IN THE SUPREME COURT OF FLORIDA

ROBERT ANTHONY PRESTON, JR. Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO. SC05-781

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Earline Walker was murdered on January 9, 1978. She was found, nude and mutilated, in an open field approximately one-quarter mile from Prestons home. She had been abducted from a convenience store in the early hours of the morning. Preston was convicted of premeditated murder, felony murder committed in the course of a robbery, felony murder committed in the course of a kidnapping, robbery, and kidnapping. The jury recommended a sentence of death by a margin of 7-5. The trial judge followed the jury recommendation and found three aggravating circumstances:

1. Prior violent felony (throwing deadly missile);
2. Committed during a felony (robbery and kidnap);
3. Heinous, atrocious and cruel (victim kidnapped, driven 1.5 miles, walked at knife point 500 yards cut throat, numerous stab wounds, cross on forehead);
4. Cold, calculated and premeditated.

The trial judge found no mitigating circumstances, even though Preston had argued he was under the influence of extreme mental or emotional disturbance, did not have the capacity to appreciate criminality and was substantially impaired, and his age should be considered statutory mitigation. This Court affirmed the death sentence, but struck the aggravating circumstance of cold, calculated and premeditated. *Preston v.*

State, 444 So. 2d 939 (Fla. 1984). In affirming, the Court made the following fact findings:

> Early in the afternoon on January 9, 1978, the nude and mutilated body of Earline Walker was discovered in an open field in Seminole County by a detective of the Altamonte Springs Police Department. The victim's body had sustained multiple stab wounds and lacerations resulting in near decapitation.
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> Earline Walker was employed as a night clerk at a convenience store and had been discovered missing from the store at approximately 3:30 A.M. when an officer of the Altamonte Springs Police Department made his regular patrol. The officer also found that the sum of $574.41 was missing from the store. The appellant, Preston, was arrested on the following day on an unrelated charge. While he was in the custody of the Seminole County Sheriff, a deputy recovered a light brown pubic hair from Preston's belt buckle. Police also found a jacket of Preston's and several detached food stamp coupons in Preston's bedroom at his mother's house the day after his arrest during a search conducted after the police had received Preston's mother's consent. Comparison of the serial numbers on the food stamps recovered from the wastebasket in Preston's bedroom with those on two coupon booklets turned over to the police by an employee of the convenience store showed four matching coupons. In addition, fracture pattern analysis confirmed the coupons had been used at the convenience store to make purchases several days before the murder. No latent fingerprints were obtained from these sources.
>
> Analysis revealed that the pubic hair recovered from Preston's belt and another discovered on his jacket could have originated from the victim. Blood samples taken from the victim and Preston were compared with two stains found on Preston's jacket. The stains proved to be of the same blood type and same enzyme group as those of the victim. In processing the victim's automobile, which had been found abandoned on the day of the murder, several usable latent fingerprints were obtained. One was identified as being Preston's.

Preston, 444 So. 2d at 941-942.

Preston filed a Rule 3.850 motion to vacate during his first death warrant. After an evidentiary hearing, relief was denied. Preston raised the following issues on appeal from that denial:

(1) The State violated *Brady v. Marland,* 373 U.S. 83 (1963), by failing to notify defense counsel that keys labeled "Marcus A. Morales" were found in the victim's car;

(2) The State violated *Brady* by failing to disclose an unfavorable personnel evaluation of Diana Bass, FDLE hair analyst;

(3) Preston's attorney on a prior drug case worked for the State during the time of his murder trial, thus creating a conflict of interest;

(4) The trial judge failed to consider mitigation;

(5) The jury instructions violated *Caldwell v. Mississippi,* 472 U.S. 320 (1985);

(6) The State violated *Estelle v. Smith*, 451 U.S. 454 (1981);

(7) Trial counsel was ineffective.

Preston v. State, 528 So. 2d 896 (Fla. 1988). This Court affirmed denial of Rule 3.850 relief.

After a second death warrant was signed, Preston filed a habeas petition/coram nobis based on Anewly discovered evidence@ that Preston=s brother, Scott, actually murdered Earline Walker. The trial court denied relief and this Court affirmed. *Preston*

v. State, 531 So. 2d 154 (Fla. 1988); *cert. denied* 489 U.S 1072. (1989). In affirming, this Court made the following additional findings of fact:

> Earline Walker, who was working as a night clerk at the Li'l Champ convenience store in Forest City, was noticed missing at approximately 3:30 a.m. on the morning of January 9, 1978. All bills had been removed from the cash register and the safe, and it was subsequently determined that $574.41 had been taken. Walker's automobile was found later that day parked on the wrong side of the road approximately one and a half miles from the Li'l Champ store. Thereafter, at about 1:45 p.m. of the same day, Walker's nude and mutilated body was discovered in an open field adjacent to her abandoned automobile.
>
> Preston lived with his brothers, Scott and Todd, at his mother's home which was located about one-quarter of a mile from the field in which Walker's body was found. Scott Preston testified that he spent the evening of January 8, 1978, at the house with his brothers and his girlfriend, Donna Maxwell. At about 11:30 p.m., he retired to the bedroom with Donna. About an hour later, Robert knocked on the door, asking Scott to go with him to the Parliament House "to get some money." When Scott declined, Robert asked one of them to help him inject some PCP. After Scott and Donna refused to do so, they heard the door slam as Robert left the house. At about 4:30 a.m., Robert returned and asked them to come to the living room where he was attempting to count some money. Because he "wasn't acting normal," they counted the money for him, which came to $325. Robert told them that he and a friend, Crazy Kenny, had gone to a gay bar called the Parliament House where they had hit two people on the head and taken their money. Scott and Donna went back to bed. Donna gave similar testimony concerning Robert's actions. She also said that shortly before 9:00 a.m., Robert returned and told her that he had heard that a body of a woman who worked in a store near their house had been discovered in a field.
>
> The head security guard at the Parliament House testified that he observed no disturbance nor was any disturbance reported to him at that establishment

during his shift which began in the early evening on January 8 and ended at 5:00 a.m. on January 9. There was no police report of any incident at the Parliament House on January 9, 1978.
A woman returning home from her late night job at about 2:20 a.m. saw Preston wearing a plaid CPO jacket at a location near the vacant lot where Walker's body was found.

Preston was arrested the day following the murder on an unrelated charge. As part of the booking process, his personal effects, including his belt, were removed, and his fingerprints were taken. A pubic hair was discovered entangled in Robert's belt buckle. A microscopic analysis of the hair together with another one discovered on his jacket indicated that they could have originated from Walker's body.

Blood samples were taken from the victim and from Preston and compared with two blood stains found on Preston's CPO jacket. The blood samples were compared as to eight separate factors, including type, Rh factor, and enzyme content. The sample from the coat and the victim matched in all eight tests, while Preston's blood did not match in three. An expert opined that the blood on the coat could not have been Preston's but could have been the victim's. He also testified that only one percent of the population would have all eight factors in their blood.
Several detached food stamps were also found in Preston's bedroom pursuant to a consent search authorized by his mother. As a result of a fracture pattern analysis, an expert witness testified that these coupons had been torn from a booklet used by Virginia Vaughn to make purchases at the Li'l Champ food store several days before the murder. Vaughn testified that at the time of her purchase the coupons had been placed either in the cash register or the safe.

Five usable latent fingerprints and palm impressions were obtained from Walker's automobile and were identified as having been made by Preston. One of these was from a cellophane wrapper of a Marlboro cigarette pack found on the front console. The other prints were located on the doorpost and the roof of the car. Preston took the stand in his own behalf. He

> agreed that he was at his mother's house in the company of his brothers and Donna Maxwell the night of January 8. However, he said he had injected PCP and had no recollection of what occurred during the middle portion of the night. He did recall trying to count some money and had some recollection of going to the Parliament House in a car driven by Crazy Kenny. Preston denied having touched Walker's abandoned automobile. He also said that he had not been in the vicinity of the Li'l Champ store for approximately six months before the murder. He testified that the food stamps discovered in his room were found by him on a path behind the Li'l Champ store on the morning of the murder when he went there to purchase cigarettes. He admitted talking to Donna Maxwell regarding the discovery of the store clerk's body but said that the conversation did not occur until about 3:30 to 4:30 p.m.

