IN THE SUPREME COURT OF FLORIDA

JOEL DALE WRIGHT, **Case No. SC06-2353**

Appellant,

v.

STATE OF FLORIDA

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Mrs. Smith, a 75-year old schoolteacher, was found murdered in her bedroom on February 6, 1983. On September 1, 1983, Wright was convicted of first-degree murder, sexual battery, burglary of a dwelling, and grand theft. The jury returned an advisory sentence of death and the trial court, in accordance with that recommendation, imposed the death sentence. This Court affirmed the convictions and the sentence of death in *Wright v. State*, 473 So. 2d 1277 (Fla. 1985)[1], cert. denied, 474 U.S. 1094, 106 S. Ct. 870, 88 L. Ed. 2d 909 (1986).

In February 1988, Wright filed his first motion for postconviction relief, raising the following issues:

> (1)(a) the State withheld exculpatory material in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to provide the defense with an alleged "script" supplied to the State's key witness, Charles Westberry;
>
> (1)(b) the State entered into a secret contract of immunity with Westberry;
>
> (1)(c) violation of discovery--State suppressed exculpatory evidence concerning the statements of Wanda Brown, Kimberly Holt and Charlene Luce;
>
> (2) ineffective assistance of counsel at both the guilt and sentencing phases of the trial;
>
> (3) defense counsel was ineffective for failing to call additional witnesses to testify as to the Defendant's character and for using a juvenile

[1] There are three published decision from this Court. The decision on direct appeal will be referred to as "Wright I."

psychiatric evaluation;

(4) failure to change venue;

(5) juror misconduct;

(6) *Miranda* violations-- deputy sheriff allowed to testify Wright said that, "If I confess to this, I'll die in the electric chair. If I don't talk I stand a chance of living;"

(7) defense counsel was unable to fully cross-examine Westberry concerning his involvement with the Defendant in dealing in scrap metal;

(8) exclusion of testimony by Kathy Waters, a witness who came forward during the trial;

(9) preclusion from admitting evidence the victim's house had been burglarized regularly; counsel was ineffective for failing to call a particular witness to testify about previous break-ins;

(10) prosecutorial misconduct for statements made during the State's closing argument;

(11) the jury should have been instructed on voluntary intoxication;

(12) absence from the courtroom while Court communicated with jurors upon their written questions during deliberations;

(13) that the burden of proof was improperly shifted in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985);

(14) instructions diluted the jury's sense of responsibility in violation of *Caldwell*;

(15) instructions concerning the jury's function at capital sentencing;

(16) heinous, atrocious or cruel was unconstitutionally applied;

(17) introduction of non-statutory aggravating circumstances;

(18) doubling of aggravating factors.

The trial court held an evidentiary hearing and issued a detailed order denying relief. After the trial court denied relief, but while the case was still pending on a motion for rehearing, Wright filed a supplement to his 3.850 motion alleging that his public defender's status as a special deputy sheriff created a conflict of interest. The trial court denied relief, and Wright appealed. This Court affirmed the trial court's denial of relief on all claims except the "public defender as deputy sheriff" claim. The case was remanded for an evidentiary hearing on the claim of conflict of interest due to his public defender's service as a special deputy. See *Wright v. State*, 581 So. 2d 882, 886 (Fla. 1991)("Wright II").

Prior to the hearing on remand, Wright filed an "amended" postconviction motion based on documents provided by the Putnam County Sheriff's Department. The trial judge then held the remand hearing on the "deputy sheriff" claim and denied relief. An evidentiary hearing on the additional postconviction claims was held in March and December 1997. After all relief was denied, Wright appealed, raising the following issues:

(1) in the first postconviction proceeding in 1988, the trial court made false findings of certain facts and this Court erroneously adopted those false facts

on appeal, the State failed to disclose exculpatory evidence as required under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), and there was newly discovered evidence of innocence admissible under *Jones v. State*, 591 So. 2d 911 (Fla. 1991);

(2) Wright's appointed trial counsel, Howard Pearl, and Pearl's investigator, Freddie Williams, were bonded deputy sheriffs, a status which interfered with their ability to provide effective assistance of counsel;

(3) the trial judge, Robert Perry, failed to reveal at the time of trial and at the time he presided over Wright's first postconviction proceeding that he was a special deputy sheriff, which would have warranted disqualification;

(4) Judge Perry's standard practice was to request the State to draft sentencing orders in capital cases which constitutes reversible error; and

(5) Judge A.W. Nichols, III, who presided over Wright's second postconviction proceeding, refused to timely rule on his motion for postconviction relief, the State delayed disclosure of exculpatory materials, and both acts amount to a denial of due process.

Wright v. State, 857 So. 2d 861, 865-867 (Fla. 2003)("Wright III"). In denying relief, this Court held in relevant part:

Claim 1

Reconsideration of Prior *Brady* Claim; *Brady* Claim; Newly Discovered Evidence

Wright's first claim in this appeal involves three separate issues: First, Wright argues that the trial court erred in denying his *Brady* claim in the first postconviction proceeding. Second, he argues that there exists new *Brady* material which entitles him to relief. Third, he argues that there is newly discovered evidence in support of his innocence. Wright also argues that this Court should consider the cumulative prejudicial effect of the *Brady* material from his first postconviction proceeding, the *Brady* material he presents here, and the newly discovered

evidence. n1 We will separately address each of the issues Wright raises under this first claim.

> n1 Wright also asserts that when we conduct our analysis of the prejudicial effect of any error, we must consider the evidence that would have been presented but for the ineffectiveness of trial counsel. Wright presented a claim of ineffective trial counsel at the first postconviction proceeding. We held then that Wright failed to meet his burden of showing deficient performance under *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). See *Wright*, 581 So. 2d at 883. We did not address the prejudice prong of the *Strickland* test. Because Wright failed to show deficient performance of trial counsel, we will not address the evidence Wright alleges would have been presented at trial but for the ineffectiveness of counsel. *See Downs v. State*, 740 So. 2d 506, 518 n.19 (Fla. 1999).

