IN THE SUPREME COURT OF FLORIDA

AMOS LEE KING,

Appellant,

vs. **CASE NO. SC02-1**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843

STEPHEN D. AKE
Assistant Attorney General
Florida Bar No. 0014087
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 801-0600
FAX (813) 356-1292

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

The facts of this case are outlined in this Court's opinion on direct appeal, King v. State, 390 So. 2d 315, 316-17 (Fla. 1980):

> On March 18, 1976 [sic], the appellant was an inmate at the Tarpon Springs Community Correctional Center, a work release facility, serving a sentence for larceny of a firearm. On this date a routine bed check was made by James McDonough, a prison counselor, at about 3:40 a. m. The appellant King was absent from his room. The counselor began a search of the building grounds and found the appellant outside the building. Appellant was wearing light-colored pants which had the crotch portion covered with blood. The counselor directed King back to the office control room inside the building. When the counselor turned to get handcuffs, King attacked him with a knife. A struggle ensued, and the counselor received several cuts and stab wounds. King left the office, then returned and found the counselor talking to his superior on the phone. He stabbed the counselor again and cut the telephone cord.
>
> At approximately 4:05 a. m., the police and fire personnel arrived at the scene of a fire at a house approximately 1500 feet from the correctional center. The police officers discovered the body of Natalie Brady. She had received two stab wounds, bruises over the chin, and burns on the leg. An autopsy revealed other injuries, which included bruises on the back of the head, hemorrhaging of the brain, hemorrhaging of the neck, and broken cartilage in the neck. There was a ragged tear of the vagina, apparently caused by the wooden bloodstained knitting needles which were found at the scene, as well as evidence of forcible intercourse. Appellant's blood type was found in Brady's vaginal washings. The medical examiner attributed Mrs. Brady's death to multiple causes and established the time of death as 3:00 a.m. Arson investigators concluded that the fire

was intentionally set at approximately 3:00 to 3:30 a.m.

Defendant King was charged by an indictment filed on April 7, 1977, with first degree murder, sexual battery, burglary, and arson. These charges were ultimately consolidated with charges of attempted first degree murder and escape that had been previously filed based on King's actions at Tarpon Springs Correctional Center. Following a jury trial before the Honorable John S. Andrews, Circuit Court Judge, King was convicted as charged and sentenced to death. After exhausting his state direct and postconviction appeals, King was awarded a new sentencing proceeding from federal court based on a finding of ineffective assistance of counsel during the penalty phase of his trial. King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985), previous history, 714 F.2d 1481 (11th Cir. 1983).

The resentencing proceeding commenced on November 4, 1985, before the Honorable Philip J. Federico, Circuit Court Judge. The State presented the testimony of six witnesses: Special Agent Manuel Pondakos of the Florida Department of Law Enforcement,[1] who coordinated the investigations of Brady's murder and the attack on Officer McDonough; Rosario Canaglioni, former Tarpon Springs police officer, who was one of the first on the scene at the Brady house fire; State Fire Marshall arson investigator Joseph Ladika, who

[1]Pondakos worked for the Pinellas County Sheriff's Office at the time of these offenses.

discussed the origin of the house fire and the damage caused by it; Detective Tom Evans of the Pinellas County Sheriff's Department, who also discussed the arson investigation; James McDonough, the Tarpon Springs Correctional Officer that was stabbed by King; and Dr. Joan Wood, the associate medical examiner.

King presented eight witnesses, and proffered the testimony of Parole Service Director Harry Dodd. Of the witnesses that testified, two were relatives (Ada Lee King, sister, and Ira Dean James, cousin); three were neighbors and friends of King's (Mayme Moreland, Johnny Lee Henry, and Robert Lee Henry); and three were ministers and/or active in the prison ministry program (Rev. Joseph Ingle, Henry Byron, and Stuart Roberson).

At the conclusion of the re-sentencing, a twelve person jury unanimously recommended the death penalty. On November 7, 1985, Judge Federico imposed a sentence of death, finding that five aggravating circumstances (murder committed by a defendant under sentence of imprisonment; murder committed by a defendant with prior violent felony convictions; defendant knowingly created a great risk of death to many persons; murder committed during a burglary and sexual battery; and murder committed in an especially heinous, atrocious, or cruel manner), and no mitigating circumstances applied.

In his direct appeal, King raised four issues: 1) the prosecutors' exercise of peremptory challenges on black prospective

jurors; 2) the exclusion of evidence of residual doubt of King's guilt; 3) the exclusion of evidence of a discriminatory application of the death penalty; and 4) the admission of hearsay testimony. This Court struck reliance on the aggravating factor of great risk of death to many persons, but affirmed the death sentence. King v. State, 514 So. 2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988).

A motion for postconviction relief was filed in the trial court, and ultimately an evidentiary hearing was held before the Honorable Susan F. Schaeffer, Circuit Court Judge, on two of the claims presented in the motion: ineffective assistance of counsel and inadequate mental health assistance. During the litigation of this postconviction motion, a state petition for habeas relief was filed in this Court and denied. King v. Dugger, 555 So. 2d 355 (Fla. 1990). Judge Schaeffer denied the motion for postconviction relief and this Court affirmed the denial of relief. King v. State, 597 So. 2d 780 (Fla. 1992).

King initiated federal review of his re-sentencing on October 30, 1992, by filing a petition for writ of habeas corpus in the District Court, Middle District of Florida, raising sixteen claims. Relief was denied and on appeal the Eleventh Circuit discussed two primary issues: whether this Court conducted a proper reweighing or harmless-error analysis after striking aggravating factors on appeal, and whether King was entitled to a new sentencing hearing

due to the prosecution's exercise of race-based peremptory strikes. The Eleventh Circuit determined the first issue to be procedurally barred and rejected the second issue as meritless. King v. Moore, 196 F.3d 1327 (11th Cir. 1999), cert. denied, 531 U.S. 1039 (2000).

On November 19, 2001 Governor Jeb Bush signed a third death warrant for King and execution is scheduled for January 24, 2002. Judge Schaeffer held a case management conference on November 21, 2001, (R. V5/763-828)[2] and thereafter issued an order scheduling deadlines for the warrant litigation. (R. V5/823-824) On November 29, 2001, the court held a hearing on various pending pleadings involving a pro se motion to vacate which had previously been filed. (R. V5/829-904) At this hearing, King filed two motions seeking DNA testing of the vaginal washings from the victim that had been blood typed prior to trial. (R. V1/44-49) The State filed a response to the motions on December 3, 2001. (R. V1/57-193)

The State's response incorporated several exhibits, including an internal state attorney report on the status of all of the physical evidence obtained during the investigation of King's crimes. (R. V1/65-85) The report was generated in July, 2001, as

[2]References to the record on appeal from the instant proceedings, Florida Supreme Court Case No. 02-1, will be cited by the designation "R." followed by the applicable volume and page number. References to the record in the direct appeal from the judgments and sentences imposed, Florida Supreme Court Case No. 52185, will be cited by the designation "DA-R." followed by the applicable volume and page number.

part of a directive by Sixth Circuit State Attorney Bernie McCabe to review the physical evidence in every death penalty case from that office due to the recent development of procedures to secure DNA testing in these cases. The report concluded that the vaginal washings taken from Mrs. Brady at the time of her autopsy had been "more than likely" destroyed by the medical examiner's office many years ago, and at any rate the washings could not be located and were not available for any further testing. (R. V1/77)

A public records hearing was held on December 10, 2001. King sought records from six agencies, and testimony was taken with regard to the status of compliance. Debra Lewis is the records custodian for the Sixth District Medical Examiner's Office, and has been employed there since May, 1999 (R. V6/942). She testified that she had provided a copy of the relevant portions of the Florida Administrative Code, which her office follows, in her public records response to the request for standard operating procedures for the destruction of specimens (R. V6/928). Lewis noted that actual body specimens such as blood or urine are kept for a year; although the office tries to keep such specimens for two years, space limitations may preclude keeping them for that long (R. V6/930-931, 943). The histology slides created from body tissues such as the heart or lungs are kept indefinitely (R. V6/930). The paraffin blocks which are created and used to make the histology slides are kept for ten years (R. V6/930). Lewis

also noted that the office makes no distinction in capital cases and would not keep specimens longer unless there was a particular request in a specific case (R. V6/931).

Lewis testified that, although there are evidence destruction logs which reflect if a sample has been destroyed, she did not know if any such logs were used back in 1977 (R. V6/942). However, if they had existed they would still be in the office, and she had not seen any logs from that time (R. V6/942). Such logs today are maintained by the toxicology lab, and Lewis did not think there was a toxicology lab back in 1977, and she had no reason to believe that the logs would go back as far as the 1970s (R. V6/943-944). The washings in this case were not sent to the toxicology lab (R. V6/946).

