IN THE SUPREME COURT OF FLORIDA

CASE NO. 06-2353

JOEL DALE WRIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of a post-conviction motion without an evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

"R." -- record on direct appeal to this Court;

“1PC-R.” -- record on appeal of denial of first Rule 3.850 motion;

"2PC-R." -- record on appeal of denial of first Rule 3.850 motion after remand;

“3PC-R.” -- record on appeal of denial of this second Rule 3.850 motion;

“Supp. 3PC-R.” -- supplemental record on appeal of denial of this second Rule 3.850 motion.

REQUEST FOR ORAL ARGUMENT

Mr. Wright has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Wright, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

Lima Page Smith was found stabbed to death at 4:15 p.m. on February 6, 1983 (R. 1628). She had twelve stab wounds in the left side of hear face and neck (R. 1739, 1816). Joel Dale Wright lived next door to Ms. Smith with his family (R. 1583). The Wright family had lived next door to Ms. Smith for many years (R. 1583).

Early in the police investigation, Mr. Wright was interviewed. He explained that on the night of the homicide he had been out late playing poker.[1] When he arrived home after midnight, he was locked out. He walked across town to Charles Westberry's house, where he spent the night. Charles Westberry initially confirmed that Mr. Wright arrived at Westberry's house about 1:00 a.m. and spent the early morning hours of February 6th sleeping on Westberry's living room couch (2PC-R. 2520, Douglas Deposition at 34).[2]

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[1]At trial, the evidence showed Mr. Wright had won about thirty dollars in the poker game (R. 1874).

[2]Denise Easter was sharing a bedroom with Westberry at the trailer, which belonged to Allen Westberry, Charles' brother. She testified at trial that she and Charles had gone to bed around 1:00 a.m. (R. 1925). Charles got up at some point during the night. When Easter awoke the next morning, Mr. Wright was asleep on the living room couch. This was not unusual. Easter observed no blood on Mr. Wright's clothes.

Allen Westberry testified that he saw Mr. Wright on the couch at 7:00 a.m., and Beverly Westberry, Allen's wife, saw Mr. Wright on the couch when she got up at 6:30 a.m. (R. 1946,

Later, while talking to his estranged wife, Paige, Westberry changed his story. He told Paige that Mr. Wright was making trouble for him: "he had a lot of nerve to get him in trouble when Charles said he had enough shit to put him under the jail." Westberry then claimed that Mr. Wright arrived at his house much later and confessed to the murder. However, his description of how Mr. Wright had committed the murder matched newspaper accounts, not the evidence from the scene.[3] Paige related this conversation to a deputy sheriff she was dating. After Westberry was arrested and charged as an accessory to murder, he agreed to testify against Mr. Wright in return for immunity (2PC-R. 2415-17). On the basis of Westberry's testimony, Mr. Wright was convicted and sentenced to death.

On April 22, 1983, Mr. Wright was charged by indictment in Putnam County with one count of first degree murder, one count

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1957). Neither noticed anything looking like blood on his clothes.

[3]According to Paige, Westberry reported that Jody had claimed to have used a kitchen knife to slit Ms. Smith's throat. In fact, Ms. Smith had been stabbed twelve times with a pocket knife. Originally, Westberry had told Paige that Mr. Wright had arrived at Westberry's trailer "covered with blood." Westberry had thought Mr. Wright had been in an accident. Westberry had also said that Mr. Wright showed him $243.00 in small bills. Later, at trial, Westberry reported considerably less blood and claimed Mr. Wright said he got $290.00 from Ms. Smith's purse as well as a jar of change. Due to the condition of Ms. Smith's house and the maner in which she lived, there was no evidence that a specific amount of money or specific items were missing.

of sexual battery with great force, one count of burglary of a dwelling, and one count of grand theft of the second degree (R. 5). On April 23, 1983, Howard Pearl was appointed to represent Mr. Wright (PC-R2. 2406). The assigned prosecutor was James Dunning. Mr. Wright entered pleas of not guilty on all counts.

Trial began on August 22, 1983, before Judge Robert Perry. On September 1, 1983, the jury returned guilty verdicts on each count (R. 688).

On September 2, 1983, the penalty phase proceeding began. Later that same day, the jury returned a recommendation of death. On September 23, 1983, Judge Perry imposed a sentence of death with regard to the murder count, 99 years on the sexual battery, 15 years on the burglary, and 5 years on the grand theft. Judge Perry found four aggravating circumstances: 1) the homicide occurred in the course of a felony; 2) the homicide was committed to avoid arrest; 3) the homicide was especially heinous, atrocious and cruel; 4) the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral justification.