Issue 1. Reconsideration of Wright's First *Brady* Claim.

Wright alleges that in his first postconviction proceeding the trial court erred in denying his *Brady* claim because the trial court made factual findings not in the record. He further argues that this Court erroneously affirmed that denial of postconviction relief on appeal. Wright seeks a reconsideration under *Brady* of three written statements made to police during the investigation of the murder. The statements were made by Wanda Brown, Kimberly Holt, and Charlene Luce. In his first postconviction hearing, Wright argued that defense counsel should have been given copies of the written statements. The trial court in that proceeding denied Wright's *Brady* claim, finding that defense counsel knew of the Brown and Luce statements and had actually interviewed Holt during counsel's own investigation. We affirmed that finding on appeal. *See Wright v. State*, 581 So. 2d 882 (Fla. 1991). Now, in his second postconviction motion, Wright argues that the first postconviction trial court, and this Court thereafter, misconstrued the

facts in the record so that the *Brady* claim was erroneously denied.

However, Wright has failed to meet his burden to show the grounds for relief he alleges here were not known and could not have been known at the time of the earlier proceeding. See *Foster v. State*, 614 So. 2d 455 (Fla. 1992). His argument that the first postconviction trial court misinterpreted the facts in the record was raised and addressed in his appeal following that proceeding, and in a motion for rehearing as well. Absent a showing that Wright did not know, or could not have known, of the alleged misconstrued facts during the first postconviction proceeding, the trial court in this proceeding properly denied relief. We will not entertain a second appeal of claims that were raised, or should have been raised, in a prior postconviction proceeding. See *Downs v. State*, 740 So. 2d 506, 518 n.10 (Fla. 1999) (stating that claim raised in earlier postconviction motion is barred in subsequent postconviction motion even if based on different facts); *Atkins v. State*, 663 So. 2d 624, 626 (Fla. 1995) (explaining that issues that were or could have been presented in a postconviction motion cannot be relitigated in a subsequent postconviction motion).

Wright also argues that the trial court erred in the first postconviction proceeding by accepting the fact that two potential suspects, Henry Jackson (Jackson) and Clayton Strickland (Strickland) were eliminated from police investigation after they were given polygraph examinations which they purportedly passed. In this second postconviction motion, Wright contends that the evidence the trial court relied upon in making its factual finding in the first postconviction proceeding, i.e., that Jackson and Strickland passed polygraph examinations, did not actually exist, a fact which Wright only realized when the State did not produce the polygraph examination results upon his public records requests made after the first postconviction motion. In order to avoid a procedural bar on this claim, Wright must allege new or different grounds for relief that were not known and could not have been known at the time of his earlier postconviction motion. See *Christopher v. State*, 489

So. 2d 22, 24 (Fla. 1986). Polygraph examination results for Jackson and Strickland were available for discovery at the time of trial and at the time of Wright's first postconviction proceeding.

Wright admits that he sought production of the polygraph results for the first time in 1997. At that time, Wright deposed Officer Derry Wayne Dedmon, who would have conducted the polygraph examinations in question. Officer Dedmon stated that in 1989 or 1990 he destroyed all of his polygraph records through 1984 by directive of the sheriff. The murder, police investigation, and trial in this case all occurred in 1983. Any polygraph examinations administered to suspects during the investigation of this case would have occurred in 1983 prior to Wright's trial, and the results would still have been available in 1988 when Wright brought his first postconviction motion. Thus, Wright has failed to demonstrate why he did not raise the absence of polygraph examination results from the record in his first postconviction proceeding and has failed to demonstrate that the absence of these documents was not known and could not have been known to him at the time of the earlier proceeding. See *Foster*.

Wright's claim that this Court should now reconsider certain factual issues that had been previously raised and resolved in the first postconviction proceeding is not well taken. His arguments here are successive since they have been previously litigated on their merits, and he has failed to show why these additional facts could not have been known at the time of the first postconviction proceedings. See *Downs; Atkins; Foster*.

Issue 2. *Brady* Claim

After his first postconviction proceeding in 1988, Wright made public records requests from which he received numerous documents. The first set of documents produced in 1991 included police investigation reports regarding criminal activity in the neighborhood of the murder. Wright asserts that these reports demonstrate that the police did not adequately investigate other potential suspects, including Henry Jackson. A second set of documents was

produced in 1996 and 1997. These documents, Wright argues, demonstrate failures and inadequacies of the police investigation and demonstrate that the investigating officer was dishonest. Wright also draws an inference from the lack of documents which, he argues, would exist if the police adequately considered other suspects. The documents Wright lists in his claim include Jackson's criminal history, neighbors' complaints to police about Jackson, and police reports involving other known criminals in the neighborhood which involve events completely unrelated to those in this case. All of this information, he alleges, is *Brady* evidence and entitles him to a new trial.

The United States Supreme Court announced in *Strickler v. Greene*, 527 U.S. 263, 281-82, 144 L. Ed. 2d 286, 119 S. Ct. 1936 (1999), the three elements that a defendant must establish in order to successfully assert a *Brady* violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Accord *Occhicone v. State*, 768 So. 2d 1037, 1041 (Fla. 2000). The burden is on the defendant to demonstrate that the evidence he claims as *Brady* material satisfies each of these elements. Even where favorable evidence is suppressed, a new trial will not be necessary where it is determined that the favorable evidence did not result in prejudice. See *Cardona v. State*, 826 So. 2d 968 (Fla. 2002). The Court in *Strickler* explained that prejudice is measured by determining "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)).