Larry Bedore, director of operations for the Sixth District Medical Examiner's Office, testified that the office did not have any policy or procedure on the destruction of specimens other than following the administrative code (R. V6/932). Bedore joined the office in 1984, and he noted that procedures had been looser in 1977 than they were in 1984 (R. V6/932). There were no written evidence procedures in 1977 or 1984, but Bedore was familiar with the standard practices from those times (R. V6/932-933, 948-949). The administrative code rule was not in effect in 1977; it was implemented in 1981, and it codified the standard procedures among medical examiner offices (R. V6/ 932-933, 952-953). The Sixth

District would have followed the same policy in principle before the code was implemented (R. V6/953). The medical examiner, Dr. Joan Wood, and her predecessor, Dr. Shiner, provided verbal policies to control handling of evidence (R. V6/933). Dr. Shiner died in 1986 and Dr. Wood replaced him as medical examiner (R. V6/933). Bedore had worked with Dr. Wood for sixteen years, and knew her procedures very well; he recalled having discussed evidence control with her at length over the years (R. V6/933, 949). In 1977, his office also performed sexual assault examinations for the county, and the standard procedure was for Dr. Wood to look at the vaginal washings under a microscope for the presence of sperm, and in some cases the washings were given to Marion Hill to do serology testing for ABO blood types (R. V6/934). The washings were never sent for further testing; at that time, blood typing was the "maximum science," because they did not know about DNA (R. V6/934).

Bedore noted that Dr. Wood handled this case, and that their records reflect that she took the vaginal washings to All Children's Hospital to study them under the microscope, then turned them over to Hill for the blood testing (R. V6/934). Although there is no documentation of what happened next, such specimens were typically in a test tube of fluid taken from the body and after the tests were completed, the test tube and all of the other biomedical waste would be discarded by Dr. Wood (R. V6/934-935).

Bedore recalled having been contacted by the state attorney's investigator recently and advising the investigator that the medical examiner's office would not still have this evidence because 1) Dr. Wood's routine procedure was to discard the specimens and 2) the medical examiner's office did not retain evidence; anything of a testable nature would be turned over to the appropriate law enforcement agency (R. V6/937). Bedore clarified that the only evidence which would be given to law enforcement would be something subject to further testing; that vaginal washing were never turned over to law enforcement agencies because all of the testing was done in-house (R. V6/949).

Bedore also noted that the toxicology testing logs which Lewis referred to, which would reflect any destruction of evidence, only began about four or five years ago (R. V6/947). There are no logs prior to that time (R. V6/947). In addition, specimens such as the vaginal washings in this case would not have been sent to the toxicology lab, and therefore would not have been recorded in any form on a log (R. V6/948).

Debra Lewis also met with the state attorney's investigator and presented him with the medical examiner's entire file on Mrs. Brady's death (R. V6/937-938). Nothing in the file offers any indication that these specimens could still be around or available (R. V6/938). There is nothing which documents that the specimens were ever returned to the medical examiner's office after being

analyzed at All Children's Hospital (R. V6/939). The documentation reflects that certain items, such as clothing, were turned over to law enforcement, but there was no documentation regarding the vaginal washings after the testing at All Children's Hospital (R. V6/939). Today, the medical examiner's office does not take vaginal washings, they prepare swabs which are sent to the FBI and then returned directly to law enforcement (R. V6/939).

Bedore and Lewis both stated that they had done everything they could to confirm that they do not possess any of Mrs. Brady's specimens today (R. V6/940). They both also confirmed that this case had never been treated any differently than any other case in that office (R. V6/940, 958). Bedore testified that there was nothing different as far as keeping logs or destroying vaginal washings in 1977 or 1979 than what was done when he came to the office in 1984 (R. V6/940).

Counsel for King noted that she had filed additional public records requests, including a request to the Pinellas County Sheriff's Office, because a computer printout from the sheriff's office indicated that they had destroyed two pieces of evidence in 1987 and 1988 (R. V6/980). Linda Johansen, counsel for the sheriff's office, noted that the evidence receipts in 1977 had been handwritten, that the office had been through two computer conversions since that time, and that Lt. Colcord could testify to explain that the notation of any destruction on the master window

in this case was a computer error (R. V6/983). Thereafter, Lt. Wallace Concord, supervisor of the technical services division of the Pinellas County Sheriff's Office, testified about the ACIS property and evidence report provided to King's attorneys (R. V6/987). Reviewing the history of the sheriff's office computer systems, Colcord explained that the notation "destroyed" on the evidence report could be a conversion problem created when information from the original computer system was transferred to a new system in April, 1991 (R. V6/988). If the new system did not recognize a particular code from the old system, there would be an "invalid" remark as noted on the evidence report (R. V6/993-994). Colcord noted that the sheriff's office still possessed the handwritten evidence receipts from 1977, which had been provided to King's attorneys in 1992 and 2001, and that there were no physical records to support the suggestion that anything was destroyed and no physical items linked to the codes to identify anything had been destroyed (R. V6/989, 992, 996). There is nothing in any of the records from the sheriff's office which indicates that they ever possessed the vaginal washings (R. V6/991, 997, 1003).

At the same hearing, Judge Schaeffer entertained King's motions to depose Dr. Wood and for DNA testing. Judge Schaeffer observed for the record that she had several cases where Dr. Wood is a potential witness, and she had been advised that Dr. Wood is very ill and not available for depositions (R. V6/959-960). Bedore

acknowledged that he had spoken with Wood recently and that she was quite ill and unavailable (R. V6/960). The court denied the request to depose Wood, finding that there had been no showing such discovery was necessary since the same information was available from Larry Bedore and that, at any rate, Wood was unavailable (R. V6/1018-1019). The judge was satisfied from the testimony that she had already heard that the vaginal washings had been destroyed as a matter of routine (R. V6/1019-1020). The court then denied the request for DNA testing as moot, finding that the substance sought to be tested did not exist and had not existed since at least 1979 (R. V6/1022, 1027).

On December 18, 2001, King filed his successive motion to vacate, request for an evidentiary hearing, and request for a stay of execution. (R. V3/399-585) The State filed its response on December 20, 2001, (R. V4/586-617) and a Huff hearing was held on December 21, 2001. (R. V7/1042-1152) At the Huff hearing, the parties agreed that, in lieu of an evidentiary hearing, the court could consider the testimony from the December 10 public records hearing and the attachments to the motion to vacate and the State's response to the request for DNA testing as competent evidence (R. V7/1053-1054, 1058-1060, 1064-1066).

On January 1, 2002, Judge Schaeffer entered a comprehensive order denying all relief. (R. V4/618-708) This appeal follows.

SUMMARY OF THE ARGUMENT

ISSUE I - The trial court properly denied King's due process claim regarding the State's failure to preserve evidence. The court's finding that the vaginal washings were not destroyed in bad faith is supported by the record, and precludes any relief on this issue.

ISSUE II - The trial court properly denied King's claim of ineffective assistance of trial counsel, based on counsel's actions regarding the victim's vaginal washings, as procedurally barred. In addition, the court's finding that this claim would be without merit is supported by the record.

ISSUE III - The trial court properly denied King's claim of ineffective assistance of counsel claim, based on counsel's failure to adequately question jurors, as procedurally barred and legally insufficient.

ISSUE IV - The trial court properly rejected King's claim of actual innocence as meritless. The court applied the correct law and correctly determined that King could not offer any reliable evidence of his alleged innocence.

ISSUE V - The trial court properly rejected King's claim of ineffective assistance of collateral counsel as procedurally barred and without merit.

ISSUE VI - The trial court properly denied King's claim challenging the constitutionality of Florida's death penalty

statute. The court applied the correct law, which soundly rejects King's argument on this issue.

ISSUE VII - The trial court properly denied King's claim challenging the constitutionality of Florida's use of lethal injection as a method of execution. The court applied the correct law, which soundly rejects King's argument on this issue.

ISSUE VIII - The trial court properly denied King's claim alleging an ex parte communication between the State and trial judge John Andrews as procedurally barred and meritless.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING KING'S CLAIM THAT THE STATE COMMITTED FUNDAMENTAL ERROR BY DESTROYING EXCULPATORY EVIDENCE

King's first issue challenges the trial court's ruling rejecting his claim of a due process violation based on the State's failure to preserve the vaginal washings from the homicide victim's body which had been tested by the medical examiner's office prior to trial. The denial of this claim involved the application of legal principles to the factual findings made below; this Court must review the factual findings for competent, substantial evidence, paying great deference to the trial court's findings, and review of the legal conclusions is de novo. Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998).

There is no dispute as to the applicable law on this claim. In order to establish a due process violation, King must demonstrate both that the State acted in bad faith in failing to preserve the evidence, and that the State's actions have resulted in substantial, actual prejudice to his case. See, Arizona v. Youngblood, 488 U.S. 51 (1988). In Youngblood, the United States Supreme Court explained that a due process claim on these facts requires a showing of bad faith on the part of the government:

The Due Process Clause of the Fourteenth

> Amendment, as interpreted in *Brady* [*v. Maryland*, 373 U.S. 83 (1963)], makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. ... We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

488 U.S. at 57-58. See also Merck v. State, 664 So. 2d 939, 942 (Fla. 1995); Kelley v. State, 569 So. 2d 754, 756 (Fla. 1990).

The element of bad faith requires more than a showing of the intentional destruction of potentially exculpatory evidence. King must show that the State was aware of the exculpatory value of the lost evidence and made a conscious effort to prevent the defense from securing the evidence. See Youngblood, 488 U.S. at 56 (noting that the exculpatory nature of the evidence must be apparent to law enforcement at the time of the destruction); California v. Trombetta, 467 U.S. 479 (1984); United States v. Valenzuela-Bernal, 458 U.S. 858 (1982). As Judge Schaeffer found, this standard is not met on the facts of this case.