The evidence against Mr. Wright derived from three sources. First, a fingerprint from Mr. Wright was found in Ms. Smith’s house. Mr. Wright explained that he wsa her neighbor and had been in the house on numerous occasions. Second, there was the

testimony of Westberry. Third, a police officer, Walter Perkins,[4] who was involved in Mr. Wright's arrest, testified that when he was alone with Mr. Wright, Mr. Wright said, "If I confess to this, I'll die in the electric chair, if I don't talk I stand a chance of living."

This Court has relied on the following summary of the facts leading to Mr. Wright's convictions and death sentence:

[4]During the winter months prior to Ms. Smith's death, Walter Perkins had become angry with Mr. Wright's mother over her failure to keep Mr. Wright and his brother away from his step-sister. So he told her that he was going to make her sorry that she ever had those two boys (2PC-R. 2587).

On February 6, 1983, a woman was found murdered in the bedroom of her home. She apparently had died the previous night after being raped and stabbed. All the doors to her home were locked, but a back window was found open. Several weeks later, Charles Westberry told his wife that petitioner Joel Wright had come to Westberry's trailer shortly after daylight on the morning of Febrary 6 and had confessed to killing the victim. Wright lived with his parents near the victim's home. Westberry's wife notified the police, and Wright was arrested and tried for the crime. At trial, Westberry was the State's principal witness. He testified that Wright had told him on the morning of Febrary 6 that Wright had entered the victim'shouse through the back windown to steal money, that the victim had discovered him as he was wiping his fingerprints from her purse, and that he had killed her because he did not want to return to prison. According to Westberry, Wright counted out $290 he claimed to have taken from the victim's home, and he asked Westberry to tell the authorities that Wright had spent the previous night at Westberry's trailer. Another witness [Paul House] for the State testified that, approximately one month before the murder, he and Wright had stolen money from the victim's home after entering through the window later found open on February 6. The jury also was told that a fingerprint identified as Wright's had been found on a portable stove in the victim's bedroom.

Wright took the stand and denied involvement in the murder. He testified that he had returned home from a party at approximately 1 a.m. on February 6, but had found himself locked out. He claimed that he then had walked along Highway 19 to Westberry's trailer, where he had spent the night. He also presented a witness who testified that, late on the night of February 5 and early in the morning of February 6, he had seen a group of three men, whom he had not recognized, in the general vicinity of the victim's home.

After the close of evidence but prior to final arguments, the defense moved to reopen the case in order to introduce the testimony of a newly discovered witness, Kathy Waters. Waters apparently had read newspaper accounts of the trial, had listened to parts of the testimony, and had discussed the trial with

> friends in attendance. She offered to testify that, shortly after midnight on February 6, she had seen a person who could have been Wright walking along Highway 19, and had also observed three persons she did not recognize near the victim's home. Waters claimed that she had not realized she possessed relevant information until the morning her testimony was proffered, and that she had come forward of her own volition.

Wright v. State, 857 So. 2d 861, 865 (Fla. 2003), quoting Wright v. Florida, 474 U.S. 1094, 1094-95 (1986) (Blackmun, J., joined by Brennan, J., and Marshall, J., dissenting). Justice Blackmun also stated, "this case comes down to Wright's word against Westberry's." Wright v. Florida, 474 U.S. at 1097 (Blackmun, J., dissenting).

The trial judge denied the defense motion to reopen the case in order to present Waters' testimony. The judge stated that Florida's sequestration rule would be rendered "meaningless" if, after discussing the case with others, a witness were permitted "to testify in support of one side or the other, almost as if that testimony were tailor-made." Wright v. State, 473 So. 2d 1277, 1279 (Fla. 1985).

At trial, the jury did not hear certain impeachment evidence regarding Westberry. Besides the disclosed immunity on the accessory to murder charge, the prosecutor gave Westberry "a limited grant of immunity" regarding the illegal scrap metal business which he and Mr. Wright operated together (PC-R. 756).

Westberry has acknowledged that he was “scared of getting into trouble for this” (PC-R. 652). Because Mrs. Westberry had knowledge of the illegal business, Westberry was worried that she might get into trouble too. This additional immunity was not disclosed to defense counsel (PC-R. 652).