As noted above, the evidence Wright claims as *Brady* material consists of information contained in police files concerning other possible suspects and other criminal activity in the same neighborhood. This is the same type of evidence that this Court recently addressed in *Carroll v. State*, 815 So. 2d 601 (Fla.

2002). In *Carroll*, the defendant argued that the State withheld favorable evidence that consisted of police investigative notes that linked the defendant with another suspect, that another person was believed by the family to be involved, and that other crimes, including another rape, had occurred in the neighborhood. In denying relief on this issue, we said, "As noted by the State, the prosecution is not required to provide the defendant all information regarding its investigatory work on a particular case regardless of its relevancy or materiality." *Id*. at 620. Likewise, investigators in this case were not required to provide all of the notes and information regarding their investigation. Thus, Wright has failed to demonstrate that the evidence should have been disclosed.

However, even if the State should have disclosed the evidence, Wright has not demonstrated prejudice by the failure to do so. In order to be entitled to relief on a *Brady* claim, the defendant must also show that the evidence "is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Gorham v. State*, 521 So. 2d 1067, 1069 (Fla. 1988). There has been no such showing in the instant case. The mere possibility that undisclosed items of information may have been helpful to the defense in its own investigation does not establish constitutional materiality. See *United States v. Agurs,* 427 U.S. 97, 109-10, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976); *Gorham v. State*, 521 So. 2d 1067, 1069. The fact of other criminal activities and the existence of other criminals in the same neighborhood where this murder occurred does not affect the guilt or punishment of this defendant.

We agree with the trial court's determination that the exculpatory effect of the documents is merely speculative; therefore, we affirm the trial court's denial of relief on this issue.

Issue 3. Newly Discovered Evidence

Wright claims that evidence produced as the result of the public records requests made after the first postconviction motion constitutes newly discovered evidence of innocence and requires a new trial. In

order to qualify as newly discovered evidence, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991) (quoting *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979)). If this test is met, the court must next consider whether the newly discovered evidence is of such a nature as to probably produce an acquittal on retrial. *Id*. at 915. Additionally, we have said that newly discovered evidence, by its very nature, is evidence that existed but was unknown at the time of the prior proceedings. See *Porter v. State*, 653 So. 2d 374, 380 (Fla. 1995).

In this case, none of the evidence Wright claims as newly discovered since the first postconviction proceeding existed at the time of trial. For example, Wright presents a memorandum from 1986 criticizing the veracity of Officer Perkins, the investigator in this case. He presents a police report filed by an elderly resident of the neighborhood where the murder occurred that implies Henry Jackson hit the resident on her head and stole her money. He also presents police reports involving a witness against Wright who was a suspect in a different homicide. None of these documents existed at the time of Wright's trial in 1983, so they are not "newly discovered" evidence.

The trial court did not err in denying relief on this newly discovered evidence claim.

Issue 4. Cumulative Effect of Evidence

Finally, Wright argues we must consider, in determining whether he is entitled to a new trial, the cumulative effect of the evidence presented at trial, along with any *Brady* evidence, newly discovered evidence, and evidence that would have been presented at trial but for ineffective assistance of counsel. See *State v. Gunsby*, 670 So. 2d 920, 921 (Fla. 1996). We have considered and addressed Wright's *Brady* claim and claim of newly discovered evidence, and found them to be without merit. As discussed above, Wright may not relitigate the merits of his first postconviction claims. Having found that each claim presented in this proceeding lacks merit, we find no cumulative error.

> See *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999) (finding that claim of cumulative error was without merit where the court considered each individual claim and found them to be without merit).

Wright v. State, 857 So. 2d 861, 867-872 (Fla. 2003) ("Wright III").

Concurrent with the appeal on the second Rule 3.850 postconviction motion, Wright filed a state petition for writ of habeas corpus raising four issues:

> (1) the State failed to disclose pertinent facts necessary for this Court's consideration;
>
> (2) appellate counsel failed to raise numerous meritorious issues on appeal;
>
> (3) the presiding judge unconstitutionally made factual findings in support of Wright's death sentence in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000); and
>
> (4) this Court failed to make an appropriate harmless error analysis after striking an aggravating circumstance on direct appeal, in violation of *Sochor v. Florida*, 504 U.S. 527(1992).

This Court denied relief on all claims. *Wright*, 857 So. 2d at 874-875 ("Wright III").

On August 11, 2003, Wright filed a Motion for DNA Testing. (R1-6). The trial judge granted the motion, and ordered that the pubic hair in Exhibit 56 and the head hair in Exhibit 63 be tested for mitochondrial DNA, and the semen sample in the rape kit, Exhibit 56, be tested for nuclear DNA. (R234-236, R258-

259).[2] MitoTyping Technologies conducted the mitochondrial DNA testing and filed a report on March 1, 2005. (R283-285). Florida Department of Law Enforcement – Jacksonville performed the nuclear DNA test on the samples in the rape kit, and filed a report dated April 18, 2005. (R299-300). The DNA profile from the sperm fraction from the vaginal swab and slide matched the DNA profile from Wright. (R300). Wright filed a Motion for Additional DNA Testing, requesting that Forensic Science Associates in California be allowed to conduct further DNA testing on the rape kit. (R304-305). The State responded, noting that Forensic Science is not an accredited lab. (R307-308).

During the time the DNA testing was being done, Wright filed a motion for postconviction relief, raising two claims: (1) newly discovered evidence of statements by Ronald Thomas and Idus Hughes; and (2) DNA testing. (SR4-39). The State filed a response on August 24, 2004. (R240-257). After several continuances of the case management conference in order to obtain the DNA test results, (R264, 282, 289, 294), a hearing was held June 27, 2005. (R309, 399-412). At that time, the judge ruled there would not be an evidentiary hearing on the

[2] "R" refers to the record in the present appeal. "SR" refers to the supplemental record in the present appeal. "TT" refers to the 1983 trial transcript.

newly discovered evidence claim, and he would not grant additional DNA testing. (R399-412). An order was entered on March 23, 2006, denying both claims in the postconviction motion. (R310-312). Wright moved for rehearing. (R313-321). Rehearing was denied. (R328). This appeal follows.

