because it was raised and decided adversely to Wright in his first Rule 3.850 proceeding. Wright has repeatedly failed to demonstrate that this claim has merit.

POINT TWO: Wright failed to carry his burden to prove that Trial Defense Counsel's status as a special deputy sheriff affected his performance in Wright's case. To the extent that he now alleges that his Defense Trial Investigator was also a special deputy, that claim is beyond the scope of remand. Moreover, although the investigator testified at the evidentiary hearing, Wright did not question him on this claim, and thereby waived it. In any event, Wright failed to prove either a *pro se* or actual conflict of interest.

POINT THREE: Wright failed to carry his burden to prove that the Trial Judge's status as a special deputy affected his performance in Wright's case. Moreover, this claim is beyond the scope of the remand. In any event, Wright failed to prove a conflict of interest of any kind. To the extent that Wright claims that Judge Perry had a standard *ex parte* practice of having the State prepare

the sentencing order in capital death penalty cases, that claim is procedurally barred because it is beyond the scope of the remand and could and should have been raised earlier. Moreover, it is barred because it was not raised in the trial court. Finally, he has utterly failed to establish any factual basis for this bald assertion, and it is both legally insufficient and meritless.

POINT IV: Wright's claim that he was sentenced by a judge whose standard practice was to have the State draft the sentencing order is beyond the scope of the remand, could and should have been raised earlier, and was not presented to the lower court. It is, therefore, procedurally barred. Moreover, Wright failed to present any factual basis for this claim, and it is, therefore, both legally insufficient and meritless.

POINT V: Wright's claim that the lower court violated his due process rights by failing to timely rule on his motion to depose the trial judge is beyond the scope of the remand and was not presented to the lower court. Therefore, the claim is procedurally barred. Moreover, the record does not factually support the claim, and indicates to the contrary. In any event, Wright has failed to carry his burden to show that the lower court abused his discretion in failing to order the deposition. Neither has he shown prejudice.

POINT VI: Wright's claim that he suffered harmful error under *Sochor* is barebones and frivolous. It is procedurally barred

because it is beyond the scope of the remand. This Court already ruled on the imposition of the death penalty after striking the aggravator, and properly concluded that the three remaining aggravators outweighed the dearth of mitigation and that the death penalty was appropriate. The time for rehearing of that decision is long since gone.

Wright is entitled to no relief.

ARGUMENT I

WRIGHT HAS FAILED TO CARRY HIS BURDEN TO ESTABLISH THAT THE STATE FAILED TO DISCLOSE MATERIAL AND EXCULPATORY EVIDENCE OR THAT IT PRESENTED MISLEADING EVIDENCE; NEITHER HAS HE ESTABLISHED THAT HIS TRIAL ATTORNEY WAS INEFFECTIVE IN FAILING TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE.

Wright's first point on appeal was designated Claim II "no adversarial testing" in the lower court. (*See* R 1138). On appeal, Wright claims that he did not receive the cumulative analysis he was entitled to under *Lightbourne v. State*, 742 So. 2d 238 (Fla. 1999), which he claims presented similar circumstances to his case. (IB 53). Wright alleges two problems tainted this Court's decision on his Rule 3.850 motion, to-wit: Wright received public records information after the initial post-conviction proceeding which "further supported" his "claims for a new trial," and Judge Perry's order denying the initial motion was based on a false fact regarding Freddie Williams. (IB 55-56).

This claim is procedurally barred because it is beyond the scope of the remand, and so, is not properly before this Honorable Court. *See Mendyk v. State*, 707 So. 2d 320, 322 (Fla. 1997). *See also Jennings v. State*, 782 So. 2d 853, 861 (Fla. 2001). This Court remanded this case for one issue only, i.e., "an evidentiary hearing on whether Wright's public defender's service as a special deputy sheriff affected his ability to provide effective legal assistance." *Wright*, 581 So. 2d at 887. Thus, the first issue

raised in this appeal is procedurally barred because it was not authorized by this Court in its order on remand.

Wright claims that Judge Perry's denial of his 3.850 *Brady* claim regarding certain witness statements was based on a false view of the facts persented at the first evidentiary hearing. (IB 53). The "what Freddie Williams knew when" component of this issue is procedurally barred because it was raised and litigated in the initial Rule 3.850 proceeding. The same argument advanced in the lower court on remand, and in this Court on appeal, was throughly briefed and argued during the initial post-conviction proceeding. Defense Counsel devoted some four pages of the reply brief to this issue. Clearly, this Court's specific adoption of the trial court's order shows that this Court rejected the claim. *See Wright,* 581 So. 2d at 886. That current collateral counsel sought to have Mr. Williams testify that his testimony was, in fact, what he said at the previous hearing does not afford any basis for again raising an already decided issue that is well outside of the scope of the remand. *See Kight v. State*, 784 So. 2d 396 (Fla. 2001).

On appeal, Wright also charges that in denying his 3.850 motion, Judge Perry relied on the "false fact" that Henry Jackson and Clayton Strickland had passed polygraph tests. (IB 60-61). This component of the claim is also procedurally barred because it is beyond the scope of the remand. *Mendyk*. Attempting to support his own speculation, Wright points to the judge's conclusion that

"'Whether the [Brown, Luce, and Holt] statements were exculpatory in nature is highly speculative and, thus, the claim is legally insufficient to support a claim under Brady.'" (IB 61). As is readily apparent from reading the circuit judge's statement in context, there is absolutely no indication that Judge Perry was relying on the two men having passed a lie detector test when he determined that whether the statements of Brown, Luce, and Holt were exculpatory was speculative. Any claim to the contrary appears to be rank speculation on the part of current Collateral Counsel and should not be further considered by this Court.[7]

Moreover, if this claim was presented to Judge Nichols below, Collateral Counsel does not bother to so advise this Court in his brief, much less reveal what the judge had to say on the matter. Such barebones and shoddy pleading is legally insufficient on which to base any relief. *See Atwater v. State*, 788 So. 2d 223, 229 (Fla. 2001).

The final component of Wright's first issue on appeal is one

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[7] Collateral Counsel also speculates that "the sole basis for excluding them as suspects," apparently, the polygraphs, "was revealed to be nonexistent." (IB 61). One problem with this is that Wright also took and passed a polygraph, however, he very obviously was not excluded as a suspect. The State submits that there were reasons other than that Mr. Jackson and Mr. Strickland also passed a polygraph which resulted in their being excluded as suspects. That the passage of a polygraph was the main thing the witnesses asked in 1988 recalled five years after trial does not mean that it was the sole or only basis for excluding them at the time.

which he casts as a *Brady*[8] violation. The standard of review of a lower court's decision on a *Brady* claim is whether competent, substantial evidence supports the lower court's factual finding. *Way v. State*, 760 So. 2d 903, 911 (Fla. 2000), *cert. denied,* 121 S.Ct. 1104 (2001); *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999).