Preston v. State, 531 So. 2d at 155 -157 (Fla. 1988). Preston also filed a petition for writ of habeas corpus simultaneously with the above proceeding. The petition raised seven issues:

(1) Appellate counsel was ineffective for not arguing the State had violated Brady re "Marcus A. Morales" keys;

(2) Erroneous jury instruction misled the jury;

(3) Appellate counsel was ineffective for failing to argue the trial court findings on aggravating and mitigating circumstances;

(4) Preston's rights to a fair trial were violated by the trial judge's refusal to instruct the jury on insanity;

(5) Appellate counsel was ineffective for failing to argue that the court erred in instructing the jury on prior violent felony;

(6) Preston was deprived of his rights to an individualized sentencing because of impermissible victim impact information;

(7) Jury instructions unfairly shifted the burden of proof to the defendant;

Preston v. State, 531 So.2d 154, 158-160 (Fla. 1988).

Preston filed a second Rule 3.850 motion for postconviction relief because the underlying felony for the Aprior violent@ aggravating circumstance had been vacated. Pursuant to *Johnson v. Mississippi*, 486 U.S. 578 (1988), this Court vacated Preston=s death sentence and remanded for re-sentencing. *Preston v. State*, 564 So. 2d 120 (Fla. 1990). Preston raised several other claims in his second postconviction motion, including:

(1) Newly discovered evidence – Scott Preston killed victim/Marcus Morales keys;

(2) State violated *Brady* by failing to disclose, and appellate counsel ineffective for failing to raise, Marcus Morales keys;

(3) Victim impact made trial unreliable;

(4) Heinous, atrocious, and cruel improperly argued;

(5) Remand required after striking aggravating factor;

(6) Jury instructions shift burden.

Preston v. State, 564 So.2d 120 (Fla. 1990).

After a re-sentencing hearing on January 28, 1991, the jury recommended the death penalty by a margin of 9-3. The trial judge granted a new sentencing hearing when it was discovered one of the jurors had not accurately responded in *voir dire*. On April 15, 1991, the jury recommended the death sentence by a vote of 12-0 after the third penalty phase. The trial judge

followed the jury=s recommendation and sentenced Preston to death on May 8, 1991. The trial court found four aggravating circumstances:

1. During commission of kidnapping;

2. Committed to avoid arrest;

3. Pecuniary gain;

4. Heinous, atrocious and cruel.

The trial judge held there was no extreme emotional disturbance and Preston=s capacity to appreciate the criminality of his conduct was not impaired. The trial court gave minimal weight to Preston=s age of 20 and found he was not a mere accomplice. As non-statutory mitigation, the trial court found Preston had a difficult childhood, a good prison record, and a good potential for rehabilitation.

This Court affirmed the death sentence. *Preston v. State*, 607 So.2d 404 (Fla. 1992), *cert. denied,* 507 U.S. 999 (1993). The following issues were raised:

(1) The State cannot seek aggravating circumstances on re-sentencing that were not sought in the original trial;

(2) Witness elimination aggravator not proven;

(3) Pecuniary gain and during-a-robbery aggravators are one single aggravator;

(4) Insufficient evidence of heinous, atrocious, and cruel;

(5) Medical examiner testified to irrelevant

evidence;

(6) Error in admission of photographs of victim;

(7) Evidence of residual doubt not allowed;

(8) Trial court failed to find two statutory mental health mitigators;

(9) Proportionality.

Preston v. State, 607 So.2d 404 (Fla. 1992)

Preston filed a third Rule 3.850 motion for postconviction relief on May 23, 1994. (SR[1] Vol.1, 1-80). The motion was amended March 22, 1995. (SR Vol.1, 97-195), and February 28, 2000. (SR Vol.7, 1081-1231). By order dated September 20, 2000, the trial judge granted an evidentiary hearing on Claims 1, 4, 6, 17, 18, 23, 27, 28, 29, 30, 31, 32, 33, 35, 36, 39. (SR Vol.8, 1380-81). Preston subsequently notified the trial judge that he did not intend to present evidence on Claims 4, 17, 18, 23, 27, 28, 29, 30, 31, 32, 33, and 35[2] and would rely on written argument on those claims. (SR Vol.9, 1384-1440). Preston filed an amended Claim 41 regarding ineffective assistance of counsel for failure to challenge the State medical expert. (SR Vol.10,

[1] Cites to the record on appeal are by volume number followed by "R" and the page number. Cites to the supplemental record on appeal are "SR" followed by the volume number and the page number.

[2] Leaving only Claims 1 (public records), 6 (ineffective assistance for failing to present corroborating witness), 36 (cumulative error) and 39 (ineffective assistance - challenge state expert).

1709-36). By order dated July 8, 2003, the trial judge allowed amendment of Claim 41, but denied an evidentiary hearing on the issue. (SR Vol.10, 1758-60). Preston also filed a Claim 42 based on *Ring v. Arizona,* 536 U.S. 584. (2002).

Status hearings were held on February 8, 2001, (Vol. 1, R4-58), May 24, 2001, (Vol. 1, R59-91), July 26, 2001, (Vol. 1, R92-104), September 28, 2001, (Vol. 1, R105-121) October 21, 2001, (Vol. 1, R122-176) January 24, 2002, (Vol. 1, R177-193) March 21, 2002, (Vol. 1, R194-208) and May 21, 2002. (Vol. 1, R209-219). An evidentiary hearing was held on January 7 and January 27, 2004. (Vol. 1, R220-328).

At the February 8, 2001, status hearing, Preston=s counsel first broached the issue of DNA testing of hairs located on Preston's clothing. (Vol. 1, R23, 25, 26). The State suggested DNA testing be conducted on the blood found on Preston's jacket stating:

> What matters is whose blood is on the defendant's jacket and does it match Earline Walker? And I'd suggest if he wants to do DNA, let's do DNA and get it done. Let's do DNA of the jacket. Let's do DNA of the blood on the jacket3, see if it matches our victim. And they can do hairs if they want.

(Vol. 1 R25-26.) The Court allowed defense counsel thirty days to file a motion as to which items he wanted to test for DNA.

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[3] DNA testing on the blood was never requested by the defense or conducted.

(Vol. 1, R33). The defense filed a notice on March 12, 2001, requesting the following items be released for DNA testing[4]:

> Victim's hair associated with the defendant's brown leather belt, item 41 CC on page 2 of 4 of the Clerk's 1981 trial exhibit list; (uncertain as to exact identity of the Clerk's trial exhibit list due to multiple hair listings).

The defense also requested leave to amend or add to this list. (SR Vol. 9, 1481-82).

The State filed an Answer to the motion for release of trial evidence on March 16, 2001. (SR Vol. 9, 1490-91). On April 19, 2001, the trial court issued an order denying the defendant's motion for release of evidence for testing with leave for the defendant to file an amended motion within twenty days "providing specific factual allegations which would justify the requested release of evidence." (SR Vol. 9, 1496-97).

Pursuant to the trial court's order, the defense filed an amended motion for release of trial evidence for testing on April 25, 2001. (SR Vol. 9, 1498-1504).

The State answered the amended motion for release of trial evidence for testing on May 21, 2001. (SR Vol. 9 R1507).

At the May 24, 2001, status hearing, defense counsel stated that they had not retained the lab pending the Court:s ruling on

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[4] Defense counsel also requested several items be released for PCP testing. The defendant withdrew his motion to test evidence for PCP. (Vol. 1, R97). This issue was never developed and is not the subject of this appeal.

whether or not there would be any DNA testing. (Vol. 1, R63). The defense requested that the hair from belt buckle be released for DNA testing and that Dr. Blake conduct the testing. (Vol. 1, R77, 81). The defense requested testing on any and all hairs connected to the victim. (Vol. 1, R84).