Additionally, in the week or so leading up to Mr. Wright’s trial, the prosecutor met with Westberry on a daily basis (PC-R. 756, 758). The prosecutor wrote out Westberry’s answers to the questions that he intended to ask at trial (PC-R. 763, 766). The prosecutor then “gave it to Charles Westberry prior to trial, asked him to review it, go over it, make sure what was there was the truth” (PC-R. 757). Westberry was instructed to return the written answers to the prosecutor prior to taking the stand (PC-R. 759). Westberry remained in jail until a week after his testimony (PC-R. 701). In 1988, Westberry testified that he had been given typed answers to read over in preparing to testify at trial (PC-R. 670, 678). He still had the documents when he was released from jail, but later was unable to find them (PC-R. 669-70). The existence of these written answers was not disclosed to defense counsel at trial, and the written answers have never surfaced during the post-conviction process (PC-R. 762).

The trial jury also did not hear evidence implicating Henry Jackson and Clayton Strickland in the murder of Ms. Smith. On February 4, 1983, Jackson and Strickland were roommates and lived next door to Charlene Luce (2PC-R. 445, 2611). This was "about a block away" from Ms. Smith's residence (PC-R. 965). On February 4, 1983, Strickland approached Luce and told her that even though Jackson might kill him, he was not scared (2PC-R. 445).[5] Luce then observed Jackson come outside into the yard brandishing a knife in his right hand (2PC-R. 445).[6] The knife was a "pocket knife" with a blade "about three or four inches long" (2PC-R. 2626).[7] Jackson was angry and was demanding money from Strickland (2PC-R. 445).

On February 5, 1983, Wanda Brown, a mail carrier, observed Ms. Smith outside her residence arguing with Strickland

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[5]Henry Jackson had previously been convicted of a homicide (2PC-R. 2615-16). Mr. Wright's prosecutor, James Dunning, had represented Jackson when Jackson was prosecuted for the homicide (2PC-R. 2432). Jackson also had a burglary conviction for burglarizing Earl Smith's house, which was across the street from Ms. Smith's house (2PC-R. 2432, 2434-35).

[6]The evidence showed that Ms. Smith was in all likelihood stabbed by a right-handed person (R. 1739, 1816). Mr. Wright is left-handed.

[7]The stab wounds on Ms. Smith were consistent with a pocket knife: "a sharp-edged weapon about, oh, a half-an-inch in width and an eighth of an inch in thickness, and not particularly long" (R. 1822). Between 2:00 and 3:00 p.m. on February 6, 1983, Strickland sold Earl Smith a pocket knife for $5.00.

and Jackson and motioning for them to move away with her hand (2PC-R. 447, 2558). Strickland then shook his arm at Ms. Smith (2PC-R. 447). When Strickland saw Brown in her postal jeep, he ran in front of the vehicle forcing her to stop (2PC-R. 2559). He walked up to the door of the vehicle and demanded to know if she had his social security check (2PC-R. 2560). She responded, "no, I don't have your check." He said, "I need some money." She told him that she had no mail for the Jackson mailbox (2PC-R. 447). Strickland asked Brown to give him some money (2PC-R. 447). She became frightened by his demeanor and drove away: "I could smell the liquor. And it -- I was kind of scared, you know, I didn't really trust either on of them" (2PC-R. 2560). When she looked back, she noticed Ms. Smith "making a motion like that for them to go off" (2PC-R. 2560). After Brown heard about Ms. Smith's murder, she called the sheriff's office and reported her observations. Two detectives went to her home on February 7, 1983, and took her statement (2PC-R. 2570).[8]

After dark on the evening of February 5, 1983 (during the period that the medical examiner gave as the range in which the murder occurred), William Bartley observed Jackson and

[8]Prosecutor James Dunning testified in 1988 that this document "should have been given" to defense counsel because it contained information that "may [be] considered [] favorable to the Defense" (PC-R. 724-25).

Strickland standing in the vacant lot next to Ms. Smith's house, drinking (PC-R. 1006-07; 2PC-R. 2431).[9]

Late in the afternoon on February 6, 1983, Kim Holt, a cashier at a local supermarket, saw a man she identified as Jackson in her checkout line. Jackson had fresh scratch marks on his face and "what appeared to be blood on him, fresh blood" (2PC-R. 2583). Holt was familiar with Jackson and the fact that he usually had no money (2PC-R. 444). Jackson announced, "I got money today" (2PC-R. 444). He paid Holt with a one hundred dollar bill and showed her that he possessed another one (2PC-R. 2583). Jackson then asked Holt if she knew that Ms. Smith had been killed (2PC-R. 444, 2583). As he was leaving, Holt noticed that it was 4:30 p.m. (2PC-R. 444).