Wright lists the statements of Brown, Luce, and Holt, various police reports of crimes which Mr. Jackson or Mr. Strickland may have been involved in, some criminal history of the two men, a decision not to prosecute Westberry for the scrap mental deals, the "script" given to Westberry, and various conclusions that could have been drawn from evidence, or the lack thereof, as the undisclosed *Brady* material at issue. (IB 65-68). The State submits that conclusions that could be drawn from evidence, or the lack of evidence, are not covered by *Brady*. Moreover, the alleged "script" has been thoroughly litigated in the prior proceedings on the 3.850 motion and decided adversely to Wright. *Wright*, 581 So. 2d at 884. Likewise, the issue regarding the statements of Luce, Brown, and Holt were litigated and decided adversely to Wright in the prior proceedings. *Id.* at 883. Thus, none of these can provide a basis for relief herein. *Thompson v. State*, 759 So. 2d 650, 657 (Fla. 2000).

The only remaining matters concern some of the reports of

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

criminal history involving Mr. Jackson and Mr. Strickland. "In order for an appellant to prevail on a *Brady* claim, the defendant must show, among other things, that there is a 'reasonable probability that had the evidence been disclosed to th defense, the result of the proceeding would have been different. *Mills*, 684 So.2d at 805 . . ..'" *Jennings v. State*, 782 So. 2d 853, 858 (Fla. 2001). Specifically addressing a claim that this information regarding other suspects should have been disclosed, this Court said: "'If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense.'" (citations omitted) *Id.* at 858-59. Even when such evidence "would have been admissible," no relief is warranted where "there is not a reasonable probability that . . . the result of the proceeding would have been different." *Id.* at 859. Producing evidence that other persons in the area had been accused of crimes unrelated to the instant one does not meet the burden of establishing a reasonable probability of a different result.[9] *See Jennings*, 782 So. 2d at 859.

[9] Collateral Counsel's claim that Judge Nichols employed the wrong standard when he held "it was Mr. Wright['s] burden to use the previously undisclosed evidence to prove that the result of the trial would have been different" is obviously incorrect in light of the plain language of *Jennings* to the contrary.

Moreover, as this Court said in *Jennings*, to prevail, Wright has to show not only a probability of a different result, but "other things." Among those "other things" is the requirement that Wright show that the undisclosed evidence could not have been found by Wright's counsel had he/she exercised due diligence. As Wright admits, Judge Nichols concluded that all of the undisclosed information could have been found with the exercise of due diligence. (IB 62). The State submits that the standard of appellate review becomes whether there is competent substantial evidence supporting Judge Nichols' decision on the diligence issue. *Jones v. State*, 709 So. 2d 512, 514 (Fla. 1998), *cert. denied*, 523 U.S. 1040 (1998).

The record is replete with such evidence. It includes:

1) Mr. Jackson and Mr. Strickland were members of the immediate community of the victim and of Wright, throughout which the defense "did a neighborhood interview . . .." (PCR1 980).[10] Many of the police reports came from members of this community. "The fact that police reports existed on these persons . . . could have been discovered by the trial team." (R 1139).

2) Captain Miller offered the information on other suspects which had been excluded by law enforcement to Attorney Pearl, who declined it. (R 2419).

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[10] "PCR1" refers to the record on appeal from the first proceeding on Wright's 3.850 motion.

3) "The defense team knew of these gentlemen [Jackson and Strickland] well before trial." (R 1139). Certainly, they could have run criminal background checks on them, and the reports and information now alleged to be newly discovered would have been found. Thus, there is competent substantial evidence supporting Judge Nichols' conclusion that the reports and criminal history information could have been found before trial with the exercise of due diligence. The circuit court's order should be upheld.

Collateral Counsel then lists a number of complaints that he has with the services Mr. Pearl provided Wright. (IB 69-70). Besides being beyond the scope of the remand, these matters were also litigated and decided adversely to Wright in the first round of the 3.850 proceedings. *See Wright*, 581 So. 2d 882. Thus, they are procedurally barred in this proceeding. *See Thompson,* 759 So. 2d at 657. Moreover, they are without merit for the reasons stated in the State's pleadings and argument in the prior proceeding.

Finally, none of the allegations, for example, other suspects, the "script," the incomplete disclosure of the deal with Westberry, the glass jar, the Walter Perkins' claim, etc., constitute error alone, and therefore, there is no error to cumulate. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999). *See Asay v. State*, 769 So. 2d 974 (Fla. 2000). Moreover, to the extent that Wright claims that cumulative error at trial adversly affected the outcome of his proceedings, the claim is procedurally defaulted because it should

have been raised on direct appeal. *See Occhicone v. State*, 768 So. 2d 1037, 1040 n.3 (Fla. 2000). The only claim that may be regarded as error is that Kathy Waters should have been permitted to testify. However, her testimony could have hurt Wright just as much, if not more than, it would have helped him. To the extent that Ms. Waters' testimony identified Wright as the late night walker going toward Mr. Westberry's place, it put him close to the crime scene at the approximate time of the victim's death. In any event, this Court found that error harmless. 473 So. 2d at 1280-81. There is nothing to cumulate with this single harmless error.

Wright is entitled to no relief.

ARGUMENT II

WRIGHT HAS FAILED TO CARRY HIS BURDEN TO ESTABLISH THAT TRIAL COUNSEL'S STATUS AS A SPECIAL DEPUTY AFFECTED HIS PERFORMANCE ON WRIGHT'S BEHALF OR THAT ANY EFFECT ON PERFORMANCE RESULTED IN INEFFECTIVE ASSISTANCE OF COUNSEL; NEITHER HAS HE SHOWN THAT DEFENSE COUNSEL'S INVESTIGATOR RENDERED DEFICIENT AND PREJUDICIAL PERFORMANCE DUE TO HIS STATUS AS A BONDED DEPUTY.

Wright complains that his "defense team," consisting of Attorney Howard Pearl and Investigator Freddie Williams, "was burdened with an undisclosed conflict that interfered with the defense's ability to represent Mr. Wright." (IB 82). He bases this on the claim that Mr. Pearl was a special deputy in Marion, Volusia, and Lake Counties, and Mr. Williams held that status in Putnam County. (IB 83, 84).