The trial court issued an order on June 26, 2001, which granted the defense's motion to have DNA testing done on the hairs recovered from Preston's belt buckle and jacket and to compare them with the known DNA of the victim. The court requested that the parties agree on an expert or laboratory that would conduct the testing (SR Vol. 9, 1517-18). The parties stipulated to using LabCorp as the testing facility. (SR Vol. 9 1519).

At the March 21, 2002, status hearing, defense counsel advised the court that mitochondrial DNA testing on the hair located under the belt buckle of the defendant did not match the victim[5]. (Vol. 2, R196). The hair on the jacket rendered inconclusive results, and defense counsel requested re-testing on the "remaining one-half hair" that had not been consumed by

[5] The test results were attached to a motion for additional testing and showed that LabCorp tested two hairs: Q2, the hair from the belt buckle, and Q5, the hair from the jacket. (SRVol. 10, 1696). Mitochondrial DNA testing on Q2 showed that the hair "could not have originated from the same source" as hair samples labeled as coming from Mrs. Walker. (SRVol. 10, 1697). There was "insufficient sequence information" obtained from hair Q5 for comparison purposes. (SRVol. 10, 1697).

testing (Vol. 2, R197). The trial judge asked the parties to try to reach an agreement (Vol. 2, R202).

At the May 21, 2002, status hearing, the parties had not reached an agreement. Defense counsel requested that additional testing be done on the jacket hair, and the State argued Preston failed to meet the requirements of Section 825.11, Fla. Stat. or Rule 3.853, Fla.R.Crim. P. (Vol. 2, R213). The trial judge allowed testing of the remaining portion of the jacket hair (Vol. 2, R215).

EVIDENTIARY HEARING

The evidentiary hearing took place on January 7 and 27, 2004. (Vol. 2, R220-328). Three witnesses testified: James Russo, Arthur Kutsche, and Marlene Alva. Mr. Kutsche was Preston=s trial attorney from the 1981 trial. Ms. Alva and Mr. Russo were Preston=s attorneys in the 1991 re-sentencing. Before taking testimony on January 7, the parties stipulated to use depositions of the witnesses in lieu of testimony on Claim 1. (Vol. 2, R232). There were five depositions attached to the stipulation: Jean McCarthy, Doreen Ferchland, Chris White, Troy Arias, and Carol Floyd. (Vol. 2, R232).

James Russo, the elected Public Defender for the Eighteenth Judicial Circuit since 1981, had worked at the Office of the State Attorney, where he prosecuted homicide cases, and in private practice before assuming his office. (Vol. 2, R242,

257). Prior to Preston=s penalty phase, Russo handled approximately five to eight capital cases. (Vol. 2, R258). Mr. Russo assigned Mr. Kutsche, a part-time public defender, to handle Preston=s trial. (Vol. 2, R243). Mr. Kutsche had a good reputation for trying capital cases and had prosecuted homicide cases with the State Attorney=s office (Vol. 2, R243).

When Mr. Russo took office, the office was essentially an office of part-time attorneys who had a private practice. Mr. Russo converted the office to full-time attorneys; however, he retained some of the part-time attorneys who were extremely talented. (Vol. 2, R244). Mr. Russo also made a policy of assigning two attorneys to a capital case. Mr. Kutsche=s representation of Preston was before the policy change. (Vol. 2, R245). However, Mr. Russo told Mr. Kutsche that anything he needed to assist him, he was "just to ask and we would provide it." (Vol. 2, R245-46).

Mr. Russo and Ms. Alva handled Preston=s 1991 re-sentencing. Ms. Alva, now a judge, was the chief assistant public defender. (Vol. 2, R246). She had significant experience in capital cases. (Vol. 2, R261). The defense had four experts. The focus was on Preston=s drug usage, specifically, PCP. (Vol. 2, R251-52). Arlene Cobb had seen Preston at a drive-through fast food restaurant or convenience store. Cobb=s deposition testimony was stronger than her trial testimony. (Vol. 2, R252). Mr. Russo and

Ms. Alva made a strategic decision not to call Cobb at the April 1991 proceeding. (Vol. 2, R254). Russo thought Cobb=s testimony would be stronger if it was presented through one of the medical experts. (Vol. 2, R262).

Donna Maxwell (Houghtaling) also testified about drug use. There was evidence of syringes in Preston=s home wastebasket and mental health witnesses testified about the effect of PCP. (Vol. 2, R253).

Russo was aware that hair could be tested to determine whether a person used PCP. (Vol. 2, R255). There were no tests performed on clothing or the syringes because Russo believed there was a sufficient amount of corroborating evidence from the doctors, Donna Maxwell, and the syringes in the wastebasket. (Vol. 2, R256). The drug-use evidence was presented and corroborated. (Vol. 2, R256). Russo did not think drug-use mitigation was enough to obtain a life recommendation under the circumstances. (Vol. 2, R256).

Mr. Russo could not specifically recall what legal research he did, but he assured the court he did whatever was appropriate and necessary, and enough to provide more than effective representation. (Vol. 2, R257).

Arthur Kutsche was Preston=s trial attorney in 1981. (Vol. 2, R270). When Kutsche was questioned about a hair found in Preston=s belt buckle, he recalled that Diana Bass, FDLE, had

testified at trial about two hairs: one from Preston=s jacket and one from his belt buckle. (Vol. 2, R270-71). Bass was not sure she had sufficient samples from the victim to make an accurate comparison. Nor was she sure she had sufficient samples from Preston. (Vol. 2, R271). There were two different public hairs which were similar microscopically to those of the victim, but dissimilar to each other. The victim=s pubic hair sample that had been provided also contained a large number of sample hairs that were dissimilar. (Vol. 2, R271). Bass never said that either one of the pubic hairs were those of the victim. (Vol. 2, R271). Kutsche did not request an independent hair analyst because he felt Bass= testimony did not have much probative value. (Vol. 2, R272). Further, the opinion of the second expert would probably have been generally the same as Bass=. (Vol. 2, R272).

Mr. Kutsche believed that witness Arlene Cobb’s trial testimony corroborated Preston’s self-reported PCP usage. (Vol. 2, R274). The defense tried to convince the trial judge that an abuse of a chemical rendered Preston into such a state that he had no control and no memory of what he had done and could not distinguish right from wrong. The judge denied an instruction with regard to that. (Vol. 2, R279).

Ms. Alva has been a board-certified criminal trial attorney since 1987. Prior to Preston=s re-sentencing, she had tried six to twelve capital cases. (299). After she was assigned the

Preston case with Mr. Russo, she read the files and met with the defendant a number of times. (Vol. 2, R301). The focus was to establish the statutory mitigation of inability-to-conform-to-law, substantial mental illness or disturbance, and age. (Vol. 2, R302). She wanted to use the same experts used at the original trial because their assessment was closer in time to the incident. (Vol. 2, R304). Ms. Alva talked to Arlene Cobb on the phone, and the latter said she did not want to be involved. Cobb did not have any recollection of the events and did not have any interest in the case. (Vol. 2, R308). Defense counsel already had Cobb's trial testimony which was consistent with the behavior of someone under the influence of PCP. That testimony could be brought in through the experts. (Vol. 2, R309). Since Preston was arrested several days after the murder, there was nothing at the defense=s disposal to test to determine whether Preston was under the influence at the time. (Vol. 2, R312). Ms. Alva disagreed with the sentencing order that said the drug use was uncorroborated. (Vol. 2, R319). Donna Maxwell testified as to drug use, the police found syringes, and Arlene Cobb testified about Preston=s behavior. (Vol. 2, R319-20).

The trial judge denied relief on all claims in a comprehensive order dated March 31, 2005. (SR Vol.13, 2124-2182).

SUMMARY OF ARGUMENTS

Claim 1. The significance of the newly discovered evidence, that one hair on Preston's belt was not the victim's, is minimal compared to the evidence of guilt. The evidence would not probably produce an acquittal on re-trial. Closing arguments are not evidence.