Between 4:30 and 5:00 p.m., Charlene Luce was called over to her fence by Jackson, who informed her that Ms. Smith had been killed (2PC-R. 2621). When Luce asked, "why her," Jackson said that "Miss Smith told him that she didn't kept [sic] money at home" (2PC-R. 446). He also indicated that Ms.

[9]The medical examiner initially placed the time of Ms. Smith's death between 5:00 p.m. and 9:00 p.m. on Saturday, February 5. However, after Westberry changed his story on April 19 and claimed that Mr. Wright had confessed to committing the murder at 5:00 a.m., the medical examiner expanded the time range to include 5:00 a.m. on Sunday, February 6 (R. 1852).

Smith once gave him a box of chocolates.[10] Luce asked Jackson if he had killed Ms. Smith. In response, "he just turned real red in the face, and he looked at me real funny, and he turned and walked away" (2PC-R. 2622). Luce gave the sheriff's office a written statement regarding these events on February 9, 1983 (2PC-R. 445).[11]

Sheriff officers interviewed Jackson and Strickland on February 10, 1983. According to Jackson, the scratches on his face were from a fight Sunday night (February 6) (PC-R. 378).[12] According to Strickland, he had last seen Ms. Smith on "Tuesday or Wednesday" of the previous week (PC-R. 379).[13] According to Jackson, "we went to bed early" on Saturday, February 5. According to Strickland, "Henry and I had been drinking a lot on Saturday and was pretty high. We went to bed around eight o'clock I guess. I didn't get up until Sunday morning and I

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[10]Ms. Smith was found with a chocolate bar on her exposed abdomen (R. 1728).

[11]Mr. Dunning testified in 1988 that he did not remember whether he had this statement prior to trial, but if he had it, he "[c]ertainly" would have disclosed it to defense counsel (PC-R. 727). In fact, Dunning acknowledged that he would have been obligated to disclose it (Id.).

[12]When Kim Holt was interviewed on February 28, she said the scratches were already present at 4:30 p.m.

[13]In her February 7th statement, Wanda Brown had told law enforcement that she had witnesses an encounter between Strickland and Ms. Smith on Saturday, February 5.

made some coffee for Henry and I. Henry and I stayed at the trailer all morning" (PC-R. 379).

In 1988, then deputy Taylor Douglas testified that Jackson and Strickland were eliminated as suspects when they each passed a polygraph denying involvement in the murder (PC-R. 964). In 1997, Sheriff Taylor Douglas testified that he knew "Mr. Wright was" polygraphed, but beyond that he was not sure. He initially said as to Jackson and Strickland being polygraphed, "Possibility" (2PC-R. 2520, Douglas Deposition at 35). After refreshing his recollection, he listed those individuals who were polygraphed: Paul House, Charles Westberry, Jody Wright and Denise Easter (2PC-R. 2520, Douglas Deposition at 39). Thus, the sole basis for excluding Jackson and Strickland as suspects, according to the 1988 testimony, was revealed to be nonexistent.

No hair was obtained from either Jackson nor Strickland for forensic comparisons to the hair found on Ms. Smith's body (PC-R. 1003). No fingerprint comparisons were conducted between Jackson's and Strickland's known prints and the unidentified prints of value found at the crime scene (PC-R. 1003; R. 2051). Mr. Wright appealed his convictions and sentences to this Court. Mr. Wright was represented by Larry Henderson, an assistant public defender. On May 3, 1984, Mr.

Wright's forty-seven page Initial Brief was filed. The first argument in the brief concerned various rulings by Judge Perry limiting Howard Pearl's cross-examination of four of the witnesses called by the State. The second argument challenged Judge Perry's decision that Howard Pearl could not call Kathy Waters as a defense witness because she had been a spectator in the courtroom when she recalled seeing an individual that could have been Jody Wright on the night of the homicide walking beside the side of the road at the time that Jody Wright testified he was walking along the road on his way to Charles Westberry's house. Ms. Waters also recalled seeing three individuals walking in front of Ms. Smith's house at approximately the same time. The third argument challenged the judge's instruction regarding Williams Rule evidence that was admitted against Mr. Wright. The fourth argument challenged the admission into evidence of Detective Walter Perkins' testimony regarding Mr. Wright's statement announcing he did not wish to speak to Deputy Perkins. The fifth argument challenged the corpus delicti for the grand theft in the second degree conviction. The sixth argument urged that Judge Perry had erred in restricting Howard Pearl's closing argument regarding circumstantial evidence and in refusing to instruct the jury on the law regarding circumstantial evidence. The seventh argument