Wright implies that he was prejudiced by the status of his defense team when "Mr. Pearl apologized to Walter Perkins in front of the jury during his cross-examination after Mr. Perkins denied having a bad relationship with the Wright family." (IB 85). He charges that Mr. Pearl "allowed his loyalty to the State to overshadow his responsibility to Mr. Wright by abandoning his effort to impeach Walter Perkins . . .." (IB 85). He also complains that Mr. Pearl "blindly accepted Captain Miller's assurance that Henry Jackson had been eliminated as a dead lead." (IB 85-86). He then claims that Mr. Pearl and Mr. Williams "abandon[ed] any challenge to law enforcement's investigation . .

. out of loyalty to the Sheriff's Office." (IB 86).

The standard of appellate review where a Rule 3.850 motion has been denied after an evidentiary hearing is whether competent, substantial evidence supports the trial court's findings. *Melendez v. State*, 718 So. 2d 746, 747 (Fla. 1998); *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997). This Court will not substitute its judgment for that of the lower court on factual determinations, including credibility of witnesses and weight given to factual evidence presented below. *Id.* Thus, where the lower court correctly applied the law to factual findings supported by substantial, competent evidence, the lower court's ruling will be upheld.

The Freddie Williams as Special Deputy component of this claim is beyond the scope of the remand, and so, is not properly before this Honorable Court. *See Mendyk v. State*, 707 So. 2d 320, 322 (Fla. 1997). *See also Jennings v. State*, 782 So. 2d 853, 861 (Fla. 2001). This Court remanded this case for one issue only, i.e., "an evidentiary hearing on whether Wright's public defender's service as a special deputy sheriff affected his ability to provide effective legal assistance." *Wright*, 581 So. 2d at 887. Thus, the Freddie Williams component is procedurally barred.

In any event, Wright utterly failed to carry his burden to demonstrate that Howard Pearl's Special Deputy status affected his ability to provide effective legal assistance to Wright in this

case. Moreover, although Freddie Williams was called by the defense at the evidentiary hearing, he was not asked about any special deputy status he may, or may not, have held. This is particularly telling when it is noted that Sheriff Pellicer's deposition was taken in September, 1997 (during which Wright claims he learned of Williams' status), and Mr. Williams' testimony at the evidentiary hearing did not occur until December, 1997. The State submits that the failure to question Mr. Williams on this matter at the evidentiary hearing waives the claim. Moreover, it is Wright's burden to prove error, and where he did not even ask the one in the best position to know, he clearly has not met his burden.

Neither has he established error in regard to Howard Pearl. In *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999), this Honorable Court reviewed a trial court's ruling denying Rule 3.850 relief on a "Howard Pearl" claim. In so doing, this Court specified the standard of review to be whether "the record reveals competent, substantial evidence to support the judge's factual findings" that underlay the determination that no conflict of interest existed as a result of Howard Pearl's status as a special deputy at the time of trial. *Id.* at 1017. Relief is only appropriate where the defendant shows an actual conflict which adversely affected counsel's performance. *Id. See Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980); *Buenoano v. Dugger*, 559 So. 2d 1116, 1120 (Fla. 1990).

In *Teffeteller*, the trial judge made "factual findings that

Pearl was not a law enforcement officer . . . and . . . never acted in a law enforcement capacity during Teffeteller's trial." 734 So. 2d at 1017. Based on these, this Court "agree[d] with the judge's legal conclusion that neither *per se* nor actual conflict existed . . .." *Id.* "Thus, there is no merit to this claim." *Id.*

The defendant in *Herring v. State*, 730 So. 2d 1264, 1266 (Fla. 1999), *cert. denied*, 527 U.S. 1003 (1999), raised a similar Howard Pearl Special Deputy claim. Herring had previously raised claims of ineffective assistance by Mr. Pearl, and the denial of those claims was affirmed on direct appeal. *Id.* However, as in the instant case, this Court remanded for an "evidentiary hearing solely on Pearl's status as a special deputy sheriff." *Id.*

After the evidentiary hearing, the judge again denied Herring's motion, and Herring appealed. Among his complaints in regard to Mr. Pearl's special deputy status, Herring alleged that his attorney did not "aggressively cross-examine law enforcement witnesses . . .." *Id.* After making it clear that Herring was not permitted to raise "an ineffectiveness claim based on deficient performance pursuant to *Strickland* . . ." because "[t]he only issue properly before this Court is whether Pearl had an actual conflict of interest that caused him to render ineffective assistance," this Court then articulated the standard for proving a conflict of interest claim:

> To prove an ineffectiveness claim premised on an alleged conflict of interest the defendant must 'establish that

> an actual conflict of interest adversely affected his lawyer's performance.' . . . Our responsibility is first to determine whether an actual conflict existed, and then to determine whether the conflict adversely affected the lawyer's representation. A lawyer suffers from an actual conflict of interest when he or she 'actively represent[s] conflicting interests.' . . . To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were impaired or compromised for the benefit of the lawyer or another party. . . . Without this factual showing of inconsistent interests, the conflict is merely possible or speculative, and, under *Cuyler*, . . . such a conflict is 'insufficient to impugn a criminal conviction.'

(citations omitted) *Id.* at 1266-67.

This Court then listed some ten factual findings made by the circuit court in *Herring*, including many facts also found by Judge Nichols in Wright's case. *Compare Herring*, 730 So. 2d at 1267 *with* R 1138. Regarding Herring's claim that Mr. Pearl did not effectively cross examine law enforcement at trial, it was noted that "defense counsel presented no evidence or testimony that demonstrated that Mr. Pearl was actively representing conflicting interests." *Id.* at 1268. "Therefore, this Court finds that the Defendant and his counsel failed to demonstrate that any actual conflict of interest existed . . . resulting from Mr. Pearl's special deputy status." *Id.* This Court agreed that the record "reveals no evidence suggesting that Herring's interests were impaired or compromised as a result of Pearl's special deputy status," and affirmed the lower court's denials of the claim. *Id.*

In the instant case, Judge Nichols' factual findings included:

1) Pearl "was not a regular deputy," and he "had no authority to act as a deputy."

2) His special deputy card was essentially "a 'gun-toter's' (sic) permit," and "when he could legally obtain a concealed weapons permit . . . he did."

3) Pearl "never held himself out as a law enforcement officer, never used his special deputy status to obtain information and never received any information due to this status."

4) Pearl's "entire loyalty was to his clients," and "his efforts, actions and representation of this Defendant was [not] affected by his special deputy's status."