Claim 2. Trial counsel made a strategic decision to use the prior testimony of Arlene Cobb and present it through the experts rather than call a recalcitrant witness. Cobb testified at the first trial that she saw Preston at 2:20 a.m. and he acted unusually. Not only was Cobb not the best witness through whom to present this testimony, but also the testimony was cumulative to that of other witnesses regarding PCP use.

Claim 3. Preston did not raise this at the trial level or on direct appeal, and the issue is procedurally barred. Moreover, he has alleged no instances of misconduct that would require juror interviews.

Claim 4. The trial court did not err in his rulings regarding missing State Attorney files. There was no showing of intentional destruction, nor was there a showing any possibly exculpatory evidence was in the files.

Claim 5. This court has consistently held that lethal injection is not cruel and unusual punishment. The United States Supreme Court has granted certiorari on a procedural

issue regarding lethal injection; however, this does not affect the state court proceedings in this case.

Claim 6. Preston's death sentence does not violate *Ring v. Arizona*. *Ring* does not apply retroactively. One of the aggravating circumstances found by the judge was that the murder was committed during the course of a kidnapping.

Claim 7. The issue regarding counsel's effective questioning of the medical examiner is a re-cycled claim from direct appeal from re-sentencing and is procedurally barred. Counsel did object to the medical examiner's testimony. This claim did not allege sufficient specific facts to require an evidentiary hearing.

Claim 8. There was no error, either individually or cumulatively.

ARGUMENT

CLAIM 1

THE NEWLY DISCOVERED DNA EVIDENCE WOULD NOT PROBABLY PRODUCE AN ACQUITTAL ON RETRIAL

Preston first argues that the newly discovered evidence, i.e., that the hair found in his belt buckle was not that of the victim, would probably produce an acquittal upon retrial. Preston argues that the hair was a "significant" piece of State evidence, without which there would probably have been an acquittal (Initial Brief at 36).

Regarding the newly discovered DNA evidence, the trial court found:

> . . .Finally, in regards to the DNA sub-issue, because the belt buckle hair was not the only item in this case that tied the Defendant to the victim, it should be dismissed. The blood and the fingerprints are sufficient evidence. Post-conviction relief should be denied as to this claim.

(SRVol. 13, 2133). These findings are supported by substantial competent evidence. *McLin v. State*, 827 So. 2d 948, 954 n.4 (Fla. 2002)(As long as the trial court's findings are supported by competent substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.)*Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997); *Walls v. State*, 31 Fla. L. Weekly S51 (Fla. Feb. 9, 2006).

The standard of review for newly-discovered evidence was first set forth in *Jones v. State*, 591 So. 2d 911 (Fla. 1991). First, the "asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'" *Id*. at 916 (*quoting Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979)). Second, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." *Jones*, 591 So. 2d at 915. In determining whether the evidence compels a new trial under *Jones*, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Id*. at 916. This determination includes

> whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether this evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.

Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (citations omitted).

This case is similar to others in which this Court has affirmed the denial of claims of newly discovered evidence that purports to establish the defendant's innocence. In *Buenoano v.*

State, 708 So. 2d 941 (Fla. 1998), the defendant, a prisoner under a sentence of death and a third death warrant, asserted that the trial court erred in summarily denying her newly discovered evidence claim. The defendant had been convicted of the first-degree murder of her husband, who died as a result of chronic arsenic poisoning. *See id*. at 943. The newly discovered evidence consisted of a report issued by the Office of the Inspector General of the United States Department of Justice that brought into question some of the practices of an FBI special agent who testified concerning collateral-crime evidence presented during the guilt phase of Buenoano's trial. *See id*. at 945. After introducing evidence that another man with whom the defendant lived after her husband's death had also died of acute arsenic poisoning, the State presented the testimony of a third man who testified that he suspected that the defendant was trying to poison him with vitamin capsules. See id. Pursuant to a stipulation, the jury was informed that based on an examination, the FBI agent had determined that the capsules given to the third man contained paraformaldehyde, a Class III poison. *See id*. at 944. In affirming the summary denial of the defendant's newly discovered evidence claim, this Court noted with approval the trial court's determination that this evidence "constitutes, at most, impeachment evidence." *Id*. at 950. *See also Kokal v. State*, 901 So. 2d 766 (Fla.) (affirming denial of

a newly discovered evidence claim that another person confessed to committing the murder because this inadmissible hearsay evidence contradicted the overwhelming evidence of the defendant's guilt presented at trial), *cert. denied*, 126 S. Ct. 560, 163 L. Ed. 2d 471 (2005); *Sims v. State*, 754 So. 2d 657 (Fla. 2000) (affirming the denial of a newly discovered evidence claim consisting of hearsay statements that a person other than the defendant committed the murder, because the evidence was admissible solely for impeachment purposes, did not place this person at the scene of the crime, and did not affect the testimony of eyewitnesses who identified the defendant as the perpetrator.

The trial court properly considered all the evidence presented against Preston in finding this evidence would probably not produce an acquittal if the case were re-tried. The State presented the following evidence showing Preston's guilt:

> -Preston left his house approximately 12:30 a.m. after asking his brother to help him get some money;
>
> - Preston was seen in the area of the Lil Champ food store at 2:20 a.m. by Arlene Cobb. He was wearing a plaid CPO jacket. Preston denied being near the Lil Champ;
>
> - Mrs. Walker was kidnapped at approximately between 2:45 a.m. and 3:30 a.m.
>
> - Preston returned home around 4:30 a.m. with at least $325.00 cash. He was acting in an unusual manner;

- Preston testified he robbed a gay bar, but the security guard testified there were no disturbances. Likewise, there were no police reports;

- Food stamps and $574.41 were missing from the store safe;

- Food stamps matching the serial numbers of those used by Virginia Vaughn at the Lil Champ matched those found in Preston's bedroom trash;

- The torn edges from Vaughn's food stamp book matched the edges of the food stamps found in Preston's trash can;

- Blood on the plaid jacket worn by Preston had two blood stains with the blood type of Mrs. Walker;

- Preston's fingerprints were on a Marlboro cigarette wrapper, the console, and the roof of Mrs. Walker's car which was abandoned. Preston denied ever have been in the car. Donna Maxwell remembered seeing a red and white cigarette package when Preston was counting the money;

- Preston lived approximately one-quarter mile from the crime scene at which the car was abandoned and the body discovered;

- Mrs. Walker's body was not discovered until 1:45 p.m. the day after she disappeared, but Preston told his brother and Donna Maxwell at 9:00 a.m. that morning about the woman's body.

The trial judge weighed the new evidence and concluded there was no probability of an acquittal on retrial. These findings are supported by substantial competent evidence. Viewing this finding in a light most favorable to the State, the trial judge correctly held that the new evidence would not probably produce an acquittal. *See Orme v. State*, 677 So. 2d

258, 262 (Fla. 1996)(Our duty on appeal is to review the record in the light most favorable to the prevailing theory and to sustain that theory if it is supported by competent substantial evidence. *Johnson v. State*, 660 So. 2d 637, 641 (Fla. 1995)).

Preston's last argument, that he adopts the State's closing argument as evidence of the significance of the belt buckle hair, disregards the fact that closing argument is not evidence. In fact, trial counsel's closing argument was emphatically dismissive of the hair evidence. Counsel argued:

> The next item of evidence that the State's relying on trying to get you to buy their theory on are the hairs, the pubic hairs, the one hair found by Martin LaBrusciano entwined behind the buckle of the belt. But, remember what Diana Bass said with regard to these hairs, and I think it's pretty important, that they did not have the characteristics of having been forcibly removed or torn or anything other than simply as a natural event, falling out of the body of whoever's hair it was.
>
> Now, the theory, I guess, that's being promoted by the State is that that . . . that Robert Preston was on top of Earline Walker and his belt buckle came in contact with her pubic area and somehow or other there was a transfer occurred during movement. Now, you would expect, under those circumstances, I think, that there would be evidence from the root of the follicle of the hair of forcible removal rather than a simple falling out. But, that isn't what Diana Bass saw, and that's more consistent with hair in the jail envelope belongings that's been used by how many prostitutes or women who have been arrested or who knows over the years what kind of residue was in that jail envelope.
>
> Now, there was tar on the belt that . . . or a tar-y substance, which, of course, can explain how the hair could have adhered itself to the belt.