STATEMENT OF THE FACTS

This Court summarized the facts in the opinion on direct appeal:

> The facts reflect that the body of a 75-year-old woman was found in the bedroom of her home on February 6, 1983. The victim was discovered by her brother, who testified that he became concerned when she failed to respond to his knock on the door. Finding all the doors to her home locked, he entered through an open window at the rear of the house and subsequently found her body. Medical testimony established that the victim died between the evening of February 5 and the morning of February 6 as a result of multiple stab wounds to the neck and face, and that a vaginal laceration could have contributed to the victim's death.
>
> The state's primary witness, Charles Westberry, testified that shortly after daylight on the morning of February 6, appellant came to Westberry's trailer and confessed to him that he had killed the victim; that appellant told him he entered the victim's house through a back window to take money from her purse and, as appellant wiped his fingerprints off the purse, he saw the victim in the hallway and cut her throat; and that appellant stated he killed the victim because she recognized him and he did not want to go back to prison. Westberry further stated that appellant counted out approximately $290 he said he had taken from the victim's home and that appellant asked Westberry to tell the police that appellant had spent the night of February 5 at Westberry's trailer. When Westberry related appellant's confession to his wife several weeks later, she notified the police. The record also reflects that a sheriff's department fingerprint analyst identified a fingerprint taken from a portable stove located in the victim's bedroom as belonging to appellant, and that, over appellant's objection, the court instructed the

jury on the Williams rule and permitted Paul House to testify for the state that approximately one month before the murder, he and appellant had entered the victim's home through the same window that was found open by the victim's brother, and had stolen money.

In his defense, appellant denied involvement in the murder and introduced testimony that, between 5:00 and 6:00 p.m. on February 5, a friend had dropped him off at his parents' home, which neighbored the victim's, and that he left at 8:00 p.m. to attend a party at his employer's house. Testifying in his own behalf, appellant stated that he returned to his parents' home, where he resided, at approximately 1:00 a.m. on February 6, but was unable to get into the house because his parents had locked him out. Appellant testified that he then walked by way of Highway 19 to Westberry's trailer, where he spent the night. Appellant also presented a witness who testified that, late in the night of February 5 and early in the morning of February 6, he had seen a group of three men whom he did not recognize in the general vicinity of the victim's home.

After the close of the evidence but prior to final arguments, appellant proffered the newly discovered testimony of Kathy Waters, who had listened to portions of the trial testimony, followed newspaper accounts of the trial, and discussed testimony with various persons attending the trial. Her proffered testimony revealed that, shortly after midnight on February 6, she had observed a person, who may have been similar in appearance to appellant, walking along Highway 19, and had also seen three persons, whom she did not recognize, congregated in the general vicinity of the victim's house. The trial court denied appellant's motion to re-open the case, noting that the rule of sequestration is rendered "meaningless" when a witness is permitted "to testify in support of one side or the other, almost as if that testimony were tailor-made,"

> after the witness has conferred with numerous people concerning the case. The jury found appellant guilty as charged.

Wright v. State, 473 So. 2d 1277, 1278-79 (Fla. 1985).

SUMMARY OF ARGUMENT

CLAIMS I, II, and IV: This is Wright's third motion for postconviction relief. The claims are untimely, procedurally barred, and an abuse of procedure. To avoid the procedural bar, Wright presents two affidavits which he claims are newly-discovered evidence. The information in these affidavits could have been discovered with due diligence, and are not newly discovered. The Brady/Giglio claims are insufficiently plead. Additionally, he re-argues the Brady/Giglio claims raised in the prior motions which this Court has already held have no merit. The two affidavits presented in this third motion for postconviction relief are not newly discovered evidence. Wright has failed to allege due diligence. He has also failed to allege sufficient facts to show that the newly-discovered hair evidence would have changed the outcome of the trial. The requirements of Jones v. State, 591 So. 2d 911, 916 (Fla. 1991), have not been met. The trial court did not err in summarily denying the successive, procedurally barred, legally insufficient claims which are also conclusively refuted by the record. Because the claims are procedurally barred and insufficiently pled, there is no need to attach sections of the record.

CLAIM III: The trial judge did not err in denying additional DNA

testing by an unaccredited laboratory. The trial court's ruling is consistent with Rule 3.853 and this Court's opinion in Swafford v. State, 946 So. 2d 1060 (Fla. 2006).

CLAIMS I AND II and IV

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING WRIGHT'S SECOND SUCCESSIVE RULE 3.850 MOTION BASED ON NEWLY-DISCOVERED EVIDENCE, *BRADY,* AND *GIGLIO*.

Successive motion. This is Wright's third postconviction motion to vacate. The claims regarding the Brady/Giglio/newly discovered evidence of the affidavits of Idus Hughes and Ronald Thomas are untimely, successive and an abuse of procedure. A second or successive motion for postconviction relief can be denied on the ground that it is an abuse of process if there is no reason for failing to raise the issues in the previous motion. Pope v. State, 702 So. 2d 221, 223 (Fla. 1997). There is no reason these claims could not have been raised in the prior postconviction motions and are procedurally barred.

Wright attempts to resurrect these claims by couching them as newly-discovered evidence. This Court has held that a defendant may file successive postconviction relief motions that are based on newly discovered evidence. See White v. State, 664 So. 2d 242, 244 (Fla. 1995). However, in order to overcome the procedural bar, a defendant must show that the newly discovered facts could not have been discovered with due diligence by collateral counsel and raised in an initial rule 3.850 motion. See Id; Owen v. Crosby, 854 So. 2d 182, 187 (Fla. 2003). Wright has made no such showing in this case.