(R 1138). Judge Nichols found "that Mr. Pearl's service as a special deputy sheriff did not affect his ability to provide effective legal assistance" to Wright. (R 1138). As reflected by Judge Nichols' order, the testimony Mr. Pearl gave at the evidentiary hearing provided competent, substantial evidence supporting the judge's factual findings. *See* R 2446, 2447-62, 2464-65. Judge Nichols' determination that no conflict of interest existed as a result of Howard Pearl's status as a special deputy at the time of trial should be affirmed by this Honorable Court.

This Court has recognized that the inquiry "into the nature of Pearl's status as a special deputy sheriff" is "primarily factual . . .." *Quince v. State*, 732 So. 2d 1059, 1064 (Fla. 1999). Where the record supported the factual determination that Pearl "never

was and never has been a law enforcement officer with the Marion County Sheriff's Department," the lower court correctly concluded "that Pearl's status as a special deputy sheriff did not constitute a *per se* conflict." *Id.* Moreover, this Court agreed with the lower court's legal conclusion that the defendant had not carried his burden to demonstrate an actual conflict "because he failed to show that Pearl *actively* represented conflicting interests." *Id.* Clearly, the facts of record in Wright's case show that he has not carried his burden to prove either a *per se* conflict or an actual conflict. The evidence showed that Mr. Pearl "had no authority to act as a deputy . . . had no training as a deputy . . . [and] never held himself out as a law enforcement officer . . .." (R 1138). Moreover, like Quince, Wright failed to show that Pearl *actively* represented conflicting interests.

Where no actual conflict of interest is proved, "we do not reach the issue of whether the conflict adversely affected Pearl's representation." *Herring*, 730 So. 2d at 1268. Thus, inquiry should end here as Judge Nichols clearly found no actual conflict of interest, and the record supports that conclusion.

However, even were it presumed that some conflict existed, Wright would not be entitled to any relief unless he also pled and proved prejudice flowing to him from that conflict. Regarding prejudice, Wright testified that had he known that Mr. Pearl was a special deputy sheriff at the time of his trial, he would have

objected or complained about it. (R 2640). However, he did not say that he would have fired Mr. Pearl.[11] (R 2639-41). Neither did he say that, or how, another attorney would have obtained a better result for him.

Moreover, his claim that "Mr. Pearl blindly accepted Captain Miller's assurance that Henry Jackson had been eliminated as a dead lead," and that he was "willing to abandon any challenge to law enforcement's investigation . . . out of loyalty to the Sheriff's Office" (IB 85-86) is not supported by the record. Mr. Pearl explained that his reluctance to take the information Captain Miller offered Mr. Pearl on other suspects, which may have included Henry Jackson, was based on his arrangement with the prosecutor, not a blind acceptance of any assurance from Captain Miller. (R 2409-10, 2419-20, 2432, 2434, 245960, 2462, 2463).

Howard Pearl was a highly regarded veteran capital public defender who gave his "entire loyalty" to his clients "and to no one else." (R 2456). *See Wright*, 581 So. 2d at 886 ["This Court has known Howard Pearl for over thirty years and he has never compromised his advocacy for any reason."]. In the words of Mr. Pearl's long-time supervisor, James P. Gibson, the Public Defender for the Seventh Judicial Circuit: "Mr. Pearl never failed to act

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11 Defense Counsel misrepresents the record when he states that "Mr. Wright . . . testified . . . he would have fired Howard Pearl had be been advised" of the special deputy status. (IB 87).

responsibly to his clients due to this status and . . . Mr. Pearl's integrity or ability in representing clients because of this special deputy status" was "never questioned." *Herring*, 730 So. 2d at 1267. Mr. Gibson also said that "he never questioned Mr. Pearl's abilities or ethics," and "believed that Mr. Pearl was the 'most experienced and qualified attorney in the Public Defender's Office . . ..'"[12] *Quince*, 732 So. 2d at 1064. Wright has not, and can not, demonstrate any prejudice. He is entitled to no relief.

[12] "Mr. Gibson testified that he requested Mr. Pearl to resign his special deputy status because it had become an issue in postconviction and not because he in anyway believed it was a viable or meritorious issue, or even an issue at all." 732 So. 2d at 1064.

ARGUMENT III

WRIGHT HAS FAILED TO CARRY HIS BURDEN TO ESTABLISH THAT HE WAS DEPRIVED OF A FAIR AND IMPARTIAL JUDGE DURING HIS 1983 TRIAL OR HIS 1988 EVIDENTIARY HEARING DUE TO EITHER JUDGE PERRY'S STATUS AS A SPECIAL DEPUTY OR HIS ALLEGED POLICY OF IMPROPER EX PARTE COMMUNICATION WITH THE STATE.

In his third point on appeal, Wright complains that he was denied a fair and impartial judge because the trial judge, Robert Perry, had "[t]ies to Sheriff Pellicer," and had a "standard practice" of "*ex parte* contact with the State." (IB 88-95). This issue is procedurally barred because it is beyond the scope of the remand. *See Mendyk v. State*, 707 So. 2d 320, 322 (Fla. 1997). *See also Jennings v. State*, 782 So. 2d 853, 861 (Fla. 2001). This Court remanded this case for one issue only, i.e., "an evidentiary hearing on whether Wright's public defender's service as a special deputy sheriff affected his ability to provide effective legal assistance." *Wright*, 581 So. 2d at 887. The claim alleged herein has no relationship to that issue and is barred in this proceeding. *Mendyk*.

The standard of appellate review of a Rule 3.850 denial after an evidentiary hearing is whether competent, substantial evidence supports the trial court's factual findings. *Melendez v. State*, 718 So. 2d 746, 747 (Fla. 1998); *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997). This Court will not substitute its judgment for that of the lower court, and therefore, where the lower court

correctly applied the law to supported factual findings, the lower court's ruling will be affirmed by this Court. *Id.*

Ties to Sheriff Pellicer:

Wright complains that Judge Perry was "a special deputy sheriff in Putnam County at the time of trial . . .." (IB 92). According to former Putnam County Sheriff Walter Pellicer, that meant the judge had "a courtesy card" which might help him avoid a ticket, if he "got stopped for speeding." (IB 92). Wright admits that when Judge Perry testified before Judge Driver in 1992, he indicated that he "may well have been" one of those on the "listing in Putnam County" for special deputy cards. (IB 93).