The lower court denied relief upon a finding that King could not demonstrate that the vaginal washings were destroyed in bad faith. King asserts that this finding is contrary to the evidence. Specifically, the court found as follows:

Everyone, the state, the defendant, and this court, wishes the vaginal washings that were taken from the victim and analyzed for blood type before the defendant's trial in 1977 were still available for DNA testing. When it was apparent that defendants were going to be able to request DNA testing under Fla. Stat. § 925.11, which became effective October 1, 2001, Bernie McCabe, State Attorney for the Sixth Circuit, had investigators begin rounding up any evidence that existed which could be tested for DNA on all death penalty cases, beginning with the oldest cases. (T. 50-54, Hearing 11/29/01; T. 31-32, Hearing 12/10/01). Mr. King's case was one of the oldest cases in Pinellas County, if not the oldest case, the crimes having occurred in 1977. Therefore, before Mr. King filed his motion for DNA testing, Mr. McCabe had sent all the evidence that existed in defendant's case for DNA testing. The vaginal washings were missing when the state investigator looked for them to have them tested, and they are still missing today. All items that could have been tested in this case for DNA had insufficient fluids for any DNA tests. (See attachment to the State's Response to Motion for DNA Testing and to Motion to Compel Production of Evidence for DNA Testing, and identical Exhibit 4, attached to defendant's Successive Motion to Vacate Judgement and Sentence, hereinafter called "state's DNA report"). Thus, there are no DNA tests that can be done in this case. But, the state clearly wanted all items in this case, including vaginal washings, tested for DNA. The state believed that if any DNA could be found, it would solidify that Amos Lee King was the person who murdered, and sexually assaulted Mrs. Brady. The defendant says if the washings were available to be tested for DNA, they would eliminate him as the depositor of the semen in Mrs. Brady's vagina, and thus effectively exclude him as the murderer.

If the vaginal washings or rectal swabs had been kept, no one can tell this court that after 24 years there would have been anything of value to be tested for DNA. In fact, the attorneys for the defendant conceded this at the *Huff* hearing. (T.21-23, Hearing 12/21/01). If the vaginal washings and rectal swabs had been kept, and there was something still remaining after 24 years to be tested, no one can prove what the results would be. The state suggests it would produce the defendant's DNA. The defendant suggests it would produce the DNA of an unknown person who raped and murdered Mrs. Brady 24 years ago.

Where are these vaginal washings (and the rectal

swab for whatever value they might be, which is probably none, since they couldn't even be tested for blood type or determined to be evidence for either side at the first trial)? This court held a hearing on December 10, 2001. The hearing was to determine all pending motions, and all public record matters. A complete reading of the transcript of that hearing shows that in all probability the washings and swabs were destroyed by the medical examiner's office either immediately after being tested for blood type, or after being kept for a year, perhaps two. In other words, they were thrown out, as were all other such specimens taken in all cases during that time period.

. . .

At the hearing on December 10, 2001, two persons from the Pinellas County Medical Examiner's Office, Debra Lewis, the records custodian, and Larry Bedore, the director of operations, testified in conjunction with public records matters, the Motion to Compel DEN Testing, and the Motion to Compel Production of Evidence for DNA Testing, and the Motion to take Deposition. Mrs. Lewis said the M.E.'s Office kept these type specimens for one year, at the most two. (T. 26-27). Mr. Bedore says in 1977, the procedures were looser than they were after 1981, when Administrative Code 11G came into effect, after which the M.E.'s Office kept these type specimens one-two years, but that in 1977, the vaginal washings were likely destroyed by Dr. Wood after they were tested. (T. 29-31, 48). While Mr. Bedore does say, as suggested in defendant's successive motion, that evidence is turned over to law enforcement, he makes it clear that the "evidence" that he is referring to is that which the FBI or FDLE would be testing, and not vaginal washings, such as were tested in house in this case. (T. 33, 45). Mr. Bedore says, in response to Ms. Haughey's question about whether Dr. Wood would have turned evidence over to law enforcement, "Any evidence that was going to be tested by the forensic laboratory was turned over to the law enforcement agency, clothing, blood stains on materials. Vaginal washings were never turned over to law enforcement agencies because the testing was done in-house. We did our own serology in those days. There was no reason to send it out for a second serology test to determine ABO blood type. So no, those would not have been turned over." (T. 45, emphasis mine). There is no dispute in this case that testing of the vaginal washings to determine blood type was conducted by Marian Hill, an employee of the Medical Examiners office, or that Dr.

Wood delivered the vaginal washings to be tested, or that the vaginal washings themselves were not introduced into evidence in the defendant's trial, only testimony about the tests. The reports of the test results are still available and are part of the state's DNA report. Mr. Bedore also makes it clear there would have been no "log" in existence at the medical examiner's office at the time in question to help in telling us exactly when the washings or swab were destroyed, or by whom. (T. 43-45). Such a log exists today, but it did not in the 70's. (T. 43-45). In fact, these logs were put into place "only 4 or 5 years ago." (T. 43).

In addition to the testimony of Debra Lewis and Larry Bedore of the Pinellas County Medical Examiner's Office, Lt. Wallace Colcord, supervisor in charge of the technical services department of the Pinellas County Sheriff's Office, and Ms. Linda Johansen, attorney for the Pinellas County Sheriff's Office testified at the December 10 hearing. Lt. Colcord tried to explain why the Sheriff's Office records show something was destroyed in this case on March 25, 1988, and something else on August 11, 1987. (T. 85-97). Frankly, it is unclear from this testimony if any evidence in this case actually was destroyed, or if the records showing something destroyed are from computer glitches. But one thing is clear. Lt. Colcord is unequivocal that there is nothing in any record at the sheriff's office that the sheriff's office ever had any vaginal washings connected to this case. (T. 87). And Ms. Johansen testified that she had provided CCRC-M the entire archival file, which had contained all the handwritten notes of every officer who had received any property from any source. She, too, was unequivocal that no record in this case shows that the sheriff's office ever had any vaginal washings connected to this case. (T. 98-99). Therefore, if something connected to this case was, in fact, destroyed in 1987 and 1988, it was not vaginal washings or the rectal swabs.

This court has read the entire state's DNA report and the entire transcript of the December 10, 2001 hearing. After doing so, this court makes the following findings: 1. That the vaginal washings and the rectal swabs were destroyed by someone in the medical examiner's office, either immediately after they were tested, or within one to two years after they were taken, as was customary in all cases where such specimens were obtained and tested in house, as was done in this case. 2. There was no knowledge of DNA testing in 1977, 1978, or 1979.

> 3. No one connected to the medical examiner's office, the sheriff's office, or the state attorney's office could have known when these specimen's were obtained or destroyed that they might someday be scrutinized for DNA, to either include Mr. King as the secretor in the vaginal washings, or to exclude him.
>
> . . .
>
> While this may not be pertinent to the claim as raised, this court feels compelled to point out to the defendant that if he had not destroyed the pants he had been wearing on the night of the murder, and the attempted murder, the blood present on those pants could have been tested at the time of his trial to see if it matched the blood type of the victim, Mrs. Brady, as the state suggested, or the blood type of the victim, corrections officer James McDonough, as the defense suggested. The pants the defendant wore on the night of this homicide, and attempted homicide would have been introduced into evidence at King's trial, and would still be in evidence at the clerk's office. Today, the blood on those same pants could be analyzed for DNA, and if it still existed in sufficient quantity to be tested, Mrs. Brady's DNA could be either included or excluded. This potential evidence was lost to the state and the defendant, both at trial and now, through the exclusive actions of the defendant. Since the defendant admitted to the detectives that he had stabbed James McDonough, (although he contended it was in self defense) when he agreed to talk to the detectives in this case after he turned himself in, and he knew they were seeking his pants worn the night in question, why did he take them on a wild goose chase in search of the pants? (R. 1706-1708, 1752-1762. Please note that all record pages referred to in this order are attached in sequence as composite exhibit A). One can only surmise that the blood type present on the pants was not helpful to the defendant's position then or now.
>
> Because the defendant cannot show "bad faith" on the part of the state for all the reasons noted above, Claim I must be denied.

(R. V4/625-630).

The court's findings in this regard are clearly supported by the evidence presented below. However, King claims that the court should not have relied upon the testimony of Larry Bedore, as

Bedore was not employed by the medical examiner's office in 1977 and therefore he could not provide competent evidence about the procedures used at that time. He also argues that bad faith is demonstrated by 1) Dr. Wood's failure to comply with applicable law on the preservation of evidence and 2) the written notation on the lab results that the washings were very bloody and difficult to read, which allegedly made the "exculpatory" nature of this evidence apparent at the time of testing.[3]

As to the criticism of the lower court's reliance on Bedore's testimony, the record reflects that although Bedore did not start working at the medical examiner's office until 1984, he was familiar with the procedures used in 1977, and therefore the court properly relied on this testimony. Bedore worked with Dr. Wood for sixteen years, and was familiar with office policy and procedures prior to the time of his arrival (R. V6/930-931, 948-949). Bedore testified that he had extensive discussions with Dr. Wood over the years about evidence control, with Bedore having come from a background of working at a crime lab (R. V6/931). The basis of Bedore's knowledge and the reliability of his testimony as to procedures in place prior to his employment are factors of

[3]It should be noted that King's position below was that the washings were destroyed by the sheriff's office in 1987 or 1988, and that the existence of DNA testing at that time provided the necessary apparent exculpatory value. However, given the lower court's finding that the washings were destroyed by the medical examiner's office in 1977-79 and were never provided to the sheriff's office, he has modified his claim with regard to the exculpatory nature of this evidence.

credibility for the trial judge, and do not render Bedore's testimony legally incompetent.