Evidentiary hearing. Wright claims he was entitled to an evidentiary hearing on his successive postconviction motion. This Court does not substitute its judgment for that of the trial court on issues of fact when competent, substantial evidence supports the circuit court's factual findings. See, Windom v. State, 886 So. 2d 915, 921 (Fla. 2004).

The record supports summary denial on each issue raised in this point. A defendant is entitled to no relief when his postconviction motion claims are legally insufficient, procedurally barred, or otherwise meritless. Hodges v. State, 885 So. 2d 338, 355 (Fla. 2004); Blanco v. State, 32 Fla. L. Weekly S142 (Fla. Apr. 12, 2007). Wright has made conclusory allegations about the nature of the affidavits and the prejudice. He has also made conclusory allegations regarding the effect of the mtDNA testing on three hairs. Conclusory allegations are legally insufficient on their face and may be denied summarily. Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998); Occhicone v. State, 768 So. 2d at 1042; Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988).

Brady/Giglio violation. In Claim I in this appeal, Wright alleges the affidavits from Idus Hughes and Ronald Thomas establish violations of Brady[3] and Giglio.[4] (Initial Brief at 40).

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

The trial court found:

> The Defendant in Claim I argues that the Affidavits submitted from Idus Hughes and Ronald Thomas are either *Brady* material or are newly discovered evidence. The Affidavits are neither. This is the third Post Conviction Motion filed by Defendant. This material is procedurally barred. In addition, there has been no showing of due diligence to support any claim of newly discovered evidence and no showing of prejudice to meet the required standard for consideration by this Court. Further, the Defendant has not met the heavy burden to show that this material submitted as Claim I, especially in light of the DNA results set out above which show the Defendant to be the person whose semen was in the victim's vagina and anus. Accordingly, Claim II is DENIED.

(R311-312).

To obtain relief under Brady, the defendant must establish:

> (1) that the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching;
>
> (2) that the evidence was suppressed by the State, either willfully or inadvertently; and
>
> (3) that the suppression resulted in prejudice.

Johnson v. State, 921 So. 2d 490, 507 (Fla. 2005).

To establish a Giglio violation, the defendant must show:

> (1) the testimony given was false;
>
> (2) the prosecutor knew the testimony was false; and
>
> (3) the statement was material.

Guzman v. State, 868 So. 2d 498, 505 (Fla. 2003).

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[4] Giglio v. United States, 405 U.S. 150 (1972).

The only allegation to support the supposed Brady/Giglio violations are outlined in Claim II of the Initial Brief as follows:

> [T]he affidavits demonstrate "that the State previously failed to provide the defense with evidence favorable to the defendant".

(Initial Brief at 52). Wright does not allege that the State suppressed this evidence or presented this evidence at any trial or hearing. A critical element of a Brady claim is that the State was in possession of exculpatory evidence and failed to disclose it to the defense. A critical element of a Giglio claim is that the prosecution knowingly presented false testimony. Summary denial was appropriate where the allegations are insufficient to state a claim.

Furthermore, the affidavits on their face show that summary denial was appropriate. Idus Hughes clearly states that he did not talk to any attorney or police officer. (SR33). The first time Idus Hughes told anyone about "seeing Henry" near the victim's residence was when he talked to a defense investigator on August 8, 2003. (SR33-34). Not only has Wright failed to allege the State had knowledge of this witness, but also the affidavit presented shows that Idus Hughes had *no* contact with law enforcement or state attorney before he himself contacted collateral counsel.

Likewise, the affidavit of Ron Thomas fails to allege facts sufficient to require an evidentiary hearing. The first part of the affidavit alleges that he talked to Idus Hughes, who then talked to collateral counsel. Ron Thomas had no information that was imparted to the State prior to 2003. Thomas' assertion that "a detective" at the County jail asked Thomas to "find out what Charles [Westberry] did with the bloody clothes." Thomas claims he tried to talk to Charles about the murder, but Charles refused to talk. (SR38). Thomas claims he then told the detective, back in 1983, that Westberry would not talk to him. (SR39). Wright claimed in his motion to vacate that this evidence demonstrated law enforcement did not accept Westberry's testimony that Wright had blood on his clothes when he arrived at the trailer and emphasized that no bloody clothes were found. (SR17). The allegation that ambiguous evidence about "a detective" who works at the County jail tried to find bloody clothing is exculpatory, is conclusory and does not require an evidentiary hearing. Even if true, the fact the police were trying to find Wright's bloody clothing is hardly exculpatory. Paige Westberry had testified that Charles Westberry told her Wright was covered with blood when he came to the Westberry trailer after he murdered Ms. Smith. Charles Westberry denied the statement at trial. (TT2172). Charles further denied

seeing blood on Wright's shirt. (TT2175). Wright recites facts in his Initial Brief about Paige saying Charles told her Wright was wearing bloody clothing. (Initial Brief at page 2 and page 2, n.3).

There are no record cites to these facts. Paige did not testify to these facts at trial. (TT2472-2476). This claim is built on speculation.

Even if the allegations about "a detective" asking for information from Charles were true, Charles refused to talk. Wright's assertions that the information would have been in any way exculpatory are complete speculation, particularly since Charles Westberry denied any statement about bloody clothes at trial and refused to talk about the case. The allegations are legally insufficient as a ***Brady*** claim because Wright has failed to show the State was in possession of *exculpatory* evidence, which was suppressed, and which would have a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial. Smith v. State, 931 So. 2d 790, 796 (Fla. 2006) (citing Strickler v. Greene, 527 U.S. 263, 289 (1999)).