Thus, at the time of the 1997 evidentiary hearing, Wright had known about the "Judge Perry as Special Deputy" issue for nearly **five years**. While it is true that Judge Perry was not in good health throughout some of that time, there has been absolutely no evidence produced to the effect that Wright could not have taken the judge's deposition at some time during that four plus years. Moreover, he could have asked Judge Perry about his own status as special deputy in 1992. Indeed, he did; that he failed to ask then all of the questions he would have asked later does not entitle him to any relief. There is no claim that he attempted to make a more detailed inquiry on the subject, but was precluded therefrom. Thus, his complaint that he could not develop his claim because of the

judge's illness is not supported by this record.

The motion itself is legally insufficient because Wright failed to allege "how the outcome of his trial would have been different" had Judge Perry not presided over it. *See Gaskin v. State*, 737 So. 2d 509, 520 n.7 (Fla. 1999). In fact, he makes *no* allegation of prejudice. Moreover, as the postconviction judge wrote: "There is also nothing to even suggest that having any such card affected his rulings or conduct in any manner." (R 1139). Having utterly failed to carry his burden to establish that he was prejudiced by any special deputy status Judge Perry may have possessed at the time of trial, Wright is entitled to no relief.

In *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999), a trial court's ruling denying Rule 3.850 relief on a "Howard Pearl" issue was reviewed to determine whether "the record reveals competent, substantial evidence to support the judge's factual findings" of no conflict of interest as a result of the Special Deputy status. *Id.* at 1017. Relief on such a claim is not appropriate unless the defendant shows an actual conflict which adversely affected counsel's performance. *Id. See Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980); *Buenoano v. Dugger*, 559 So. 2d 1116, 1120 (Fla. 1990).

In *Teffeteller*, the trial judge made "factual findings that Pearl was not a law enforcement officer . . . and . . . never acted in a law enforcement capacity during Teffeteller's trial." Based on these, this Court "agree[d] with the judge's legal

conclusion that neither *per se* nor actual conflict existed . .," and found no merit to the claim. *Id*.

The State contends that the same standard of review would apply to the Judge Perry version of the Howard Pearl Special Deputy issue. The postconviction judge found that Judge Perry "may have been issued a card of some sort by the Putnam County Sheriff," but "there was no proof submitted that his name appeared on a list kept by the Sheriff's Office." (R 1139). He further found that the card carried "no privileges and meant nothing," and there was no indication that Judge Perry "ever used any such card . . .." (R 1139). Finally, nothing "even suggest[ed] that having any such card affected his rulings or conduct . . .." (R 1139).

From the factual findings, it is clear that Wright failed to establish a conflict which adversely affected Judge Perry's performance in his case. He is entitled to no relief. *Teffeteller.*

Standard *ex parte* practice:

Wright makes the wholly unsubstantiated allegation that Judge Perry had a standard practice to have the State draft the sentencing order in death cases, and this standard procedure involved improper *ex parte* communication with the prosecutor. (IB 94-95). This issue is procedurally barred because it was not raised in the 3.850 motion filed in the trial court. *Thompson v.*

State, 759 So. 2d 650, 668 n.12 (Fla. 2000); *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988). *See Shere v. State*, 742 So. 2d 215, 224 n.7 (Fla. 1999). An issue may not be presented for the first time on appeal. *See Finney v. State*, 660 So. 2d 674, 683 (Fla. 1995), *cert. denied*, 516 U.S. 1096 (1996).

This claim is also barred because it exceeds the scope of the remand. This Court remanded this case for resolution of a single issue i.e., the Howard Pearl Special Deputy claim. *Wright*, 581 So. 2d at 887. The claim alleged herein has no relationship to that issue and is barred in this proceeding. *See Mendyk v. State*, 707 So. 2d 320, 322 (Fla. 1997). *See also Jennings v. State*, 782 So. 2d 853, 861 (Fla. 2001).

Finally, this claim is procedurally barred because the unsubstantiated ground on which it is based was known to Wright's post-conviction counsel, by his own assertion, no later than early 1998 when the evidentiary hearing on the *ex parte* order claim in the Richard Randolph case was held. (IB 44 n.48. *See* Appendix A). Likewise, he admits that he knew of the *ex parte* contact in *Jones* and *Colina*" in 2000. Thus, his failure to raise the instant issue in a Rule 3.850 motion within the time specified by the rule procedurally bars the consideration of any such claim at this time.[13] *See Henderson v. Singletary*, 617 So. 2d 313, 316 (Fla.

[13] Of course, since it was not raised below, it is not addressed in the order on appeal denying the motion subsequent to the remand hearing.

1993), *cert. denied*, 507 U.S. 1047 (1993). Raising it for the first time in the May 24, 2001 initial brief herein well exceeds the time limitation of Rule 3.850.

Moreover, were it not procedurally barred, it is wholly without merit. Wright has utterly failed to carry his burden to establish that Judge Perry engaged in *ex parte* communication in his case at any time, much less that he did so in connection with any standard practice of directing the State to prepare the findings in support of a death sentence imposed by him in Wright's case. "[S]heer speculation based on the action of [the trial judge] in another case" cannot provide a basis for relief. *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000). Wright's claim, as presented herein, is rank speculation which cannot support relief of any kind. *Id.*

Wright's bare allegations of alleged information in other cases which indicate some type of *ex parte* contact by Judge Perry are legally insufficient to support the instant claim. *See Atwater v. State*, 788 So. 2d 223, 229 (Fla. 2001). He claims that a former prosecutor testified "[a]t an evidentiary hearing in February of 2000," in the Randall Jones case to such *ex parte* contact with Judge Perry. (IB 89). He also alleges that Judge Perry's law clerk testified in the case of Richard Randolph that a prosecutor "participated on [an] *ex parte* basis in the 1989 drafting of

sentencing findings . . .” in Randolph’s case. (IB 95). However, he fails to provide this Court and the State with a record of this alleged evidence, and the State disputes the defense characterizations of the testimony.

In *Card v. State*, 652 So. 2d 344, 345-46 (Fla. 1995), this Court said that if an improper *ex parte* contact were established, the question of whether that deprived the defendant of an independent weighing of the aggravation and mitigation and consideration of the appropriate sentence would be determined by the nature of the contact between the court and the State, including when the order was provided to the judge and the defendant. Thus, it is clear that the instant claim is to be decided from the record before this Court in **this** case, and there simply is no record support for Wright’s speculation about the manner in which the sentencing order was prepared.[14] There is no evidence of *ex parte* contact between Judge Perry and Wright’s prosecutor, of when or from whom Judge Perry received the sentencing order he signed, or of when Wright was given a copy of either a draft or the final order. Clearly, Wright has not met the

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[14] It is interesting to note that although Judge Perry’s law clerk was called as a witness at the evidentiary hearings in both *Jones* and *Randolph*, Wright did not present any such witness at his hearing. The logical inference therefrom is that the law clerk who prepared Wright’s subject order would not have supported the instant claim in this case.

standard to show an improper *ex parte* contact which would entitle him to relief in regard to the sentencing order entered in his case. *Card*.