King's allegation that bad faith is demonstrated by the medical examiner's office's alleged lack of compliance with Section 406.13, Florida Statutes (1973), is similarly unpersuasive. As Judge Schaeffer expressly found, that statute was not violated by the discarding of any evidence in this case:

> The defendant cannot show bad faith on the part of the Pinellas County Medical Examiner's Office when someone, presumably Dr. Wood, the Assistant Medical Examiner at the time, destroyed the washings and swab. Before 1981, Florida Statue 406.13 (1973) did not even require the medical examiner's office to maintain such specimens for <u>any</u> length of time. It merely provided that "any evidence or specimen coming into the possession of said medical examiner in connection with any investigation or autopsy ***may*** be retained by him or be delivered to one of the law enforcement officers assigned to the investigation of the death." F.S. 406.13 (1973)(emphasis mine). It was only when the Administrative Code was amended in 1981 that the requirement that the type specimens involved here "***shall*** be retained for ***one year***, and afterwards at the discretion of the medical examiner" (emphasis mine) was included. The 1981 Amendment to the Administrative Code is still in effect today. See *Fla. Admin. Code Ann. R.* 11G-2.004 (1)(h) and (4)(b) (2001); F.S. §406.13 (2001). Thus, even today, the medical examiner could destroy a specimen such as a vaginal washing or rectal swab after one year. In this case, which occurred in 1977, whether the vaginal washing and swab were destroyed immediately after they were tested for blood types, or whether they were retained for one or two years before they were destroyed, they were not destroyed contrary to any law in existence, the medical examiner had no reason to believe the specimen could ever be of any use to exonerate Mr. King in the future, they were not destroyed contrary to any existing policy that existed at the Sixth Circuit Medical Examiner's Office, and in sum, nothing about the destruction of either the vaginal washing or the rectal swabs shows any required bad faith on the part of the

> medical examiner, and thus, the state. Without a showing of bad faith, the defendant simply cannot prevail.

(R. V4/629). In addition, the failure to abide by applicable procedures and regulations does not, in itself, demonstrate the bad faith necessary to support a due process claim. United States v. Deaner, 1 F.3d 192, 200 (3d Cir. 1993).

The suggestion that the exculpatory value of this evidence was apparent from the handwritten notation that the washings were bloody and difficult to read is also without merit. The court below specifically found that there was no knowledge of DNA testing at the time of the destruction and that the medical examiner had no reason to believe this evidence could ever be used to exonerate King (R. V4/628-629). Prior to being discarded, the washings had been properly tested using the "maximum science" available and had incriminated King. Defense counsel questioned Marian Hill during deposition prior to trial as to the meaning of her notation and any possible effect the blood in the washings could have on her readings (DA-R. V3/535). On these facts, there was no reason for anyone to believe that this evidence could ever provide exculpatory information to King in 1977.

Thus, King's claim fails because the lower court's finding that the washings were not discarded in bad faith is well supported by the record. King has not identified any improper State action or misconduct committed in bad faith which has prevented him from investigating and presenting a valid postconviction claim. While

he has criticized the State for failing to maintain evidence, he has not presented any basis for a finding of bad faith as necessary to establish that a due process violation has occurred. Similar claims have been rejected on comparable facts. Holdren v. Legursky, 16 F.3d 57 (4th Cir. 1994) (finding no constitutional error when government physician treating rape victim discarded specimens of unknown value); United States v. Boyd, 961 F.2d 434 (3d Cir. 1992) (failure to preserve urine sample that was previously tested and discarded according to standard procedure did not violate due process).

Even if King could establish the necessary bad faith in this case, he cannot prevail because no actual, substantial prejudice can be discerned. He cannot specify what any further testing of the vaginal washings could possibly add to any potential postconviction claim. Thus, he cannot show this evidence to be necessary or material to any relevant claim. Although counsel for King is sure to point out that there is no way to determine what information may have been revealed had this material been available, this will always be the situation when possible evidence of unknown value has been lost, and courts have consistently held that speculative claims of prejudice are insufficient even on these facts. See Rogers v. State, 511 So. 2d 526, 531 (Fla. 1987) (defendant's burden of establishing actual prejudice from pre-indictment delay is not met by speculative allegations of faded

memories or the disappearance of purported alibi witnesses); United States v. Crouch, 84 F.3d 1497, 1515 (5th Cir. 1996) (en banc). The washings were, of course, tested prior to trial, and King has not identified any potential deficiencies or problems with that testing or the results obtained. Additionally, although King asserts that the washings provided the "only" evidence to connect him with Brady's murder, there was clearly other strong circumstantial evidence presented at trial which established King's guilt on this offense. Thus, the evidence would not prove or disprove any material issue in this case.

The cases cited by King do not compel any relief. In United States v. Elliott, 83 F.Supp.2d 637 (E.D. Va. 1999), the court specifically found that the sheriff's office acted in bad faith by destroying glassware that had been confiscated as having been used for the manufacture of illegal drugs. Significant to that case was the fact that residue on the glass was destroyed prior to ever being subjected to any testing, and the district judge found that the glassware had apparent exculpatory value at the time of the destruction. In addition, at least one jurist suggests that Elliott does not follow the applicable law under Youngblood. See United States v. Vera, 2001 U.S. Dist. LEXIS 9337 (D. Oregon, June 26, 2001). In the instant case, however, there was no reason to believe in 1977 that the vaginal washings could be subject to any further testing, or could provide any exculpatory value.

Similarly, in Stuart v. State, 907 P.2d 783 (Idaho 1994), the necessary bad faith in the State's destruction of jail telephone logs was based in part on the fact that the State had concealed the existence of a tape recording of a telephone call rather than providing it to the defense in pretrial discovery. In this case, King's attorneys were well aware of the existence of the vaginal washings before trial; under the reasoning of Stuart, the fact that the State did not conceal the existence of the washings demonstrates good faith. Neither Elliott, Stuart, nor any other case cited by King, provides a basis for granting relief on the facts of this case.

Although the court below denied this claim on its merits, there are a number of reasons that this issue could have been denied on procedural grounds. King should be denied relief on the basis of laches, the doctrine that a criminal defendant's unreasonable delay in seeking relief accompanied by resulting prejudice to the other side (here, the State) warrants refusal or denial of relief. King has waited some 24 years after the discovery of the victim's body to initiate an inquiry when the defense was on notice at the time of trial that there had been lab testing conducted on vaginal washings. No action was taken then and such inaction has continued throughout years of appeals and postconviction collateral litigation in the state and federal courts. Now, after the signing of the third warrant of execution

by the Governor, King seeks to initiate additional lab examination on the items; however, the specimens are no longer available. Clearly, there is no reasonable explanation why such request was not and could not have been made earlier in prior stages of litigation. This undue delay results in prejudice to the State because as noted in McCray v. State, 699 So. 2d 1366, 1368 (Fla. 1997), "As time goes by, records are destroyed, essential evidence may become tainted or disappear, memories of witnesses fade, and witnesses may die or be otherwise unavailable."

King asserts that the doctrine of laches should not apply because his request for DNA testing was timely under the new statute; however, nothing precluded King from attempting to secure this evidence for testing years ago. Defendants have sought DNA testing for years. See Zeigler v. State, 654 So. 2d 1162 (Fla. 1995); Sireci v. State, 773 So. 2d 34, 43 (Fla. 2000). The fact that his request for testing was timely does not mean his current due process claim, which clearly could have been discovered years ago, must now be considered.

Even if the evidence were available, no meritorious claim could be presented. In Zeigler, a successive motion for postconviction relief was based, in part, upon a request for DNA testing. This Court affirmed the trial court's summary denial of the request for testing, finding that DNA testing had been available for years and therefore any DNA claim would be

procedurally barred. Further, Zeigler failed to show, given the other evidence of his guilt, how the DNA evidence would probably have resulted in a finding of innocence: a requirement for a successful claim based upon newly discovered evidence. Zeigler, 654 So. 2d at 1164 (citing Jones v. State, 591 So. 2d 911, 915 (Fla. 1991)); Sireci, 773 So. 2d at 43 (finding DNA testing claim time barred as not filed within two years of the test becoming available and further, finding that even if conducted, test would not "probably produce an acquittal on retrial."). Similarly, King has not reasonably demonstrated how any possible DNA testing in this case could produce a different result in light of the substantial evidence of his guilt.

Finally, it must be noted that King's motion below was improperly pled, as King failed to comply with the new postconviction Rule 3.851 in several respects. The most serious deficiency is King's failure to offer a sufficient statement to explain why each of these claims could not have been presented previously. See Fla.R.Crim.P. 3.851(e)(2)(B). This Court should insure compliance with the new rule by recognizing that a consequence of the failure to comply with Rule 3.851(e)(2)(B) will result in a procedural bar, and expressly deny relief on that basis in this case.