Wright has also failed to assert a legally sufficient Giglio claim because he has failed to even allege that the State presented false testimony which might have reasonably changed

the outcome of the case. Guzman v. State, 941 So. 2d 1045, 1050 (Fla. 2006). The testimony the State presented from Charles Westberry was that Wright did *not* have on bloody clothing when he came to the trailer after killing Miss Smith.

Summary denial was appropriate. See Tompkins v. State, 872 So. 2d 230, 241 (Fla. 2003)(affirming the trial court's summary denial of Brady claims where "either the undisclosed documents are not Brady material because they are neither favorable to Tompkins nor suppressed, or Tompkins has not demonstrated that he was prejudiced by the lack of disclosure").

As this Court stated in Wright III:

> The mere possibility that undisclosed items of information may have been helpful to the defense in its own investigation does not establish constitutional materiality. See *United States v. Agurs,* 427 U.S. 97, 109-10, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976); *Gorham v. State*, 521 So. 2d 1067, 1069. The fact of other criminal activities and the existence of other criminals in the same neighborhood where this murder occurred does not affect the guilt or punishment of this defendant.
>
> We agree with the trial court's determination that the exculpatory effect of the documents is merely speculative; therefore, we affirm the trial court's denial of relief on this issue.
> Wright III at 870.

Newly Discovered Evidence. In Claims I and II, Wright alleges that the affidavits of Idus Hughes and Ronald Thomas are newly-discovered evidence. (Initial Brief at 40). Alternatively,

Wright claims trial counsel was ineffective for failing to discover this evidence, i.e. that this evidence existed at the time of trial. (Initial Brief at 40). These claims are inconsistent facially and speculative.

This Court succinctly set forth the standard for newly-discovered evidence in Wright III.

> In order to qualify as newly discovered evidence, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." Jones v. State, 591 So. 2d 911, 916 (Fla. 1991) (quoting Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979)). If this test is met, the court must next consider whether the newly discovered evidence is of such a nature as to probably produce an acquittal on retrial. Id. at 915. Additionally, we have said that newly discovered evidence, by its very nature, is evidence that existed but was unknown at the time of the prior proceedings. See Porter v. State, 653 So. 2d 374, 380 (Fla. 1995).

Wright III at 870-871. Idus Hughes lived “a half-mile down the road” from the victim. (SR10). Wright makes no allegation he could not have obtained this information with due diligence. He simply states that the information was not provided until 2003. If the information did not exist until 2003, it is not newly discovered under Jones because it did not exist at the time of trial. If the evidence did exist at the time of trial, Wright failed to allege or establish due diligence in failing to discover an available neighborhood witness for 20 years.

Furthermore, under the Jones standard, the evidence would not produce an acquittal on retrial. As this Court found on direct appeal:

> The record already contained unrefuted testimony that three individuals were gathered near the victim's home.

Wright I at 1280.

Henry Jackson, the subject of the "new" evidence from Idus Hughes, was also the subject of a newly-discovered evidence claim in Wright III:

> After his first postconviction proceeding in 1988, Wright made public records requests from which he received numerous documents. The first set of documents produced in 1991 included police investigation reports regarding criminal activity in the neighborhood of the murder. Wright asserts that these reports demonstrate that the police did not adequately investigate other potential suspects, including **Henry Jackson**. A second set of documents was produced in 1996 and 1997. These documents, Wright argues, demonstrate failures and inadequacies of the police investigation and demonstrate that the investigating officer was dishonest. Wright also draws an inference from the lack of documents which, he argues, would exist if the police adequately considered other suspects. The documents Wright lists in his claim include **Jackson's** criminal history, **neighbors' complaints to police about Jackson**, and police reports involving other known criminals in the neighborhood which involve events completely unrelated to those in this case. All of this information, he alleges, is Brady evidence and entitles him to a new trial.
>
> . . . . .
>
> However, even if the State should have disclosed the evidence, Wright has not demonstrated prejudice by the failure to do so. In order to be entitled to relief on a Brady claim, the defendant must also show that the

> evidence "is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988). There has been no such showing in the instant case. The mere possibility that undisclosed items of information may have been helpful to the defense in its own investigation does not establish constitutional materiality. See United States v. Agurs, 427 U.S. 97, 109-10, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976); Gorham v. State, 521 So. 2d 1067, 1069. The fact of other criminal activities and the existence of other criminals in the same neighborhood where this murder occurred does not affect the guilt or punishment of this defendant. We agree with the trial court's determination that the exculpatory effect of the documents is merely speculative.

Wright III at 869-870. (Emphasis supplied)

This Court further addressed Henry Jackson in the newly-discovered evidence section in Wright III:

> Wright claims that evidence produced as the result of the public records requests made after the first postconviction motion constitutes newly discovered evidence of innocence and requires a new trial. In order to qualify as newly discovered evidence, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." Jones v. State, 591 So. 2d 911, 916 (Fla. 1991) (quoting Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979)). If this test is met, the court must next consider whether the newly discovered evidence is of such a nature as to probably produce an acquittal on retrial. Id. at 915. Additionally, we have said that newly discovered evidence, by its very nature, is evidence that existed but was unknown at the time of the prior proceedings. See Porter v. State, 653 So. 2d 374, 380 (Fla. 1995).
>
> In this case, none of the evidence Wright claims as newly discovered since the first postconviction proceeding existed at the time of trial. For example,

> Wright presents a memorandum from 1986 criticizing the veracity of Officer Perkins, the investigator in this case. He presents a police report filed by an elderly resident of the neighborhood where the murder occurred that implies **Henry Jackson** hit the resident on her head and stole her money. He also presents police reports involving a witness against Wright who was a suspect in a different homicide. None of these documents existed at the time of Wright's trial in 1983, so they are not "newly discovered" evidence.