Neither is there support for his barebones complaint that Judge Perry "had *ex parte* contact with the prosecutors" during 1988 and 1989 in connection with Wright's first post-conviction proceeding. This claim is facially and legally insufficient. *See Atwater v. State*, 788 So. 2d at 229. Moreover, this claim, like the one regarding the preparation of the sentencing order, was not presented to the lower court, and is, therefore, procedurally barred. *Thompson; Doyle*. *See Shere.* It is also beyond the scope of the remand and should not be considered for that reason. *Mendyk.*

Further, the preparation of an order denying a Rule 3.850 motion is not subjected to the same level of scrutiny as the preparation of a sentencing order. *Valle v. State*, 778 So. 2d 960, 964-65 n.9 (Fla. 2001). *See Glock v. Moore*, 776 So. 2d 243, 249 n.8 (Fla. 2001), *cert. denied*, 121 S.Ct. 848 (2001). The bare allegation and Defense Counsel's speculation does not come close to meeting the standard for establishing error in regard to the post-conviction order. Moreover, in the absence of proof of an *ex parte* communication on the merits of the case at issue or that the trial judge did more than simply request the State prepare an order

reflecting his rulings on the 3.850 motion, there is no error.[15] *See Swafford v. State*, 636 So. 2d 1309, 1311 (Fla. 1994). There is no such proof here, and therefore, Wright's claim is without merit. *Swafford*. *See Glock*, 776 So. 2d at 248-49[adoption of State's proposed order denying 3.850 not violation of due process where defense had opportunity "to argue all of the issues in his brief and at a hearing."]. In fact, there are not even any specific factual allegations, and therefore, had the claim been raised in the 3.850 motion, summary denial would have been appropriate. *State v. Williams*, No. SC94989, slip op. 12 (Fla. Aug. 23, 2001).

Wright is entitled to no relief.

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[15] Like *Swafford*, Wright had the opportunity to, and did, argue his claims to the trial judge at the Rule 3.850 hearing(s) which resulted in the 1989 order complained-of herein. *See Wright*, 581 So. 2d at 882.

ARGUMENT IV

WRIGHT HAS FAILED TO CARRY HIS BURDEN TO ESTABLISH THAT HE WAS SENTENCED TO DEATH BY A JUDGE WHOSE STANDARD PRACTICE WAS TO HAVE THE STATE DRAFT THE FINDINGS IN SUPPORT OF A DEATH SENTENCE; NEITHER HAS HE CARRIED HIS BURDEN TO ESTABLISH PREJUDICE FROM ANY SUCH ALLEGED PRACTICE.

In his fourth point on appeal, Wright makes the wholly unsubstantiated bare allegation that Judge Perry had a standard practice of having the State draft the sentencing order in death cases, and this standard procedure violated due process. (IB 96-97). This issue is procedurally barred because it is beyond the scope of the remand. This Court remanded this case for the Howard Pearl Special Deputy claim only. *Wright*, 581 So. 2d at 887. The claim alleged herein has no relationship to that issue and is barred in this proceeding. *See Mendyk v. State*, 707 So. 2d 320, 322 (Fla. 1997). *See also Jennings v. State*, 782 So. 2d 853, 861 (Fla. 2001). It is further procedurally barred because it was not raised in the Rule 3.850 motion or otherwise in the trial court. *Thompson v. State*, 759 So. 2d 650, 668 n.12 (Fla. 2000); *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988). *See Shere v. State*, 742 So. 2d 215, 224 n.7 (Fla. 1999). It is also barred because it was not raised within the time limitation of Rule 3.850. *See Henderson v. Singletary*, 617 So. 2d 313, 316 (Fla. 1993). Finally, it is barred because the conclusory allagations do not meet the defendant's burden to plead a legally valid claim. *See Atwater v.*

State, 788 So. 2d 223, 229 (Fla. 2001). *See also State v. Williams,* No. SC94989, slip op. at 12 (Fla. Aug. 23, 2001) [where motion does not allege specific facts to support a claim, summary denial is appropriate.].

Moreover, Wright has utterly failed to carry his burden to factually establish that Judge Perry had a standard practice of directing the State to prepare the findings in support of a death sentence imposed by him, much less that he was prejudiced by any such practice. Throughout his Claim IV, Wright cites to no facts in the record which would support any such claim. Neither does he reference the matter in his statement of the case and facts, other than to make an inappropriate comment in a footnote regarding what he claims may have occurred in other cases. (IB 44-45 n.48). "[S]heer speculation based on the action of [the trial judge] in another case" cannot provide a basis for relief. *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000), *cert. denied*, 121 S.Ct. 2563 (2001). Wright's claim, as presented herein, is rank speculation which cannot support relief of any kind.[16] *Id.*

In *Rushen v. Spain*, 464 U.S. 114, 119 (1983), in which a postconviction relief motion was at issue, the Supreme Court held that *ex parte* communications do not automatically entitle a

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[16] Indeed, Wright's assertion in his footnote 78 regarding what he claims to have "learn[ed]" from reading an initial brief in another case is completely improper and should be entirely disregarded.

defendant to relief. Rather, it is necessary to determine any prejudicial effect of the communication. *Id.* Where *ex parte* communications are "innocuous," there is no harmful, or reversible, error. *Id.* at 121. *See Glock v. Moore*, 776 So. 2d 243, 249 n.8 (Fla. 2001)*; Swafford v. State,* 636 So. 2d 1309, 1311 (Fla. 1994). Thus, a mere allegation of a standard of practice which involved an *ex parte* communication could never be sufficient to establish error. *Rushen; Glock, Swafford. See Atwater*, 788 So. 2d at 229.

Moreover, Wright has not demonstrated that he made a serious effort to obtain any testimony from Judge Perry, much less testimony on this *ex parte* communication issue. Although the defense did express a preference to speak with Judge Perry again, the concern was directed primarily to the "Howard Pearl" issue and/or the issue of the judge's own status as a special deputy, and was not directed to any *ex parte* communications or improper drafting of a sentencing order. *(See* R 2476, 2479). Defense Counsel also made it clear that his preference was grounded on the desire to have a "live" witness, rather than have the postconviction judge read the transcript of Judge Perry's testimony in the 1992 proceedings before Judge Driver. (R 2478, 2482). Thus, this claim is procedurally barred because no attempt was made to secure, much less present, Judge Perry's testimony on this issue.[17]

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[17] Defense Counsel also asked to postpone the hearing even as to Mr. Pearl, however, he indicated he expected Mr. Pearl to testify to

See also, Point V, *infra*, at 68.