For all of the foregoing reasons, King's due process claim was properly denied below and does not compel the granting of any

relief.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING KING'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL BASED ON COUNSEL'S ACTIONS WITH REGARD TO THE VAGINAL WASHINGS

King next asserts that the court below erred in denying his claim of ineffective assistance of counsel for failing to investigate and preserve the vaginal washings taken by the medical examiner's office prior to trial, or to move to suppress the vaginal washings due to their unavailability. The court below found this claim to be procedurally barred. Whether or not a claim is procedurally barred is reviewed de novo. Bailey v. Nagle, 172 F.3d 1299, 1302 (11th Cir. 1999) (stating that whether a petitioner is procedurally barred from raising particular claims is a mixed question of law and fact that we review de novo); West v. State, 790 So. 2d 513, 514 (5th DCA 2001); Bain v. State, 730 So. 2d 296 (Fla. 2d DCA 1999). If reviewed substantively, claims of ineffective assistance of counsel are considered de novo. Sims v. State, 754 So. 2d 657, 670 (Fla. 2000); Stephens v. State, 748 So. 2d 1028 (Fla. 1999).

The lower court's finding of a procedural bar is correct. Florida Rule of Criminal Procedure 3.851(e)(2)(B) requires any successive motion to include "the disposition of all previous claims raised in postconviction proceedings and the reason or reasons the claim or claims raised in the present motion were not raised in the former motion or motions." Although King's motion

asserted that "[f]acts pled in this motion were unknown to previous counsel and therefore were unable to be pled in former motions," this conclusory statement is clearly insufficient to satisfy the dictates of Rule 3.851. The State respectfully submits that the failure to comply with this requirement in and of itself compelled the finding of a procedural bar.

In addition, the court below outlined the extensive litigation on prior claims of ineffective assistance of counsel at guilt phase (R. V4/630-631). King is not entitled to raise such claims in a piecemeal fashion. Pope v. State, 702 So. 2d 221, 223 (Fla. 1997); Lambrix v. State, 698 So. 2d 247 (Fla. 1996) (stating that successive claims of ineffective assistance of counsel on different grounds are not permitted); Jones v. State, 591 So. 2d 911 (Fla. 1991); see also State v. Stewart, 636 So. 2d 16, 17 (Fla. 1994) (ruling that trial court erred in granting stay and conducting further proceedings where claims were or should have been made previously).

King suggests that the procedural bar should be ignored in this case "in the interest of justice" and consistent with this Court's decision in Peede v. State, 748 So. 2d 253 (Fla. 1999). Peede involved the litigation of an initial postconviction motion, which this Court remanded for an evidentiary hearing. Peede in no way suggests that all capital postconviction motions litigated previously can be reconsidered. Such an interpretation would

destroy any possibility of finality in these cases.

Even if this Court were to find that the claim is not barred, no relief is warranted under Strickland v. Washington, 466 U.S. 668 (1984). In order to establish a claim of ineffective assistance of counsel under Strickland, a defendant must demonstrate that counsel's performance was deficient, and that there was a reasonable probability that but for the deficient performance, the outcome of the proceeding would have been different. Here, King has failed to satisfy either of the two prongs.

The court below noted that no deficient performance was evident on these facts:

> It must also be remembered that no one has suggested that Mr. King is not blood type A, and a secretor. This is easy for every attorney who has dealt with Mr. King to determine. Ask Mr. King! One can only assume the reason it has never been said that an independent examination of Mr. King's blood has revealed anything else is because he is indeed type A, and a secretor. Blood typing is a fairly easy procedure. Blood bank employees do it all the time. This is not like DNA testing which is much more complicated. Thus, no one can really suggest that an additional blood type analysis, done by Mr. Cole or any other lawyer, on the vaginal washings, would have produced a different result. We must remember that blood typing was the only science available at the time of Mr. King's trial. Thus, it is really unfair to challenge Mr. Cole's performance in this regard, when in all probability, Mr. Cole and all of the defendant's present and past counsel knew King was an A secretor, and thus, the semen in Mrs. Brady could have been deposited by Mr. King.
>
> As to the suggestion that Mr. Cole should have developed that the evidence had been destroyed before trial, that is something that can't even be determined today. No one knows if the vaginal washings were destroyed by the medical examiner before or after the defendant's trial. The report of the analysis is

included in the state's DNA report. No one can really suggest it is wrong, that there was not both O and A blood type in the washings. Thus, it is doubtful that Mr. Cole could have shown the requisite "bad faith" required for relief even if it was destroyed and Mr. Cole had raised this issue. (See Claim I for the discussion on "bad faith.")

Finally, Mr. Harrison raised Mr. Cole's failure to get an independent analysis in defendant's initial 3.850 motion. (See Claim II G iii, in defendant's initial "Motion for Post Conviction Relief", 14-16, attached to this order as Exhibit B.) The state responded to this claim in their response. (See state's Response to Motion for Post Conviction Relief, p. unknown, but under the state's discussion of claim G, attached to this order as Exhibit C.) At the evidentiary hearing on defendant's motion, witness Anthony Rondolino, then Chief Assistant Public Defender, and co-counsel to Mr. King, now Sixth Circuit Judge, discussed what this court was trying to say at the *Huff* hearing on defendant's present motion, which is that in 1977 there was no law that allowed confidential experts to be appointed, and there was no money in the public defender's budget for this. Thus, if an expert was appointed, it was as a court's expert, and their report was made available to both the court and the state. Often times this appointment of an expert backfired, since the results were often the same and all defense counsel had done was to assist the state in proving their case. (3.850 Evidentiary Hearing, 11/13/81, 26-27; 49-50, attached to this order as Exhibit D.) (Note that the quality of Attachments B-F is poor. This is because they could be located only on microfilm.) See this court's discussion of this problem of having to get a court expert instead of a confidential expert (T. 33-38, Hearing 12/21/01). Mr. Cole should not be judged by lawyers and judges by standards of what lawyers would do today, but by what they could or should have done in 1977, the time of Mr. King's trial. Having been a criminal practitioner in those days, I am very aware of the dilemma that would have existed for Mr. Cole to ask the court for an expert and then have it come back to haunt him. Had Mr. Cole requested an expert, a serology expert from the FBI would probably have confirmed that Mr. King is an A secretor, and that the vaginal washings contained A and O blood type. How competent or effective is that!! Then the state could have had an FBI examiner to provide this damning evidence, instead of a medical examiner's employee, Marion Hill, who had never before

testified, or been qualified as an expert. (R. 1665). (R. V4/631-632).

Trial counsel was clearly not deficient for failing to secure and independently test the vaginal washings. In fact, the record reflects that counsel explored excluding Hill's testimony and questioned the significance of her notation that the washings were bloody. See Hill v. Dugger, 556 So. 2d 1385, 1388-89 (Fla. 1990) (affirming trial court's denial of ineffective assistance of counsel claim based on defense counsel's failure to obtain an independent expert on blood testing). Even if some deficiency could be presumed, King clearly cannot establish any prejudice. King speculates that an inconclusive result from an independent test would have raised a reasonable doubt as to whether a type A secretor was involved in the rape and murder of Ms. Brady. This allegation is clearly without merit and based solely on King's speculation. In Zeigler v. State, 654 So. 2d 1162, 1164 (Fla. 1995), this Court stated that Zeigler's "request for DNA typing is based on mere speculation and he has failed to present a reasonable hypothesis for how the new evidence would have probably resulted in a finding of innocence." Likewise, even if King obtained an independent test which was inconclusive, he is unable to show that this evidence would have probably produced a different verdict. Accordingly, no relief is warranted.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING KING'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON COUNSEL'S ALLEGED FAILURE TO ADEQUATELY QUESTION JURORS

King's next claim again asserts that his trial counsel provided ineffective assistance. The court below found this issue to be procedurally barred and legally insufficient (R. V4/633). Whether or not a claim is procedurally barred is reviewed de novo. Bailey v. Nagle, 172 F.3d 1299, 1302 (11th Cir. 1999); West v. State 790 So. 2d 513, 514 (5th DCA 2001); Bain v. State, 730 So.2d 296 (Fla. 2d DCA 1999). If reviewed substantively, claims of ineffective assistance of counsel are considered de novo. Sims v. State, 754 So. 2d 657, 670 (Fla. 2000); Stephens v. State, 748 So. 2d 1028 (Fla. 1999).

As noted previously, claims of ineffective assistance of counsel are typically procedurally barred in successive postconviction motions. Pope, 702 So. 2d at 223; Lambrix, 698 So. 2d at 248; see also Buenoano v. State, 708 So. 2d 941, 952 (Fla. 1998) (successive postconviction claim that juror failed to disclose criminal conviction during voir dire is procedurally barred because counsel could have researched and discovered any irregularities in the jurors' background within the time limits of rule 3.850). In addition, the claim that counsel failed to conduct jury selection in a reasonably professional manner, where based entirely on the transcript of the trial, is procedurally barred as

a direct appeal issue. Robinson v. State, 707 So. 2d 688, 697 n.16 (Fla. 1998) (claim of ineffective assistance of counsel based on jury selection was procedurally barred). King's failure to comply with Rule 3.851(e)(2)(B), requiring a successive motion to state the reason any claim was not raised previously, demanded the finding of a procedural bar.

Even if this claim is considered, however, no relief is warranted. King alleges that juror Demuth gave a misleading answer during voir dire when asked by the prosecutor "Mrs. Demuth, in reading your questionnaire, can we assume no one in your immediate family has ever been involved in the court process?" Mrs. Demuth responded, "No, sir." (DA-R. V7/1240). King learned of a newspaper article dated July 6, 1996, in which it is alleged that juror Demuth said her father was a Chicago policeman. King does not allege or show that his trial counsel was unaware of this fact, or that the juror withheld the fact or answered any question untruthfully. King claims only in general, conclusory language that defense counsel was ineffective for performing only a perfunctory voir dire. He neglects to mention that the juror questionnaires referred to in the questioning of Demuth would have provided additional information to that of the jurors' answers during voir dire; the court below noted that questionnaires have always elicited this information (R. V4/633). Defense counsel was probably satisfied to have Demuth, a mother of four children still

at home and a substitute elementary teacher, on the panel (DA-R. V7/1240-1242).