challenged Judge Perry's finding of the "avoiding arrest" aggravator. The eighth argument challenged Judge Perry's finding of the "cold, calculated and premeditated" aggravator and argued that the finding constituted an impermissible doubling of the "heinous, atrocious or cruel" aggravator. The ninth argument asserted that Sec. 921.141, Fla. Stat., as applied, deprived Mr. Wright of his constitutional right to have the jury of his peers decide the facts at issue in the penalty phase proceeding. The tenth argument alleged that the Florida capital sentencing provisions were unconstitutional on their face and as applied.

On June 21, 1984, after the submission of the Initial Brief, counsel for Mr. Wright filed a motion seeking relinquishment of jurisdiction in order to permit evidentiary development regarding a statement made by a juror to deputy clerk of court. Counsel for Mr. Wright submitted an affidavit from Judith Marks, Deputy Clerk of the Circuit Court, in which Ms. Marks recounted a statement made by Sandra Wilkinson, one of the jurors at Mr. Wright's trial. According to Ms. Marks, she and Ms. Wilkinson discussed "the actions of one of the other jurors, who kept falling asleep during the trial." Ms. Wilkinson then stated "that it was not that the State proved [Mr. Wright] to be guilty, but that the defense did not prove

that he was innocent." On June 28, 1984, this Court denied the motion for relinquishment.

On September 4, 1984, after all briefing had been completed, Mr. Wright's counsel filed a second motion for relinquishment. This motion was premised upon ambiguity in the transcript of Mr. Wright's trial, "in that the transcript fails to establish either Mr. Wright's presence or absence during the portion of his trial where an inquiry was conducted concerning the bias of one of his jurors (See pages 2831-2858 of the Record on Appeal)." This motion was granted on September 19, 1984. A hearing was held in circuit court, and the record on appeal was supplemented. Mr. Wright's counsel was then permitted to file a two and one half page supplement to his briefs raising an eleventh argument asserting that Mr. Wright's absence from the bias inquiry violated his constitutional right to be present at all stages of his capital trial.

Mr. Wright's convictions and sentence of death were affirmed by this Court in July, 1985. The Court did not address many of the errors Mr. Wright had raised. Of the seven guilt phase issues, this Court only addressed the second and third arguments. As to the second argument, this Court found the exclusion of Kathy Waters' testimony was error, but harmless. Wright v. State, 473 So. 2d 1277, 1279-81 (Fla. 1985), *cert.*

denied, 474 U.S. 1094 (1986)(Blackmun, J., joined by Brennan, and Marshall, JJ, dissenting regarding this Court's determination that the trial court's decision to preclude Ms. Waters as a defense witness was harmless error). As for the penalty phase issues, this Court struck the "cold, calculated and premeditated" aggravator. After striking the aggravating circumstance, the Court merely stated, "Because the court properly found there were no mitigating and three aggravating circumstances, we conclude the imposition of the death penalty was correct." Wright v. State, 473 So.2d at 1282.[14]

[14]However, the prosecutor had conceded in proceedings before the jury to the presence of at least one mitigating factor:

> Another factor that you might want to consider as a mitigating circumstance is his age, twenty-five years of age. Certainly he's young. Certainly that is a factor that has been established by the evidence.

(R. 2982). In addition, testimony was presented from Susan Wright, Mr. Wright's wife of five years who was the mother of Mr. Wright's three young children (R. 2948). She expressed her love for Mr. Wright and described him as "a good father." Two of Mr. Wright's sisters testified. Diane Hughes testified to her love for Mr. Wright and his good character (R. 2953). Debbie June testified that Mr. Wright was a "[v]ery gentle person. I mean, he's watched my kids many of times" (R. 2958). Mr. Wright's mother died before Mr. Wright's trial. Mitigation was presented and argued by defense counsel.