Wright III at 870-871. (Emphasis supplied)

The fact that one more person has come forward with information about Henry Jackson does not change this Court's finding that this information is speculative and irrelevant. Thus, the prejudice prong of Jones cannot be met.

Insofar as the "new" evidence that Ronald Thomas tried to obtain information from Charles Westberry in jail, the claim is insufficiently pled because the "detective" is not identified, there is no specific time frame except "1983," and Westberry refused to talk. If the evidence existed at the time of trial, it is not newly discovered under Jones. If it did not exist at the time of trial[5], there has been no showing of due diligence. Last, there was nothing exculpatory about the fact the police were looking for Wright's bloody clothing, and the third prong of Jones cannot be met.

Wright makes a conclusory allegation that Ronald Thomas' affidavit provides impeachment of Westberry's testimony.

(Initial Brief at 52). He does not explain how information that Westberry really did have Wright's bloody clothing would help Wright. Summary denial was appropriate given the conclusory nature of this claim and the fact that, from the face of the pleadings, the Jones standard could not be met.

Ineffective assistance of counsel. Wright intersperses ineffective assistance of counsel claims within his newly-discovered claims in an attempt to avoid the procedural bar. As explained above, none of the information was exculpatory nor would it have changed the outcome of the proceeding. Therefore, Wright has neither alleged or established that trial counsel was deficient under Strickland v. Washington, 466 U.S. 668 (1984). Neither can he show prejudice since none of the information is exculpatory. The only thing Wright has accomplished by raising ineffective assistance of counsel is to gut his newly-discovered evidence claim because if this evidence existed at the time of trial, it is not newly discovered under Jones.

DNA results. Wright also challenges the summary denial of the DNA claim. (Initial Brief at 41). The trial judge held:

> CLAIM II
>
> In Claim II, the Defendant requested the testing of certain biological evidence that was collected at the scene as provided in Fla. R. Crim. P. 3.853. This evidence consisted of pubic hairs collected from the victim or the victim's clothing that were previously

[5] Wright's trial was in September 1983.

> determined not to be hair of the deceased victim. The State suggested that other evidence consisting of semen recovered from the vagina and the anus of the victim should also be DNA tested at the same time. There was some concern that the semen collected had been destroyed in a previous test conducted prior to the technological advances for DNA testing that now exist. This Court ordered the testing and the results were submitted to this Court, the Defendant and the State.
>
> DNA testing was completed on the pubic hairs and these results determined that none matched the Defendant. These tests were conducted by a private laboratory selected by the Defendant.
>
> The slides of the semen samples were submitted to the Florida Department of Law Enforcement Laboratory and a determination was made that there was a sufficient amount remaining to conduct DNA testing on those samples. The results of those tests determined that both the vaginal and anal swabs of the recovered semen were a match to the Defendant's DNA. The Defendant requested a second test be performed, but the expert suggested by the Defendant was not on the certified list as defined in the Rule and the motion was denied.
>
> The DNA results of the semen samples showing a match of the semen collected from the vagina and anus of the victim to the DNA of the Defendant conclusively refute the basis for Claim II. Accordingly, Claim II is DENIED.

(R310-312). Wright argues these findings are error because the DNA results were not admitted in the record even though the results were filed with the court and are part of the record on appeal. (R295-297, 298-300). Wright then states that the trial judge erred in failing to consider the mtDNA testing on the three hairs. (Initial Brief at 44). The results of

Mitotyping's MtDNA testing were filed with the court in the same manner as FDLE's test results and are included in the record. (R283-285). Wright asks this Court to consider only the evidence he believes is favorable to him, even though both reports were filed in the same manner.

In any case, there was nothing exculpatory about the mtDNA testing. The trial judge ordered DNA testing on the rape kit and mtDNA testing on three hairs. (R234-236, 2388-259). Testing on the semen samples in the rape kit matched Wright. (R299-300). mtDNA testing on the hairs excluded both Wright and the victim. (R235). The evidence at trial was that none of the hairs could be matched to Wright.

The testimony of the FDLE microanalyst at trial regarding hairs on the victim's dress or in pubic combings was that there were two caucasian hairs on her maroon dress that were "foreign" (TT2079) and one "brown hair present which demonstrated some characteristics of caucasian pubic hair, but the hair was different from the hairs in the pubic hair standard from [the victim] Smith." (TT2080). The debris and hairs from the maroon dress were marked for identification as State Exhibit KKK (TT2076) and admitted as State Exhibit 63. (TT2100, 793). The parties stipulated that the pubic combings were contained in the rape kit, State Exhibit 56. (TT2080-81, 793).

As to the two foreign brown hairs on the maroon dress:

> [t]hose two brown hairs were different from the hairs and head hair standard of Wright and Westberry.

(TT2082). The hair that was in the pubic hair combing:

> [u]pon examination of the characteristics that were present in that hair and in examining the pubic hair standards submitted from Wright and Westberry, it was decided that that hair did not demonstrate sufficient characteristics to be suitable for comparison with the hairs in any of those standards, in that the hair was not a typical caucasian pubic hair, and it was not suitable for comparison.

(TT2082). The FDLE analyst repeated this conclusion later in her testimony:

> There was not a hair that was absolutely characteristic of caucasian pubic hair found in the pubic hair combing in Miss Smith that was different from hers. There was a hair present that demonstrated some characteristics of caucasian pubic hair.

(TT2094). In conclusion, defense counsel asked the witness:

> Q. Now, and the bottom line that we have here is that whatever that pubic hair was or whose ever it might have been, in the pubic hair found in the pubic hair of Miss Smith, you could not match it with Jody Wright.
>
> A. That’s correct.

(TT2095).