A review of the transcript of the jury selection as a whole clearly demonstrates that defense counsel acted reasonably as the advocate required by the Sixth Amendment. In addition, even if some possible deficiency were contemplated based on King's current counsel's suggestion that he would have done things differently during voir dire, no prejudice can be discerned in this case. Given the strength of the State's evidence against King, no reasonable juror would have failed to convict him of this murder. Since the outcome would not have been different even if voir dire had been conducted as now suggested, no prejudice accrued. See Thomas v. Borg, 159 F.3d 1147, 1152 (9th Cir. 1998) (in rejecting claim that counsel was ineffective for failing to establish under representation of blacks on his jury, court found no prejudice because evidence was so overwhelming that no reasonable juror, black or white, would have voted to acquit Thomas). Given the lack of any explanation as to why this claim was not raised previously, the speculative nature of King's second-guessing trial counsel's jury selection, the lack of any identifiable bias among the jurors that convicted him, and the absence of any possible prejudice, this claim was properly summarily denied.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING KING'S CLAIM OF ACTUAL INNOCENCE

King's next claim asserts that the trial court should have granted relief because he is "actually innocent" of his conviction as well as his death sentence. The denial of this claim was premised on the trial court's finding that King had failed to offer any reliable evidence of his alleged innocence; since this claim was denied factually, this Court must review the lower court's ruling with deference. Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998).

The court below rejected this claim, finding:

> Claim IV is a claim of "actual innocence" of both the guilt-innocence phase of Mr. King's trial, and the penalty phase. Taking the penalty phase first, two juries, the second unanimously (we didn't take penalty votes in 1977), have recommended that the proper sentence for this defendant, under the laws of the state of Florida, is death. Two different trial judges have sentenced the defendant to death. The Florida Supreme Court must have believed the death sentence proportional on each review of the death sentence it has conducted. What "new evidence" has the defendant shown in his successive motion to show that a jury's recommendation, or a trial judge's sentence, or the Florida Supreme Court's required proportionality review in upholding the defendant's sentence of death would be different if the "new" evidence could be presented? The answer is "none." Remember, King did not ask for an evidentiary hearing where he could present any new evidence, so presumably there must have been nothing new he could have presented.
>
> In this case, the Florida Supreme Court has upheld four of the aggravating factors found by Judge Federico. No amount of "new" evidence can change them. 1. Mr. King was serving a sentence of imprisonment for the crime of larceny of a firearm when he committed this murder. 2. Mr. King had previously been convicted of the crime

of robbery on two separate occasions, and the contemporaneous attempted murder of Mr. McDonough, three prior crimes that involve the use or threat of violence to the person. 3. Mr. King committed the murder in question while he was engaged in the crime of burglary to the victim's home, and sexual battery. 4. The murder for which Mr. King is sentenced was heinous, atrocious and cruel. *King v. State*, 514 So. 2d 34 (Fla. 1987). Nothing can ever alter those four weighty aggravating circumstances.

The suggestion seems to be made that if the vaginal washings were available, which they are not, and if they could be examined and prove that Mr. King was not the person who raped Mrs. Brady, which can never be proved since the washings are not and never will be available then the jury would have a lingering doubt about Mr. King's guilt and would recommend a life sentence. However, lingering doubt is not a mitigating circumstance in Florida, and it is this very case that reiterates that this is the law. *King v. State*, 514 So. 2d 354, 357-358 (Fla. 1987). While this court realizes that several current Justices of the Florida Supreme Court might want to reverse this law, this is not the case to do so. The reason is that if a new sentencing hearing were provided, King has shown nothing he could add to his previous trial to show lingering doubt, of which the first jury would have been well aware when they recommended a sentence of death. King merely speculates on what might be the case if certain vaginal washings were available to be tested. But, they are not. See Claim I, *supra*

Even Mr. King seems to realize that once a jury decides that Mr. King is guilty beyond a reasonable doubt, that same jury would recommend a death sentence, and the judge, following the law, would impose a death sentence, and the Florida Supreme Court, in performing a proportionality review, would uphold the death sentence. Mr. King says "I didn't want them coming here attacking Mr. Harrison, he didn't do this, he didn't do this in the penalty phase. I know that this case is too aggravating to be mitigated under those circumstances." (T. 42, Hearing 11/29/01). And in response to the court's question, "Mr. King, you know exactly what I know, don't you. And what you know is that if your case gets past the guilt phase, the chances of your having much success with a jury in the penalty phase is not good." The defendant replies, "I understand. That's correct." (T. 42, Hearing 11/29/01). Mr. King is simply not "actually innocent" of the death sentence that has been imposed in

this case.

What about his assertion that he is "actually innocent" of the murder? What "new" evidence do we have after 24 years? The answer is once again "none." Where is the new evidence that the defendant says Mr. Cole should have presented that would show that the knife that murdered Mrs. Brady and stabbed Mr. McDonough did not come from Mrs. Brady's house? Where is the new evidence that shows that the knife purportedly used on Mrs. Brady and Mr. McDonough was not made by Case knives, and similar to other Case knives that Mrs. Brady had in her kitchen? Where is the new evidence that shows that Mr. King is not an A secretor? Where is the new evidence that shows that Mr. King did not stab Mr. McDonough when he went to handcuff the defendant to find out why he was out of the center and had a blood soaked crotch? Where is the new expert witness testimony that shows that Dr. Wood was incorrect in her testimony that the stab wounds on Mrs. Brady could have been made by the Case knife that the defendant admitted having and throwing away as he escaped from the work release center? Where is the new evidence that shows the defendant was not missing from the work release center at the time the murder/rape/arson/burglary was committed at Mrs. Brady's home, which was 1500 feet from the work release center? Where is the new evidence that shows that the defendant was not found by Mr. McDonough trying to get back into the work release center soon after the murder/rape/arson/burglary was committed, and that he was sweating, agitated, and had a blood soaked crotch? Where is the new evidence that shows Mrs. Brady's vagina was not punctured with a knitting needle found broken at her house with blood on it, which would have caused her to bleed profusely from her vagina, and would have caused the perpetrator to have a bloody crotch if he had intercourse with Mr. Brady by merely unzipping his fly? Where are the defendant's blood soaked pants so they can be analyzed to determine if Mrs. Brady's blood type or DNA was on them? The answer is that after 24 years there is still no "new" evidence to show that any of this evidence, and testimony admitted at Mr. King's trial is erroneous or different today. Where is any "new" evidence of someone saying, "I lied at Mr. King's trial", or new testimony saying, "I committed this crime, not Mr. King?" This is the type of new evidence that must be shown to get a court to review an "actual innocence" claim. *Schlup v. Delo*, 513 U.S. 298 (1995). In this case, there is no such "new" evidence.

> In *Schlup v. Delo*, 513 U.S. 298 (1995), The Court says at 324: "A substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare", and must be supported by "new reliable evidence whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial." King has presented no "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at his first trial", thus, there is no "new reliable evidence" that can give Mr. King relief on this claim.
>
> The evidence used to convict King at his trial in 1977 may have been circumstantial, but not one shred of it has changed in 24 years, and he has presented no new evidence, except his claim on the vaginal washings, which is sheer speculation as to whether or not if they were available to be tested, and could be tested, the result would even be exculpatory. The washings might, as the state had hoped, have produced the final damning blow to Mr. King. The only real thing which exists to show "actual innocence" is Mr. King's saying it is so, and this is neither new nor sufficient for relief to be granted. Claim IV must be denied.

(R. V4/634-639).

King's claim that he is actually innocent of Mrs. Brady's murder fails to offer sufficient allegations of new evidence of innocence to afford any relief. King asserts that his execution will violate his constitutional rights because he can allegedly demonstrate that he is "actually innocent" pursuant to Schlup v. Delo, 513 U.S. 298 (1995) and Sawyer v. Whitley, 505 U.S. 333 (1992). However, actual innocence is not a substantive claim but only a gateway to review otherwise barred claims of constitutional error. See Herrera v. Collins, 506 U.S. 390 (1993).

Even if considered, his claim is without merit. In Schlup, the United States Supreme Court noted that "a substantial claim

that constitutional error has caused the conviction of an innocent person is extremely rare," and must be supported by "new reliable evidence whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial." 513 U.S. at 324.

King has not identified any "new reliable evidence" to support his claim; he merely continues his due process argument of Claim I, speculating that evidence which is no longer available may have helped him establish his innocence, and demanding a presumption[4] that the long-ago destroyed evidence would have exonerated him. His exclusive reliance on this unsupportable presumption falls far short of the showing of actual innocence discussed in Schlup. The evidence of King's guilt presented at trial was strong, and included eyewitness testimony establishing that he was missing from the Tarpon Springs Correctional Center at the time of Brady's murder; that he returned to the center, covered with blood, and attacked a counselor with the knife taken from the Brady residence; and that King's blood type grouping was found in the victim's vaginal washings, along with incriminating statements and other circumstantial evidence of his guilt. None of this evidence is

[4]King's request for a presumption that destroyed evidence would have been favorable to him under the doctrine of spoliation is not well taken since the washings were not destroyed to keep King from testing them. Even if it applied, however, this doctrine would backfire on King, as it would require a presumption that the pants King was wearing at the time he escaped, bloody by eyewitness accounts, would have provided incriminating evidence of Brady's murder.

challenged by his claim of actual innocence. Clearly, King cannot meet his burden of showing that no reasonable juror would have convicted him of first degree murder in light of his "new evidence," and he has not established that his conviction is a miscarriage of justice under Schlup.