The pubic hair on the jacket could have come from anywhere. It could have been on there for quite a while and just stayed there. It could be . . . reasonably, it could even have been the Defendant's own or somebody in his household. Diana Bass has no comparison samples from people in the Preston household. She admitted that she may have had an insufficient sample from the Defendant himself. She said she requires more than 25 samples for comparison purposes as a minimum, but she said she can't remember whether, in this particular instance, she had less than 25.

Now, all in the world she said about either one of those pubic hairs is this: That I may have had an insufficient sample from the Defendant. I can't remember. But . . . so, I can't say and I can't say. She thinks she had a sufficient sample from the pubic hairs of Earline Walker, but she admitted that within the samples, the number of hairs from the sample of Earline Walker, that the one that she had that she's trying to compare was dissimilar to others in the sample. All in the world she's telling us is that she found one or more hairs within that sample that she found microscopically similar to the one that she had.

She also found ones that were dissimilar, and you'll notice her wording. It was very careful. She said this hair and this hair both possibly, not probably, but possibly could, not did, but could have come from the victim, Earline Walker. That's all she said. That's no match up on hairs. That's no proof beyond a reasonable doubt, doesn't even approach that, that those pubic hairs even belonged or grew on the body of Earline Walker

In addition, she testified that she did not compare the two pubic hairs, one on the jacket, one on the belt, to each other. They may very well have been dissimilar, one to another. We just don't know. What would that mean? She admitted that she doesn't make photographic blowups or illustrations because of the fact that within a sample, there are all sorts of dissimilarities, although there may be similarities, and to try to illustrate this to you people, who don't know anything, the Jury, would only confuse you. So, you must rely on the expert. My opinion, what I say I

> saw. I think that's a little bit too much in the votary type thing, and if there's something that rises to the dignity of evidence presentable in a case such as this I don't think there should be any hesitation in presenting what that is for you to look at.

(1981 Trial transcript, 1847-50). The hair analyst testified the hair "could have" been from Mrs. Walker, and the issue was argued and the analyst's testimony effectively discredited by trial counsel. The newly-discovered evidence would be nothing more than impeachment evidence and would not produce an acquittal on retrial.

CLAIM 2

COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CALL ARLENE COBB AS A WITNESS TO CORROBORATE PRESTON'S DRUG USE

Preston next argues that trial counsel was ineffective for failing to call Arlene Cobb at the re-sentencing hearing to establish that Preston had the appearance of a person under the influence of drugs. Arlene Cobb was not an expert witness and could only have given a lay opinion as to her perceptions. She was the witness who saw Preston at 2:20 a.m. near the Lil Champ store right before he kidnapped and murdered Mrs. Walker. She had testified at the 1981 trial and did not want to be involved in 1991. Nor did she remember clearly her exact perceptions from January, 1978. Trial counsel made a strategic decision to present the evidence of PCP consumption and drug intoxication through Preston, four mental health experts qualified to testify on the effects of drugs on behavior, and Donna Maxwell (Houghtaling) who had direct knowledge of the drug consumption.

The trial court held:

> The Defendant's sixth claim is that he was denied effective assistance of counsel when counsel failed to present a corroborating witness, Arlene Cobb, at the re-sentencing hearing. He claims she would have testified about his bizarre behavior and his ingestion of PCP. "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *See Occhicone v. State,* 768 So.2d 1037 (Fla. 2000). As the record reflects, the

> defense attorneys, James Russo and Marlene Alva, made a reasonable strategic decision not to call Cobb at the April 1991 proceeding (See excerpt of transcript of evidentiary hearing attached hereto as Exhibit B). They determined Cobb's testimony could come in through the medical experts and be stronger (See excerpt of transcript of evidentiary hearing attached hereto as Exhibit C). Despite the fact that Cobb was not called as a witness at the re-sentencing phase, the jury was not deprived of evidence that corroborated the Defendant's testimony that he ingested PCP on the night of the murder as medical experts, Dr. Krop and Dr. Levin, both cited Cobb as a source of information for corroboration. Furthermore, Alva talked to Cobb on the phone and the latter expressed that she did not have any recollection of the events. Thus, counsel's performance was not deficient as it did not fall below the objective standard of reasonableness based on the foregoing facts. Post-conviction relief should be denied as to this claim.

(SR Vol.13, 2125-26). This finding is supported by substantial competent evidence.

This Court's standard of review following the denial of a postconviction claim where the trial court has conducted an evidentiary hearing affords deference to the trial court's factual findings. *McLin v. State*, 827 So. 2d 948, 954 n.4 (Fla. 2002). "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997) (*quoting Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984)).

The facts adduced at the evidentiary hearing showed that Mr. Russo and Ms. Alva, both experienced capital attorneys, handled Preston=s 1991 re-sentencing. They hired had four experts. The focus was on Preston=s drug usage; specifically, PCP (Vol. 2, R251). Arlene Cobb had seen Preston at a drive-through fast food restaurant or convenience store. Cobb=s deposition testimony was stronger than her trial testimony (Vol. 2, R252). Mr. Russo and Ms. Alva made a strategic decision not to call her at the April 1991 proceeding (Vol. 2, R254). Russo thought Cobb=s testimony would be stronger if it was presented through one of the mental health experts (Vol. 2, R262). Donna Maxwell also testified about drug use. There was evidence of syringes in Preston=s home wastebasket and mental health witnesses testified about the effect of PCP (Vol. 2, R253).

The attorney tried to establish the statutory mitigation of inability-to-conform-to-law, substantial mental illness or disturbance, and age (Vol. 2, R302). Ms. Alva talked to Arlene Cobb on the phone, and the latter said she did not want to be involved. Cobb did not have any recollection of the events and did not have any interest in the case (Vol. 2, R308). Defense counsel already had her trial testimony which was consistent with the behavior of someone under the influence of PCP. That testimony could be brought in through the experts (Vol. 2, R309).

The evidence from the April 1991 penalty phase was the following: Donna Maxwell Houghtaling was 17 years old at the time Earline Walker was murdered. She had known Preston since she was 12 years old (Vol. 5, PP[6] 898-899). She started using PCP at age 13 (Vol. 5, PP 900). PCP could be snorted, smoked or injected. One time Donna forgot her name when she was doing PCP and that was when she stopped using it (Vol. 5, PP 901, 904). When PCP is smoked, it Acreeps up on you and it takes awhile to have an effect on your perception.@ When it is injected there is an immediate effect (Vol. 5, PP 902). Injecting PCP has more of an effect than using LSD or marijuana. Donna never saw anyone on PCP get violent, but she did see people crawling around on the floor and unable to walk (Vol. 5, PP 903).

[6]Cites to the April 1991 penalty phase will be APP.@

On January 8, 1978, Donna received a call from Scott Preston inviting her over to the Preston home (Vol. 5, PP 904). She rode her bike over around 9:30 p.m. Scott and his two brothers, Todd and Bob (the defendant) were also there (Vol. 5, PP 905). They smoked about four joints of marijuana. They drank some beer (Vol. 5, PP 906). Donna and Scott went into the bedroom for awhile. Preston came to ask Scott to Ahold his arm off@ so he could inject some drugs. Scott did not go out (Vol. 5, PP 908). Donna did not see Preston inject any drugs. Around 4:30 a.m. Preston came into the house and was Atalking real loud and stuff and was pretty excited.@ Preston was in the living room counting money, saying AI did it.@ (Vol. 5, PP 909). Preston was unable to count the money. He kept coming up with different numbers. He also kept dropping it. Preston could not control his hands. Finally, Scott and Donna counted the money for Preston (Vol. 5, PP 910). Preston was a fairly intelligent person except for the time he was under the influence of drugs (Vol. 5, PP 912). Preston was definitely under the influence of drugs in the early morning hours when Earline Walker was killed (Vol. 5, PP 912). He was uncoordinated and fumbling and his eyes were dilated, a sign he was under the influence of PCP (Vol. 5, PP 914).