Finally, even if not procedurally barred, it is meritless because Wright has produced no evidence of any *ex parte* communication of any kind in his case. In fact, he has not even alleged any specific instance of improper *ex parte* communication or delegation of the responsibility for the sentencing order. His entire claim is that the judge had a standard practice of having the State draft the sentencing order. He does not even say that this alleged standard practice was followed in his case.

In *Card v. State*, 652 So. 2d 344, 345-46 (Fla. 1995), this Court said that in the case of an improper *ex parte* contact, the question of whether the defendant was deprived of an independent weighing of the aggravating and mitigating factors would be determined by the nature of the contact between the judge and the prosecutor, including such factors as when the order was provided to the judge and to the defendant. Thus, this claim is to be decided from the record before this Court in this case, and there simply is no record support for Wright's speculation about the

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"other claims," specifying "Claim One and Claim Two of the 3.850 files (sic) back in 1992." (R 2353). The judge ruled that the case would go forward because he was "a little concerned about Mr. Pearl's health problems" as well as Judge Perry's. He worried that "if we put this off we may never have it." (R 2360).

manner in which the trial judge prepared his sentencing orders.[18] There is no evidence of *ex parte* contact between Judge Perry and Wright's prosecutor, of when or from whom Judge Perry received the sentencing order he signed, or of when Wright was given a copy of either a draft or the final order. Clearly, Wright has not met the standard to show any improper *ex parte* contact, much less a standard practice of such, or an improper contact or practice in his case.

Wright's reliance on *State v. Riechmann*, 777 So. 2d 342 (Fla. 2000) is misplaced. In *Riechmann*, the trial judge delegated the entire responsibility for determining the aggravating factors and determination of any mitigation to the prosecutor, and that was the basis for relief. 777 So. 2d at 351-52. In Wright's case, there is no indication whatsoever that Judge Perry did not independently weigh the aggravating and mitigating factors in determining Wright's death sentence. In fact, the record is to the contrary. The Judgment and Sentence itself recites in pertinent part:

> This Court has considered the evidence including the testimony heard during the August 22, 1983, trial, reviewed the presentence investigative report, and the jury's advisory sentence recommending imposition of the sentence of death.

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[18] *See* note 13, *supra*, at 63.

(RDA 707-714).[19] A detailed sentencing order then follows in which the proposed mitigators are fully discussed and evidence relevant to both the proposed mitigation and the aggravators is set out. *Id.* In the absence of any specific allegation, much less proof, of improper communication and delegation in Wright's case, *Riechmann* provides no basis for relief.

Shortly before the final instruction to the jury during the penalty phase, Judge Perry said: "I might say to you, gentlemen, as I have said before that this is probably the most difficult decision I have ever made in my life. Certainly it is the most difficult professional decision." (R 3055). There can be no doubt that Judge Perry carefully weighed and considered the aggravating and mitigating evidence before reaching the "most difficult" decision of his professional career, i.e., to sentence Wright to death.

Wright is entitled to no relief.

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[19] "RDA" refers to the record on direct appeal, Florida Supreme Court case number 64,391.

ARGUMENT V

WRIGHT HAS FAILED TO CARRY HIS BURDEN TO ESTABLISH THAT THE PROCEDURE FOLLOWED DURING HIS MOST RECENT POST-CONVICTION PROCEEDINGS VIOLATED HIS DUE PROCESS RIGHTS UNDER *JONES V. STATE*.

Wright complains that Judge Nichols deprived him of due process under *Jones* when he "refused to timely rule on Mr. Wright's motion to depose Judge Perry." (IB 98). He also complains that the State should have learned of some unspecified "evidence" which might have been favorable to him and the failure to "timely disclose" that unspecified evidence denied him due process. Wright's failure to identify the mystery evidence renders the claim legally insufficient. See *Atwater v. State*, 788 So. 2d 223, 229 (Fla. 2001).

Moreover, it is procedurally barred because any such claim is beyond the scope of the remand. *Mendyk v. State*, 707 So. 2d 320, 322 (Fla. 1997). See also *Jennings v. State*, 782 So. 2d 853, 861 (Fla. 2001). The issue on remand was well specified by this Honorable Court in its order remanding for further proceedings on the Howard Pearl Special Deputy issue. 581 So. 2d at 887. That is the only issue which was appropriate on remand, and the only one which should be reviewed on appeal.

Regarding his claim that Judge Nichols refused to timely rule on a defense motion to take Judge Perry's deposition, Wright offers no record citation. The State submits the record does not support

this claim.

According to the record, on March 4, 1997, Defense Counsel informed the court that "Judge Perry is in the intensive care unit of the local hospital." (R 2347, 2348). He moved "for a continuation of that issue" because he felt it "inappropriate to try and drag him into court or put him through the stress of that questioning, even over there." (R 2348). The court granted the defense-requested continuance. (R 2348).

On March 5, 1997, Defense Counsel announced "a stipulation as to the Howard Pearl issue" and said that only Mr. Pearl would be called at the evidentiary hearing on that claim. (R 2351, 2853). He also announced that he expected Mr. Pearl to testify to "other claims," specifying "Claim One and Claim Two of the 3.850 files (sic) back in 1992," (R 2353), but made no mention of any further need for Judge Perry's testimony on the Howard Pearl Special Deputy issue, or any other claim. In fact, Defense Counsel sought to postpone the hearing even as to Mr. Pearl, but Judge Nichols refused because he was "a little concerned about Mr. Pearl's health problems" as well as Judge Perry's. The judge worried that "if we put this off we may never have it." (R 2360). Still, Defense Counsel made no mention of any need for Judge Perry's testimony and did not request a ruling on any pending motion to take the judge's deposition.