King's characterization of the evidence against him as "circumstantial" does not establish his innocence. The "actual innocence" standard is not satisfied upon a showing of reasonable doubt; it demands evidence of such a nature that no reasonable juror would have convicted a defendant. Schlup, 513 U.S. at 327. King has not offered a colorable claim of innocence to permit consideration of the merits of his other substantive claims.

King has similarly failed to satisfy the test of Sawyer v. Whitley, 505 U.S. 333 (1992); under this decision, a defendant must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him eligible for the death penalty. King asserts without explanation that DNA testing would also have exonerated him of the underlying aggravating felonies and claims that innocence of the death penalty is determined by weighing the mitigating evidence against the factors in aggravation. That is not the test under Sawyer; in Florida, a defendant is eligible for the death penalty after a single aggravating factor has been established, and King would need to show that **all** of his aggravating factors are invalid. Sawyer,

505 U.S. at 347; see In re: Medina, 109 F.3d 1556, 1566 (11th Cir. 1997). Even if reweighing were appropriate, King has not cited any mitigation which could potentially outweigh the four aggravating factors repeatedly found, applied, and upheld in this case. King's conviction and sentence are not unreasonable in fact or law, and his bald assertion of actual innocence does not compel any relief.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN DENYING KING'S CLAIM OF INEFFECTIVE ASSISTANCE OF COLLATERAL COUNSEL

King also asserts that his right to due process has been violated because his initial postconviction attorney in 1981, Baya Harrison, allegedly provided ineffective assistance of counsel. The court below found this claim to be procedurally barred and without merit. Whether or not a claim is procedurally barred is reviewed de novo. Bailey v. Nagle, 172 F.3d 1299, 1302 (11th Cir. 1999); West v. State 790 So. 2d 513, 514 (5th DCA 2001); Bain v. State, 730 So. 2d 296 (Fla. 2d DCA 1999). If reviewed substantively, claims of ineffective assistance of counsel are considered de novo. Sims v. State, 754 So. 2d 657, 670 (Fla. 2000); Stephens v. State, 748 So. 2d 1028 (Fla. 1999).

The court's rejection of this claim below is well reasoned:

> Mr. King attacks collateral counsel as filing an ineffective initial 3.850. How can he really say that? It was Mr. Harrison's 3.850 motion that got him relief from the Eleventh Circuit, and a new sentencing hearing. *King v. Strickland*, 714 F.2d 1481 (11th Cir. 1983; *King v. Strickland*, 748 F.2d 1462 (11th Cir. 1984). Thus, that part of Mr. Harrison's work must have been effective. It was only part of his work which did not get Mr. King a new trial that is attacked as being ineffective collateral counsel.
>
> Mr. Harrison filed a motion to continue the hearing, stating in his motion that there were things he didn't have time to do "within the time constraints imposed by this Court and the Governor of Florida" (Motion to Continue, 3, attached as exhibit E). Mr. Harrison then goes on to list six areas that he couldn't do, either because of time or financial constraints. (Exhibit E. 3-4). This motion was denied by Judge Andrews. (Exhibit

> D, 4, 137-139). This denial was subject to appellate review. In fact, Mr. Harrison listed "Denial of motions filed with the Motion for Post Conviction Relief" as one judicial act to be reviewed. (Exhibit F). It is barred from further review at this time.
>
> The Florida Supreme Court reviewed Mr. Harrison's claim of ineffective assistance of trial counsel. *King v. State*, 407 So. 2d 904 (Fla. 1981). The 11th Circuit took great pains to evaluate all the evidence which Mr. Harrison had presented to show ineffective counsel at the guilt-innocence stage of his trial. *King v. Strickland*, 714 F.2d 1481, 1485-1489). It concluded that Mr. Cole was not ineffective at the guilt-innocence state of the trial. Neither court took exception to the work of Mr. Harrison. The Florida Supreme Court has been known to criticize collateral counsel. *Peede v. State*, 748 So. 2d 253, fn.5 (Fla. 1999).
>
> But, whether Mr. Harrison was effective or not, his effectiveness cannot now be challenged some 20 years after he filed Mr. King's initial motion. In 1988, King, through CCR, filed a motion for post conviction relief, challenging Harrison's effectiveness at the new penalty phase granted by the Eleventh Circuit. Any ineffectiveness of Harrison's previous work should have been raised at that time. King is procedurally barred from raising it now. Even if it could be raised now, there has been no showing of prejudice that is that the result of any new trial would be different than it was 24 years ago. This has already been explored in Claim IV above and will not be repeated here.

(R. V4/637-638).

Once again the lower court's finding of a procedural bar is correct. Harrison's effectiveness was challenged in postconviction proceedings in 1988, and any questionable aspects of his performance should have been argued at that time. As previously noted, claims challenging the adequacy of counsel cannot be raised piecemeal, and therefore this Court must uphold the finding of a procedural bar.

Even if considered, this claim does not present any basis for

the granting of relief. This Court has squarely rejected the suggestion that a claim of ineffective assistance of collateral counsel can offer justification for excusing otherwise applicable procedural bars. See Lambrix v. State, 698 So. 2d 247 (Fla. 1996). The opinion in Lambrix is well supported by federal law. There is clearly no constitutional right to collateral counsel, and therefore any alleged lack of effective assistance of counsel in postconviction proceedings does not compel any relief. See Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); Murray v. Giarratano, 492 U.S. 1 (1989).

In Pennsylvania v. Finley, 481 U.S. 551 (1987), the United States Supreme Court expressly refused to apply a due process requirement of effective counsel to situations where a state has opted to afford collateral postconviction counsel to indigent inmates. In doing so, the Court noted that no constitutional right to appointed counsel exists in state postconviction proceedings. 481 U.S. at 558. In Murray v. Giarratano, 492 U.S. at 7, 10, the Court confirmed that the holding of Finley is equally applicable in cases involving defendants sentenced to death. See also Kennedy v. Herring, 54 F.3d 678, 684 (11th Cir. 1995) (in denying petitioner's allegation that insufficient state funding for collateral counsel constituted "cause" so as to preclude application of a procedural bar, the court noted "[i]t makes no sense to say that the state need not provide counsel at all, but that if the state opts to

provide counsel, the state must fund counsel adequately or face the possibility of excusing procedural defaults"). King's principal authority to counter these cases is the dissenting opinion in Coleman v. Thompson, 501 U.S. 722 (1991); however, reliance on this dissent is misplaced and not persuasive.

King suggests that Lambrix should be revisited in light of this Court's decision in Williams v. State, 777 So. 2d 947 (Fla. 2000). Williams did not overrule Lambrix. Rather, Williams is easily distinguishable. In that case, this Court did not recognize any claim of ineffective assistance of collateral counsel, but resolved the issue on due process grounds. Williams had been denied the opportunity to pursue initial postconviction remedies because his collateral attorney did not timely invoke the postconviction process. The total deprivation of collateral review was a lack of process that could not stand under the Fifth Amendment. King, on the other hand, has not been deprived of a forum for collateral review. To the contrary, King has been provided with years of extensive postconviction review. He filed an initial postconviction motion in 1981 which was fully litigated both in the trial court and on appeal in this Court. He presented guilt and sentencing claims for consideration in federal court, ultimately succeeding on a claim which earned him a re-sentencing in 1985. The validity of his re-sentencing proceeding has been repeatedly upheld in collateral challenges in state and federal

courts. He has no basis to claim that he has not been afforded collateral review of his conviction and sentence.

Finally, even if this claim could be considered, there is no merit to the suggestion that Harrison's collateral performance was deficient. A review of the decisions rejecting Harrison's claims of ineffective assistance of guilt phase counsel demonstrates that counsel's performance was thoroughly explored. See King v. Strickland, 714 F.2d 1481 (11th Cir. 1983). Harrison aggressively attempted to relitigate guilt at King's re-sentencing and argued many of the claims now being presented. On these facts, no deficiency can be discerned and, as the court below found, no possible prejudice exists since, 24 years later, there is still no reasonable claim of innocence. No relief is warranted on this claim.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN DENYING KING'S CLAIM AS TO THE CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY

King's next issue challenges the constitutionality of Florida's death sentencing statute. Citing Apprendi v. New Jersey, 530 U.S. 466 (2000), King alleges that Florida's death penalty statute is only constitutional if the particular aggravating factors are charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. This is a purely legal claim and is therefore reviewed de novo.