Dr. Levin testified that Preston was a Apoly substance abuser,@ meaning he used drugs on a regular basis (Vol. 5, PP

923). He used PCP (phencyclidine) as early as age 12 (Vol. 5, PP 923). A physical dependence and psychological dependence develop with use of phencyclidine. A person gets strong euphoric reactions. When a person is in the throes of PCP dependence, they use drugs to maintain normalcy (Vol. 5, PP 924). PCP is a very dangerous drug. The biggest danger is the unpredictability with behavior patterns ranging from sedated/comatose to aggressive/psychotic (Vol. 5, PP 925, 936). On January 8, 1978, Preston injected PCP in a large dose (Vol. 5, PP 932). PCP injection causes an immediate, long-lasting high (Vol. 5, PP 933). From the reports of people around Preston on the night of the murder, it was Dr. Levin=s opinion Preston was under the influence of mood-altering substances (Vol. 5, PP 933). First, he asked for held to tie off his arm. Then, Arlene Cobb saw Preston at approximately 1:30 a.m. in the headlights of her car. He was acting strangely, staring at her car, and not moving for 20-30 seconds. One of the reactions of PCP is a blank stare, a dissociative state (Vol. 5, PP 934). Later, Donna saw Preston acting in a mood altered, drugged condition (Vol. 5, PP 935). Preston was unable to conform his behavior to the confines of the law due to the drug use (Vol. 5, PP 936).

Dr. Vaughn had treated drug abusers for many years. With PCP, the patient becomes paranoid. They develop an acute inability to think, to reason, to plan. PCP use can lead to

crime and violent behavior. It is a very dangerous drug (Vol. 5, PP 964).

Dr. Krop=s testimony from the prior proceeding was read into evidence in lieu of live testimony[7] (Vol. 5, PP 973). In Dr. Krop=s opinion, Preston=s cognitive state was affected by drug abuse and brain damage from an accident (Vol. 7, PP 1372). Preston used a combination of drugs from the age of 10 (Vol. 7, PP 1375). The day of the murder, Preston smoked marijuana, drank beer and shot a couple Adimes@ of PCP earlier in the day and 4-5 Adimes@ that night (Vol. 7, PP 1376). Based on the reports of Donna Maxwell and Arlene Cobb, Dr. Krop was able to determine that Preston=s mental state was significantly impaired (Vol. 7, PP 1379).

Therefore, not only was Cobb's testimony regarding Preston's state of mind presented through another witness, the testimony was cumulative to that of the other witnesses.

In order to establish ineffective assistance of counsel, a defendant must prove two elements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by

[7] Dr. Krop testified at the January 1991 penalty phase but was unavailable in April 1991. His prior testimony was read into the record. The transcripts of the January 1991 penalty phase were included in the record of appeal from the April 1991 re-sentencing.

> the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687(1984). In determining deficiency, every effort must be made to eliminate the distorting effects of hindsight. *Strickland,* 466 U.S. at 689.

Arlene Cobb testified at the 1981 trial for the State. Her trial testimony regarding Preston=s conduct as exhibiting signs of drug intoxication was not as strong as her deposition testimony. Defense counsel, Mr. Russo and Ms. Alva, made a strategic decision not to call her to testify. Cobb did not want to be involved with the proceedings. Her testimony could come in through the mental health experts and be stronger. Both Dr. Krop and Dr. Levin cited Cobb as a source of information to corroborate Preston=s strange behavior shortly after the murder. The PCP use was also corroborated by Donna Maxwell Houghtaling and the syringes found in the wastebasket.

This Court has repeatedly stated that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and

counsel's decision was reasonable under the norms of professional conduct." *Occhicone v State*, 768 So. 2d 1037, 1048 (Fla. 2000); *see Chandler v. State*, 848 So. 2d 1031, 1041 (Fla. 2003)*; Shere v. State,* 742 So. 2d 215, 220 (Fla. 1999); *State v. Bolender,* 503 So. 2d 1247, 1250 (Fla. 1987). There has been no showing counsel=s decisions were unreasonable. *See Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000) ("Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions.").

CLAIM 3

THE TRIAL COURT DID NOT ERR IN DENYING THE REQUEST TO INTERVIEW JURORS.

There was no request to interview the jurors at the trial level, and this claim is procedurally barred. *Arbelaez v. State,* 775 So. 2d 909 (Fla.2000); *Griffin v. State* 866 So. 2d 1, 20-21 (Fla. 2003). This claim was also insufficiently pled as Preston failed to allege juror misconduct which would require interviews. This claim fails for lack of proof. *See Schwab v. State*, 814 So. 2d 402, 406 (Fla. 2002).

Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar prohibits a lawyer from initiating communication with any juror regarding a trial with which the lawyer is connected, except to determine whether the verdict may be subject to legal challenge. The rule provides that the lawyer "may not interview the jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist." R. Regulating Fla. Bar 4-3.5(d)(4). Before conducting such an interview, the lawyer must file a notice of intent to interview, setting forth the name of the juror to be interviewed. The lawyer must also deliver copies of the notice to the trial judge and opposing counsel a reasonable time before the interview. This Court has cautioned "against permitting jury interviews to support post-conviction relief" for allegations which focus upon jury deliberations.

Johnson v. State, 593 So.2d 206, 210 (Fla.1992) (stating that "it is a well settled rule that a verdict cannot be subsequently impeached by conduct which inheres in the verdict and relates to the jury's deliberations"). The trial court held:

> The Defendant alleges in his eighth claim that Florida's rule prohibiting defense counsel from interviewing jurors violates equal protection and due process and the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This claim is procedurally barred because it could have been raised on direct appeal. *Id.* Notwithstanding, the Defendant has failed to present any evidence of juror misconduct in this case and there is no report by a juror or anyone else that the jurors considered extrinsic matters. Therefore, he has not shown that he has been prejudiced by this rule. This is alternative and secondary to the procedural bar holding, which is an adequate and independent basis for the denial of relief. Post-conviction relief should be denied as to this claim.

(SRVol. 13, R2126). This finding is supported by the record.

CLAIM 4

THE TRIAL COURT DID NOT ERR IN HIS RULINGS REGARDING THE MISSING STATE ATTORNEY FILES

Preston alleges in the caption that the trial court erred in denying his claim about missing State Attorney files, but fails to inform what relief could possibly be granted. Preston admits there was no intentional action on the part of the State and there is no indication the missing files contained exculpatory evidence (Initial Brief at 53). The trial court held:

> The Defendant's first claim is that he was denied effective representation for lack of access to public records. Despite the deposition testimony on the first trial indicating several files from the State Attorney's Office were missing, the Defendant has failed to show the missing files contain anything exculpatory. While the State Attorney is under a continuing duty to disclose the records, they have made a reasonable and diligent search for those files. Post-conviction relief should be denied as to this claim.

(SRVol. 13, 2124). These findings are supported by substantial competent evidence. Generally, this Court's standard of review following the denial of a postconviction claim where the trial court has conducted an evidentiary hearing affords deference to the trial court's factual findings. *McLin v. State*, 827 So. 2d 948, 954 n.4 (Fla. 2002). "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997) (*quoting Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984)).

The deposition testimony showed that a 1978 file from the State Attorney=s Office was lost somewhere between the State Attorney=s office and Iron Mountain storage facility. There was no showing the file was intentionally destroyed or there was any bad faith. The only argument in the Rule 3.851 motion was that the State Attorney failed to provide complete records. Preston

has alleged no bad faith or misconduct. He has not alleged this is a *Brady*[8] claim or that there is anything exculpatory in the files. The depositions which were introduced at the evidentiary hearing conclusively establish that Preston is entitled to no relief. *See Provenzano v. State* 739 So. 2d 1150, 1153 (Fla. 1999).