The new testing on the hairs does not meet the Jones standard, because the jury knew at trial that the hairs did not match Wright. Wright cannot allege any new evidence derived from the mtDNA hair testing would change the outcome of the

trial. Thus, this claim was insufficiently pled. If claims are either successive or insufficiently pled, it is unnecessary for this Court to reach the merits of a claim concerning the trial court's failure to attach portions of the record. Owen v. Crosby, 854 So. 2d 182, 187-188 (Fla. 2003); Spencer v. State, 842 So. 2d 52, 69 (Fla. 2003); Diaz v. State, 719 So. 2d 865, 866 (Fla. 1988); Asay v. State, 769 So. 2d 974 (Fla. 2000); Anderson v. State, 627 So. 2d 1170 (Fla. 1993); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990).

It is unnecessary to conduct an evidentiary hearing if allegations are legally insufficient. Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998); Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000); Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988) This is equally applicable to newly-discovered evidence claims. A defendant who fails to allege the factors prerequisite to relief on a newly discovered evidence claim and is not entitled to an evidentiary hearing. Moore v. State, 820 So. 2d 199, 203 (Fla. 2002); See also Davis v. State, 736 So. 2d 1156, 1158-59 (Fla. 1999) ("To be entitled to an evidentiary hearing on a newly discovered evidence claim, Davis must, in addition to satisfying the due diligence requirement of rule 3.850(b), allege that he has discovered evidence which is 'of such nature that it would probably produce an acquittal on

retrial.'").

Cumulative Error. At page 54 of his initial brief, Wright also asserts a "cumulative effect" argument, attempting to resurrect claims which were raised on direct appeal and deemed harmless error. These underlying sub-claims are procedurally barred in post-conviction and may not be renewed as substantive claims under the guise of ineffective assistance of counsel. This Court has held that when the individual claims are procedurally barred or without merit, a claim of cumulative error also fails. See Griffin v. State, 866 So. 2d 1, 22 (Fla. 2003)("Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit, and [the defendant] is not entitled to relief on this claim."); Downs v. State, 740 So. 2d 506, 509 n.5 (Fla. 1999) (examining all the defendant's claims including a Brady claim and finding none of them sufficient to warrant an evidentiary hearing; therefore, there was no cumulative error). See also, Reed v. State, 875 So. 2d 415, 438 (Fla. 2004) (because this Court affirmed the denial of each of Reed's individual post-conviction claims, including his IAC/prosecutor comment claims, this Court likewise affirmed the denial of Reed's cumulative error claim).

This Court addressed a similar cumulative error claim in Wright III as follows:

> Finally, Wright argues we must consider, in determining whether he is entitled to a new trial, the cumulative effect of the evidence presented at trial, along with any Brady evidence, newly discovered evidence, and evidence that would have been presented at trial but for ineffective assistance of counsel. See State v. Gunsby, 670 So. 2d 920, 921 (Fla. 1996). We have considered and addressed Wright's Brady claim and claim of newly discovered evidence, and found them to be without merit. As discussed above, Wright may not relitigate the merits of his first postconviction claims. Having found that each claim presented in this proceeding lacks merit, we find no cumulative error. See Downs v. State, 740 So. 2d 506, 509 n.5 (Fla. 1999) (finding that claim of cumulative error was without merit where the court considered each individual claim and found them to be without merit).

Wright III at 871. Since there was no merit to any prior claim and there is no merit to any claim raised in this third postconviction motion, there is no cumulative error.

CLAIM III

THE TRIAL JUDGE DID NOT ERR IN DENYING WRIGHT'S MOTION FOR ADDITIONAL DNA TESTING; THE TRIAL JUDGE FOLLOWED RULE 3.853

On August 11, 2003, Wright filed a Motion for DNA Testing. (R1-6). The trial judge granted the motion, and ordered that the pubic hair in Exhibit 56 and the head hair in Exhibit 63 be tested for mitochondrial DNA, and the semen sample in the rape kit, Exhibit 56, be tested for nuclear DNA. (R234-236, R258-259). MitoTyping Technologies conducted the mitochondrial DNA testing and filed a report on March 1, 2005. (R283-285). Florida Department of Law Enforcement – Jacksonville performed the nuclear DNA test on the samples in the rape kit, and filed a report dated April 18, 2005. (R299-300). The DNA profile from the sperm fraction from the vaginal swab and slide matched the DNA profile from Wright. (R300). Wright filed a Motion for Additional DNA Testing, requesting that Forensic Science Associates in California be allowed to conduct further DNA testing on the rape kit. (R304-305). The State responded, noting that Forensic Science is not an accredited lab. (R307-308). After a hearing on the issue, the trial judge denied additional testing because Forensic Science Associates is not an accredited lab under Rule 3.853. (R309, 311).

Rule 3.853(c)(7) provides:

> The court-ordered DNA testing shall be ordered to be conducted by the Department of Law Enforcement or its designee, as provided by statute. However, the court, on a showing of good cause, may order testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors or the National Forensic Science Training Center when requested by a movant who can bear the cost of such testing.

The trial judge followed this Rule. Furthermore, this Court has previously denied this exact claim in Swafford v. State, 946 So. 2d 1060, 1061 (Fla. 2006):

> We affirm the circuit court's order, including its denial of Swafford's motions for an additional evidentiary hearing under rule 3.853 and his motion seeking further DNA testing by a laboratory not certified as required by rule 3.853(c)(7).

Swafford involved the same laboratory as the present case, and the issue on appeal was the same in this case. Collateral Counsel cites to a prior order in the Swafford case (Initial Brief at 22), but fails to acknowledge the published, final opinion in that case which is dispositive of this claim.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests this Honorable Court affirm the order of the trial court and deny all relief.

Respectfully submitted,

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_____
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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 **Martin J. McClain, Special Assistant CCRC-South**, 141 N.E. 30th Street, Wilton Manors, FL 33334, this _____ day of June, 2007.

_____
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