The court below rejected this claim based on a number of state and federal decisions consistently rejecting King's attempted expansion of Apprendi. This ruling was correct since the claim is soundly refuted by all relevant case law. As King acknowledges, in Mills v. State, 786 So. 2d 532, 536-38 (Fla.), cert. denied, 121 S. Ct. 1752 (2001), this Court held that Apprendi did not apply to Florida's capital sentencing scheme. See also Brown v. Moore, 26 Fla. L. Weekly S742 (Fla. Nov. 1, 2001); Mann v. Moore, 794 So. 2d 595 (Fla. 2001). Federal courts have also held that Apprendi is not retroactive. See In re Joshua, 224 F.3d 1281, 1283 (11th Cir. 2000). The claim is particularly disingenuous in this case, since King's death penalty recommendation at his resentencing was in fact unanimous. Therefore, his argument would not provide any basis for relief in this case.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN DENYING KING'S CLAIM AS TO THE CONSTITUTIONALITY OF LETHAL INJECTION IN FLORIDA

King also challenges the trial court's denial of his challenge to the constitutionality of lethal injection as a method of execution. This is a purely legal issue which must be reviewed de novo; however, King is clearly not entitled to relief. This Court has repeatedly upheld Florida's lethal injection statute and procedures against the same Eighth Amendment claims presented herein. See Provenzano v. State, 761 So. 2d 1097, 1099 (Fla.), cert. denied, 530 U.S. 1255 (2000); Sims v. State, 754 So. 2d 657, 663-70 (Fla.), cert. denied, 528 U.S. 1183 (2000); Bryan v. State, 753 So. 2d 1244, 1253-55 (Fla.), cert. dismissed, 528 U.S. 1133 (2000). King has not offered any facts which were not known at the time of these decisions, and has not offered any basis for reconsideration of this issue. He fails to acknowledge, let alone distinguish, clear case law contrary to his position. This claim must be denied.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN DENYING KING'S CLAIM OF AN IMPROPER EX PARTE COMMUNICATION

King's next claim asserts that the trial court erred in denying his claim of an improper, ex-parte communication between the State and Judge Andrews during the original trial. The court below properly found this claim to be procedurally barred and without merit. Whether or not a claim is procedurally barred is reviewed de novo. Bailey v. Nagle, 172 F.3d 1299, 1302 (11th Cir. 1999) (stating that whether a petitioner is procedurally barred from raising particular claims is a mixed question of law and fact that we review de novo). If reviewed substantively, his claim of an ex-parte conversation involves a mixed question of law and fact, and should be considered de novo. Stephens v. State, 748 So. 2d 1028 (Fla. 1999).

King alleges that the improper conduct involved a conversation concerning the refusal of some State witnesses to testify while being videotaped or photographed. Once again, King's motion failed to state the reason or reasons this claim was not raised in a prior motion, as required by Rule 3.851 (e)(2)(B). Accordingly, the finding of a procedural bar should be upheld.

With regard to this claim, the lower court found:

> In his last claim, the defendant alleges the trial court had an ex-parte communication with the court regarding the video or still photographing of three witnesses who had purportedly stated they would refuse to testify if they were photographed. Two of these men were

still in the prison system, and one had been recently paroled.

While there does not appear to be any conversation on the record about removing the cameras, or more probably, not allowing the photographers to use their equipment when these three men were testifying, there is record activity of which defense counsel and the defendant were clearly aware. For example, the first discussion on the record is on the morning of July 7, 1977, before the trial begins for the day, when Judge Andrews announces, in the presence of all counsel and the defendant, "For the media people here this morning, there will be absolutely no photographs taken of the witnesses Robert Hudson and Hawkins" (R. 1434). If these two experienced defense attorneys had not known about this previously, perhaps from an off the record conversation from the evening before after the court adjourned for the night, surely they would have said, "wait a minute, what gives here?" It should be noted that Mr. Hudson, Mr. Roberts, and Mr. Hawkins were the next three witnesses called to testify, the same three regarding who the judge had just entered his prohibition about photographing on the record. (R. 1337-1338).

In between the testimony of Mr. Roberts and Mr. Hawkins, defendant's attorney objects, as he had done previously, two days before when the trial started, to the television and photographic equipment "being in the courtroom". (R. 1461-1462). Again, later in the morning, when these three witnesses were finished and other witnesses had been testifying, where photographing and video taping was permitted, defendant's counsel again objects, and says, in part, "I don't know what effect it is going to have on [the jurors]. I have noticed that the still camera was removed and a certain portion...", and after the judge interjected something about someone's attire, counsel says, "I just think the actions of the television camera operators standing up and sitting down, not taking pictures of certain witnesses accentuates the testimony of certain witnesses..." (R. 1589-1590). On both occasions Mr. Rondolino objected to the cameras, he also moved for a mistrial, which was denied. (R. 1462, 1592).

A clear reading of these record pages shows that the defendant's lawyers knew the court was excluding the cameras as to some witnesses and allowing it for others. It is doubtful there was an ex-parte conversation. Counsel entered objections and moved for mistrials on the difference in photographing some witnesses and not others. This whole issue of cameras in the courtroom,

the first time this had happened in the State of Florida, and the different treatment of certain witnesses was available for appellate review, and was reviewed. *King v. State*, 390 So. 2d 315, 318 (Fla. 1980). This claim is procedurally barred.

It is apparent that defendant's attorneys did not make a specific objection to the exclusion of the cameras on the three witnesses previously mentioned. It may have seemed inappropriate to do so when counsel for the defendant was continually objecting, and trying to make a record that cameras in general were objectionable, to ask that they not be turned off for a certain time period. If Mr. Harrison thought it was ineffective for the attorneys not to have objected, he could have added it to his claims of ineffective assistance of counsel. It was clearly in the record. Again, this issue is procedurally barred.

If, as Mr. King suggests, there was an ex-parte communication, it is certainly not newly discovered. Collateral counsel could have discovered it with due diligence and raised it in defendant's initial 3.850 motion. It was in the record for him to see. Additionally, there was a letter written by the trial judge, which CCRC-M concedes was in the court file in January, 1978, and was copied to defendant's trial counsel. (T. 68, Hearing 12/21/01). This letter lays out what happened regarding the photographing of these three witnesses. Collateral counsel could have read the record, and when he didn't see anything specific about this on the record, he could have asked co-counsel Rondolino, (Mr. Cole was deceased), how this came about, and could have learned about ex-parte communication, if there was any. The fact that this cannot be considered newly discovered evidence bars review at this time.

Finally, even if this were not to be considered procedurally barred, for some reason, the defendant must fail in this claim. To succeed on a newly discovered evidence claim, he must show prejudice. These witnesses were fairly minimal in importance as to the murder charge. They were more important as to the attempted murder charge. While neither this court no the Florida Supreme Court will countenance ex-parte communication, the defendant simply is unable to show that such communication, if it occurred, prejudiced the jury's guilty verdict, or his sentence of death.

Defendant's Claim VIII must be denied.

(R. V4/641-643).

Although defense counsel objected to the cameras coming and going and was aware that these witnesses were being treated differently, no objection was lodged on the basis that this was favorable treatment to the witnesses meant to curry favor, no suggestion was made that their testimony was inconsistent with their prior depositions and no suggestion was made that defense counsel was unaware of the court's basis for the order to not photograph the witnesses. The letter from Judge Andrews with its attachment of letters from the media, wherein references are made to the State advising the court that these witnesses would not testify if they were to be photographed (attached to King's motion as Exhibit 13) is dated January 17, 1978 and reflects that a copy of the letter was sent to counsel for King, Tom Cole. This claim has clearly been available to King for over two decades and the failure to previously assert it constitutes an abuse of the process. See Kight v. State, 784 So. 2d 396, 400 (Fla. 2001) (successive motion will be dismissed if "it fails to allege new or different grounds for relief" or if the failure "to assert those grounds in a prior motion constituted an abuse of the procedure"). In addition, even if defense counsel was not fully aware of the situation at the time of trial, this claim does not qualify as newly discovered evidence because it could have been discovered collaterally with due diligence. Correll v. State, 698 So. 2d 522, 524 (Fla. 1997); Rogers v. State, 783 So. 2d 980 (Fla. 2001).

The court below properly found that, even if this claim were

reviewed, King could not prevail because he could not demonstrate any prejudice. To be entitled to relief on a newly discovered evidence claim, King must show that he has discovered evidence which is "of such nature that it would probably produce an acquittal on retrial." Jones v. State, 591 So. 2d 911, 915-16 (Fla. 1991). In this case, the testimony was not crucial to the State's case and was merely corroborative of other evidence. The particular witnesses, Hawkins, Hudson and Roberts, were inmates who witnessed part of King's attack against Officer McDonough and their testimony was consistent with their prior depositions, the physical evidence and the testimony of Officer McDonough and Charles Shockley. The court below found these witnesses to be minimal to the murder charge and determined that any alleged improper communication could not have affected the verdict or sentence. There is simply no evidence that the decision to preclude photographing the witnesses in any way affected the outcome of the trial. Cf. Correll v. State, 698 So. 2d 522, 524 (Fla. 1997) (denying relief where blood spatter expert's exaggeration of her credentials was merely corroborative of medical examiner's testimony).

On these facts, the lower court properly rejected this claim, and King is not entitled to any relief on this issue.

CONCLUSION

Based on the foregoing arguments and authorities, this Court must affirm the lower court's denial of King's successive motion for postconviction relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843

STEPHEN D. AKE
Assistant Attorney General
Florida Bar No. 14087
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 801-0600
(813) 356-1292 Facsimile

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and U.S. mail to Richard E. Kiley and April E. Haughey, Assistant Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida, 33619, and the Honorable Susan F. Schaeffer, Circuit Judge, Sixth Judicial Circuit, 545 First Avenue North, Room 417, St. Petersburg, Florida 33701, this _____ day of January, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____
COUNSEL FOR APPELLEE