Troy Arias, general manager of Iron Mountain records management, was contacted by the Seminole County State Attorney=s office regarding Preston=s records All the records had been Aretrieved@ and were not at their location (SR Vol.12, 2019). Iron Mountain kept the records for the state attorney and the public defender in Seminole County (SR Vol.12, 2020, 2024). It was possible the files were at Iron Mountain, but Arias could not be certain (SR Vol.12, 2022). There were over 360 cartons received from the State Attorney office the same day the Preston file was received (SR Vol.12, 2023). It would be possible to look though the 362 boxes to try to find the missing state attorney file (SR Vol.12, 2023, 2034).

Jean McCarthy also worked at Iron Mountain storage as an administrator. She found one log with information on Preston files. The entry showed one carton was in the possession of the State Attorney=s office. (SR Vol.12, 1973). It could be possible

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

a file was misfiled or the State Attorney failed to list a file. McCarthy had no idea where the files could be. There were 360 cartons filed with Iron Mountain the day the Preston files were delivered. (SR Vol.12, 1975). It would take approximately one week to go through all the boxes (SR Vol.12, 1976). Iron Mountain keeps a record of all files that are destroyed or purged. (SR Vol.12, 1983). McCarthy did not go through the records to determine whether any Preston files had been destroyed. (SR Vol.12, 1984). When Iron Mountain received a request from the State Attorney office to find the Preston file, they conducted a search for all files under APreston.@ (SR Vol.12, 1990).

Iron Mountain also stored the public defender files for Preston. (SR Vol.12, 1974). There were 13 boxes of public defender files for APreston.@ (SR Vol.12, 1992). McCarthy looked through those boxes. (SR Vol.12, 1994-95). The searches done by Iron Mountain and a record of the files were attached as an exhibit to McCarthy=s deposition.

Chris White, State Attorney Chief of Operations, testified about what would have been in the State Attorney files (SR Vol.12, 1884). First-degree murder cases were supposed to be kept on the premises and not shipped to Iron Mountain (SR Vol.12, 1888, 1894). The state attorney would not send their file to the Attorney General=s office, the agency which perfects

the appeals in capital cases (SR Vol.12, 1896). Apparently, the 1981 trial file was lost before the 1991 re-sentencing (SR Vol.12, 1888, 1894). The prosecutor had to copy the files from the sheriff=s office for the 1991 proceeding (SR Vol.12, 1894). White found one box of files which he allowed CCRC to examine a month before the deposition (SR Vol.12, 1888). There could be witness files missing because the alphabetical listing stopped at AP.@ (SR Vol.12, 1889). Mr. White listed the items that were in the box (SR Vol.12, 1890-91). It appeared the preparation files were missing (SR Vol.12, 1891). White had made efforts to locate the missing files (SR Vol.12, 1891).

Doreen Ferchland, file room clerk at the State Attorney office, tracks the files on the computer (SR Vol.12, 1932). There was no record on the Preston file except for a request from Carol (SR Vol.12, 1938). When Preston=s files were requested, she found two boxes in the file room. (SR Vol.12, 1935). Ferchland did not know where the missing files were. She had been working for the state attorney since 1993 and knew the files were in the file room, but had no reason to look inside the box (SR Vol.12, 1942). Ferchland called Miss Tee when they were looking for the Preston files. She was told there was nothing there. (SR Vol. 12, 1943). There was a record of a request from Iron Mountain (formerly known as Florida Data Bank) by a Susan Richards in 1990. At that time the Preston file was

not in the box it was supposed to be in (SR Vol. 12, 1948). Attached to the deposition was a copy of a record from Florida Data Bank showing File ID 78-0038 marked as Anot in box@ (SR Vol. 12, 1957).

Carol Floyd, Mr. White=s secretary, looked for the Preston files. She was told there were two boxes in the office (SR Vol. 12, 1916). She requested the file from Iron Mountain (SR Vol. 12, 1917). Because of limited storage space, files had to be sent to Iron Mountain for storage. Floyd did not know when the Preston file was sent out for storage (SR Vol. 12, 1919).

This evidence shows that there was no violation of the public records law and no intentional destruction of evidence. This case is now 28 years old. It is unfortunate that the filing system failed. The trial judge dealt with the situation appropriately by acknowledging the State's continued duty to disclose the records if they are ever located. There was no error in the trial judge rulings.

CLAIM 5

LETHAL INJECTION DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Preston claims that lethal injection is cruel and unusual punishment. This issue was Claim 37 in the amended motion for postconviction relief. The trial court held:

> The Defendant asserts in his thirty-seventh claim that execution by lethal injection is cruel and unusual.

> This should have been raised on direct appeal and as such is procedurally barred. *Id.* Additionally, the courts have rejected this claim. See *Sims V. Florida,* 754 So.2d 657 (Fla. 2000). This is alternative and secondary to the procedural bar holding, which is an adequate and independent basis for the denial of relief Post-conviction relief should be denied as to this claim.

(SRVol. 13, 2132).

Florida enacted a lethal injection option statute six years ago. See Fla. Stat. § 922.105(1) (as amended by 2000 Fla. Sess. Law Serv. Ch. 00-2 (S.B. No. 10A § 2) (West)); see also, *Sims v. State*, 754 So. 2d 657, 663 n.11 (Fla. 2000). In *Sims*, an extensive evidentiary hearing was conducted in the trial court on the lethal injection procedures in Florida and the Florida Supreme Court held that "the procedures for administering the lethal injection do not violate the Eighth Amendment's prohibition against cruel and unusual punishment." 754 So. 2d at 668. Preston does not claim that the lethal injection chemicals or procedures used by Florida have changed during the past six years.

Moreover, in the past few weeks, the Florida Supreme Court has affirmed the summary denial of similar "lethal injection" post-conviction claims filed by other death row inmates. *See, Hill v. State*, 31 Fla. L. Weekly S31 (Fla. Jan. 17, 2006); *Rutherford v. State*, 31 Fla. L. Weekly S59 (Fla. Jan. 27, 2006) (same). There is no reason for Preston to conclude that the

trial court in this case would apply the Florida Supreme Court's recent, controlling authority in *Hill* and *Rutherford*.

Although the United States Supreme Court is presently examining a federal procedural issue in both *Hill* and *Rutherford*, that federal procedural issue does not affect this Court's ruling. In *Hill v. Crosby*, Case No. 05-8794, the Supreme Court granted certiorari on January 25, 2006, to review the following procedural questions:

> Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentence state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?
>
> Whether, under [the Supreme Court's] decision in *Nelson [Nelson v. Campbell*, 541 U.S. 637 (2004)], a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1883?

Hill, a Florida death row inmate under an active death warrant, challenged his execution by lethal injection by filing a suit in federal court for declaratory and injunctive relief under 42 U.S.C. §1983. Both the District Court and the Eleventh Circuit treated Hill's §1983 complaint as the functional equivalent of a successive habeas petition and dismissed it.

A "grant of certiorari does not constitute new law." *See, Ritter v. Thigpen*, 828 F.2d 662, 665-66 (11th Cir. 1987). Even

in a case where a scheduled execution is imminent, the grant of certiorari alone is not enough to change the law. *See Robinson v. Crosby*, 358 F.3d 1281, 1284 (11th Cir. 2004); *See also*, *Thomas v. Wainwright*, 788 F.2d 684, 689 (11th Cir. 1986) ("any implications to be drawn [from a grant of certiorari in another case] may be discerned by application to the Supreme Court") (citation omitted); *Rutherford v. Crosby*, 19 Fla. L. Weekly Fed. C238 (11th Cir. Jan. 30, 2006) [addressing collected cases on the issue of stay and explaining that even if Rutherford's challenge to Florida's three-chemical process in lethal injection was cognizable in a §1983 action, Rutherford's request for injunctive relief was properly denied on equitable grounds because of unnecessary delay], application for stay granted by *Rutherford v. Crosby*, 2006 U.S. LEXIS 1082 (U.S., Jan. 31, 2006). However, the uniquely procedural federal §1983 questions presented in *Hill* and *Rutherford* are not at issue in Preston's state postconviction proceeding.