On March 7, 1997, Defense Counsel argued that the evidentiary

hearing was to encompass issues beyond the Howard Pearl Special Deputy issue, the Judge Perry Special Deputy issue, and the public records issue. (R 2364, 2369-81). Specifically, Mr. McClain wanted to have an evidentiary hearing on a previously made *Brady* claim and a newly discovered evidence claim. (R 2378). The State objected, pointing out that "the claims . . . appear to me to be just outgrowths of the earlier motion, which was denied and upheld on appeal." (R 2380). The State agreed that the issue on remand was broad enough to include the effect Howard Pearl's "status as a special deputy sheriff" had "on the representation he gave Mr. Wright." (R 2387). However, the State continued to object to any attempt at "raising it as a *Brady* violation itself . . .." (R 2388). The prosecutor asserted that any claims - other than the special deputy status claim(s) - were procedurally barred. (R 2389). Relying on the plain language of this Court's remand order, Judge Nichols ruled that the court would take up the Howard Pearl Special Deputy claim and "that's the only reason that we were here today."[20] (R 2381. See R 2386).

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[20] The trial judge emphasized that the Supreme Court "affirm[ed] the denial of relief on all grounds set forth in the initial motion, but" whether the special deputy sheriff service affected Mr. Pearl's ability to provide effective assistance of counsel to Wright. (R 2396). Judge Nichols found this to be "a narrow issue, not a broad issue." (R 2397). The judge refused to accept Defense Counsel's characterization of that issue including a determination of whether Mr. Pearl was ineffective in other regards. (R 2397). Defense Counsel sought to "proffer that evidence" as "relevant on Claim Two of the December, 1991 motion . . .." (R 2397). The judge

Wright either questioned Judge Perry on both Special Deputy issues in 1992, or was on notice of the claims and had the opportunity to do so. He never claimed that he had reason to believe that the judge's testimony on either issue would change from that he gave in 1992, and merely stated a preference for "live" testimony and a hope that he could better argue his position this time around.

There was no charge of a deprivation of due process based on a refusal to grant a motion for Judge Perry's deposition made in the lower court; thus, it is not appropriate on appeal. *Finney v. State*, 660 So. 2d 674, 683 (Fla. 1995). *See Shere v. State*, 742 So. 2d 215, 224 n.7 (Fla. 1999). Moreover, there is no merit to any such claim. "[A] party may be allowed to take post-conviction depositions of the judge who presided over the trial only when the testimony of the presiding judge is absolutely necessary to establish factual circumstances not in the record . . .." *State v. Lewis*, 656 So. 2d 1248, 1250 (Fla. 1995). Wright never claimed Judge Perry's testimony was absolutely necessary to establish any factual component of any of his claims, and it was not. Thus, this issue is without merit.

In any event, Wright has failed to carry his burden to show that Judge Nichols abused his discretion in failing to order the

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reiterated his belief that such was beyond the scope of the remand. (R 2398-99).

deposition. He has shown neither entitlement, nor prejudice, from the absence of the deposition.

Wright is entitled to no relief.

ARGUMENT VI

WRIGHT HAS FAILED TO CARRY HIS BURDEN TO ESTABLISH THAT HE SUFFERED HARMFUL ERROR UNDER *Sochor v. Florida.*

As he has repeatedly throughout his brief, Wright presents another barebones and frivolous claim of error. Such claims do not support relief. *See Atwater v. State*, 788 So. 2d 223, 229 (Fla. 2001). *See also State v. Williams*, No. SC 94989, slip op. 12 (Fla. Aug. 23, 2001). This time, he claims that this Court erred on direct appeal, and "the circuit court's ruling was erroneous" in following this Court's decision on direct appeal. (IB 99).

This claim is beyond the scope of the remand. The only issue remanded was the Howard Pearl Special Deputy issue. *Wright*, 581 So. 2d at 887. Thus, this claim is procedurally barred. *Mendyk*, 707 So. 2d 320, 322 (Fla. 1997).

Were the claim not defaulted, it would still not afford Wright relief. Again, Wright misrepresents the facts. He claims that this Court struck the aggravator and then "merely stated that 'the imposition of the death penalty was correct.'" (IB 99). He alleges that this Court "failed to conduct any harmless error analysis . . .." (IB 99). In its entirety this Court said: "Because the court properly found there were no mitigating and three aggravating circumstances, we conclude the imposition of the death penalty was correct and find it unnecessary to remand for a new sentencing hearing." (emphasis added) *Wright*, 473 So. 2d at 1281. Clearly,

this Court made a harmless error analysis, determining that with three[21] remaining aggravators and no mitigators, death was still appropriate and resentencing was not required. Although *Sochor* had not yet been decided, this Court's harmless error analysis would have met its standard.

In *Hardwick v. Dugger*, 648 So. 2d 100, 106 (Fla. 1994), this Court rejected the instant claim, to-wit:

> Claim 2 asserts that this Court committed constitutional error when it failed to remand for resentencing after striking two aggravating circumstances on direct appeal. We find no merit to this claim. As the United States Supreme Court explained in *Sochor v. Florida*, 504 U.S. 527 . . . (1992), federal law does not require a state appellate court to remand for resentencing when it determines that an invalid aggravating factor has been weighed by the sentencer, but the appellate court must 'either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error.' This Court concluded that the error was hamrless 'in light of the particular valid aggravating factors remaining in this case and the absence of any mitigating factors.' *Hardwick*, 521 So. 2d at 1077. Consequently, claim 2 is without merit.

Thus, Wright's instant claim is without merit. *Hardwick*.

Moreoever, it is elemental that a State circuit court can not overrule this Honorable Court, and therefore, Wright's claim that "[t]he circuit court's ruling was erroneous" in refusing to find

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21 These were: "(1) the murder took place after the defendant committed rape and burglary; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; . . .;" and, (3) "the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification."

error in this Court's ruling on direct appeal (IB 99) is absurd. The absurdity is underscored by the fact that Wright does not even allege, much less demonstrate, why the circuit court's ruling was "erroneous." Such barebones pleading is wholly insufficient to state a claim upon which relief could be granted were the claim to otherwise have merit; *See Atwater,* 788 So. 2d at 229; the raising of such patently frivolous claims should be sanctioned. *See* Fla. R. App. P. 9.410.

Wright is entitled to no relief.

CONCLUSION

Based upon the foregoing arguments and authorities, the trial court's denial of Rule 3.850 relief should be affirmed. Likewise, Wright's conviction and sentence of death should be upheld in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **MARTIN J. MCCLAIN,** Special Assistant CCRC-South, 9701 Shore Rd., Apt. 1-D, Brooklyn, NY 11209 and **OFFICE OF CCRC FOR THE SOUTHERN REGION,** 101 N.E. 3rd Ave., Suite 400, Ft. Lauderdale, FL 33301, on this _____ day of August, 2001.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

JUDY TAYLOR RUSH

ASSISTANT ATTORNEY GENERAL