This Court has consistently rejected this claim. *Cole v. State*, 841 So. 2d 409, 430 (Fla. 2003); *Griffin v. State*, 866 So. 2d 1, 17 (Fla. 2003); *Provenzano v. State,* 761 So. 2d 1097, 1099 (Fla. 2000); *Sims v. State*, 754 So. 2d 657 (Fla. 2000); *Bryan v. State,* 753 So. 2d 1244, 1253 (Fla. 2000). Preston offers no compelling reason to change state law.

CLAIM 6

PRESTON'S SENTENCE OF DEATH DOES NOT VIOLATE *RING V. ARIZONA*

Preston filed Claim 42 in a supplement to his amended motion to vacate. This claim addresses the U.S. Supreme Court case of *Ring v. Arizona*, 536 U.S. 584 (2002). This issue is procedurally barred and has no merit. This Court has consistently held that, unlike the situation in Arizona, the statutory maximum sentence for the crime of first degree murder in Florida is death. *Mills v. Moore,* 786 So. 2d 532 (Fla. 2001), *cert. denied*, 532 U.S. 1015 (2001). The trial court found:

> Finally, the Defendant argues in his forty-second claim that his judgment and sentence of death must be vacated in light of *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428,153 L.Ed.2d 556 (2003). The Florida Supreme Court has denied such a claim for relief. See *Robinson v. State* 865 So.2d 1259 (Fla. 2004).

(SRVol. 13, 2134).

The United States Supreme Court's decision in *Schriro v. Summerlin*, 542 U.S. 348 (2004), held that the decision in *Ring* is not retroactive. A majority of this Court has also concluded that Ring does not apply retroactively in Florida to cases that are final, under the test of *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *See Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005). Accordingly, Preston's *Ring* claims are procedurally barred in these postconviction proceedings.

Further, this Court has rejected similar claims that *Ring* requires aggravating circumstances be alleged in the indictment or individually found by a unanimous jury verdict. See *Blackwelder v. State*, 851 So. 2d 650, 654 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003). Thus, Preston is not entitled to postconviction relief on his *Ring* claims. *Walls v. State,* 31 Fla. L. Weekly S51 (Fla. Feb. 9, 2006).

Furthermore, the trial court found the aggravating circumstance of during-a-kidnapping, thus taking Preston outside the application of *Ring.* A unanimous jury found Preston guilty beyond a reasonable doubt of kidnapping, thereby satisfying the mandates of the United States and Florida Constitutions. *See Kimbrough v. State*, 886 So. 2d 965, 984 (Fla. 2004); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla.), cert. denied, 539 U.S. 962 (2003).

CLAIM 7

THE CLAIM REGARDING TRIAL COUNSEL'S EFFECTIVE ASSISTANCE OF COUNSEL IS PROCEDURALLY BARRED AND HAS NO MERIT.

Preston argues that the trial court erred in denying this claim without a hearing but makes no specific allegations as to how counsel was ineffective. The entire text of the original Claim 41 which was denied without prejudice in the September 19, 2000, order was:

> MR. PRESTON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY TRIAL COUNSEL'S FAILURE TO CHALLENGE THE COMPETENCY OF THE MEDICAL EXAMINER.
>
> 1. The State presented Dr. Gumersindo Vicenta Garay as the medical examiner in the cause.
>
> 2. Dr. Garay testified that the cause of death was multiple stab wounds.
>
> 3. Prior to Dr. Garay's testimony, defense counsel failed to *voir dire* the witness; without objection accepted Dr. Garay as an expert in the field of pathology and failed to challenge the witness's testimony and evidence presented as the medical examiner for the state.
>
> 4. Defendant requests that this Court grant a hearing so that he may present evidence on this claim.

(SRVol. 7, 1228) The State responded that Preston failed to allege facts that would require a hearing (SRVol.8, 1291). The barebones allegation that trial counsel failed to adequately *voir dire* the witness failed to allege what evidence would be disclosed if the witness were questioned differently. Further, Preston did not identify any lack of qualifications that trial counsel should have used as impeachment, nor did he attack any of the testimony as unreliable.

Preston then amended Claim 41 to read:

> MR. PRESTON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY TRIAL COUNSEL'S FAILURE TO CHALLENGE THE COMPETENCY OF THE MEDICAL EXAMINER.

> 1. The State presented Dr. Gumersindo Vicenta Garay as the medical examiner in the cause.
>
> 2. Dr. Garay testified that the cause of death was multiple stab wounds.
>
> 3. Prior to Dr. Garay's testimony, defense counsel failed to *voir dire* the witness; without objection accepted Dr. Garay as an expert in the field of pathology and failed to challenge the witness's testimony and evidence presented as the medical examiner for the state.
>
> 4. The medical examiner's work and testimony in this case show fundamental flaws that should have been challenged by defense counsel. Among the significant shortcomings were the possibility that Dr. Garay used an office assistant to determine cause of death instead of an Assistant Medical Examiner; that his duties included the pronouncement of death; that he wavered as to whether the body had *rigor mortis* when he viewed the victim's body (possibly affecting the time of death); that he testified in a misleading and confusing manner as to the processes details conclusions regarding the autopsy with many improper references to the wounds and/or cuts identified on the victim's body.
>
> 5. The deficiencies in the medical examiner's autopsy and testimony were prejudicial to the defendant because of the apparent impact such would have on the jury. To the extent that trial counsel failed to challenge the medical examiner in this regard, trial counsel was ineffective and the consequent prejudice entitles him to a new guilt phase trial under *Strickland v. Washington*, 466 U.S. 688 (1984).

(SRVol.10, 1710-11). The State filed a response (SRVol.10, 1741-44).

The testimony of the medical examiner was raised on appeal from re-sentencing, and this Court held:

> Preston argues that he was denied due process by the admission of irrelevant evidence. The medical examiner

> testified about the autopsy of the victim. According to his testimony, the initial wound was to the victim's neck. The victim immediately lost consciousness and/or died. Defense counsel objected on the grounds of relevance to any testimony about injuries inflicted after the initial wound. The trial court overruled the objection. We find no error in the admission of the testimony concerning the wounds inflicted after the initial neck wound. Injuries inflicted after the victim was rendered unconscious are part of the criminal episode. The medical examiner's testimony demonstrated the deliberate nature of the crime and refuted Preston's claim that he was in a PCP-induced frenzy at the time of the murder. Further, the jury was specifically instructed that it could not consider injuries inflicted after the victim lost consciousness in determining whether the murder was especially heinous, atrocious, or cruel.

Preston v. State, 607 So.2d 404, 410 (Fla. 1992).

Preston now raises the same issue as ineffective assistance of counsel in order to avoid procedural bar. *See Freeman v. State*, 761 So. 2d 1055, 1067 (Fla. 2000) (holding that claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel). *Rodriguez v. State*, 31 Fla. L. Weekly S39 (Fla. May 26, 2005).

Not only is this issue procedurally barred, it does not allege sufficient facts to require an evidentiary hearing. As a general proposition a defendant is entitled to an evidentiary hearing on a motion for postconviction relief unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a

particular claim is legally insufficient. *See, e.g., Maharaj v. State*, 684 So. 2d 726 (Fla. 1996); *Anderson v. State*, 627 So. 2d 1170 (Fla. 1993); Fla. R. Crim. P. 3.850. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. *See Kennedy v. State*, 547 So. 2d 912 (Fla. 1989).

Insufficiently pleaded claims of ineffective assistance of counsel, that is, claims which fail to allege facts to demonstrate deficient performance and prejudice, should be summarily denied. *Rose v. State,* 617 So. 2d 291 (Fla. 1993); *Mendyk v. State*, 592 So. 2d 1076 (Fla. 1992).

CLAIM 8

THERE WAS NO ERROR IN THE POSTCONVICTION PROCEEDINGS, EITHER INDIVIDUALLY OR CUMULATIVELY.

Preston’s last claim is a catch-all of cumulative error. There was no error in the post-conviction proceedings, neither individually nor cumulatively.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee respectfully requests that all requested relief be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **Robert T. Strain**, CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, this _____ day of February, 2006.

_____
Assistant Attorney General

CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Courier New, 12 point font, pursuant to Fla. R. App. 9.210.

_____
Assistant Attorney General