Mr. Wright sought relief pursuant to Fla. R. Crim. P. 3.850 on February 22, 1988. An evidentiary hearing commenced before Judge Robert Perry on October 3, 1988.[15]

[15]Mr. Wright's claims in his motion to vacate included his arguments that: 1) he was deprived of a constitutionally adequate adversarial testing because either the state failed to disclose or the defense unreasonably failed to discover exculpatory evidence regarding other suspects; 2) he was deprived of a constitutionally adequate adversarial testing because either the state failed to disclose or the defense unreasonably failed to discover exculpatory evidence impeaching Charles Westberry, including the details of the limited grant of immunity extended to Mr. Westberry; 3) he was deprived of the effective assistance of counsel at the guilt phase of his trial; 4) he was deprived of his Fifth and Sixth Amendment privilege when trial counsel forced him to testify; 5) he was deprived of effective representation at the penalty phase of his capital trial; 6) he was deprived of a fair trial due to juror misconduct; 7) the State improperly used his invocation of his right to silence as evidence of his guilt; 8) his was deprived of his right of confrontation; 9) he was deprived of his right to present favorable evidence when the trial court refused to permit the presentation of evidence discovered after the defense rested, but before closing argument; 10) he was deprived of a fair trial by virtue of the prosecutor's closing argument; 11) he was denied his right to present favorable evidence that the victim's home had frequently been burglarized in the weeks prior to her homicide; 12) he was deprived of a fair trial due to the denial of his request for a change of venue; 13) he was deprived of his right to be present ineduring all critical stages of his trial; 14) he was deprived of his right to an instruction on voluntary intoxication; 15) the penalty phase instructions improperly shifted the burden of proof; 16) the penalty phase jury was mislead as to its sentencing responsibility; 17) the jury instruction on the heinous, atrocious or cruel aggravating circumstances was constitutionally overbroad; 18) the penalty phase jury instructions incorrectly set forth the aggravating circumstances to be considered by the jury; 19) non-statutory aggravating circumstances were improperly presented to the penalty phase jury; and 20) the jury was improperly instructed as to the need for a majority to return a life recommendation.

On June 8, 1989, Judge Perry entered an order denying post-conviction relief. Judge Perry's decision was premised upon a factual finding that "Mr. Freddie Williams [Howard Pearl's investigator] testified that he was aware of the statements by Brown and Luce" that implicated Henry Jackson and Clayton Strickland in the homicide of Ms. Smith. Relying upon Taylor Douglas's testimony that Jackson and Strickland were eliminated as suspects when they passed polygraph examinations, Judge Perry further stated, "Whether the statements were exculpatory in nature is highly speculative and thus, the claim is legally insufficient to support a claim under Brady."

On June 22, 1989, Mr. Wright filed a motion for rehearing and a motion to amend with newly discovered evidence regarding Howard Pearl's status as a special deputy sheriff. On August 21, 1989, Judge Perry denied relief on the "Pearl" issue on the basis of the decision by another judge in another case in which an evidentiary hearing had been conducted.

Mr. Wright appealed to this Court. As to all but one claim, the Court quoted Judge Perry's order verbatim and denied relief, stating: "We find that the trial court properly denied relief on each of the claims made in Wright's initial rule 3.850 motion." Wright v. State, 581 So.2d 882, 886 (Fla. 1991). The Court did reverse the denial of the claim regarding whether

Howard Pearl's ability to provide effective assistance was impaired because of his status as a special deputy. This issue was "remanded for an evidentiary hearing." 581 So.2d at 887.

During the remand, the Rule 3.850 motion was amended. An evidentiary hearing was conducted in 1997. An order denying relief was entered in June of 2000. Mr. Wright appealed.

While Mr. Wright's appeal was pending in this Court, he also filed a petition for a writ of habeas corpus. In the habeas petition, Mr. Wright alleged: 1) the State withheld information crucial to a proper resolution of the issues raised by Mr. Wright in his direct appeal; 2) Mr. Wright's appellate counsel rendered ineffective assistance of appellate counsel in failing to raise numerous meritorious issues appearing in the record; 3) Mr. Wright was deprived of his right to have a jury determination of the facts necessary to render him death eligible; and 4) this Court failed to conduct the constitutionally required harmless error analysis when it struck an aggravating circumstance on direct appeal.

The 3.850 appeal and the habeas proceeding were consolidated. On July 7, 2003, this Court issued an opinion denying the petition for writ of habeas corpus and affirming the denial of post-conviction relief. Wright v. State, 857 So. 2d 861 (Fla. 2003).

On August 6, 2003, Mr. Wright filed a motion seeking DNA testing pursuant to Rule 3.853 in the circuit court 3PC-R. 1). The motion requested mitochondrial DNA testing of a pubic hair contained in a rape kit which had been introduced into evidence at Mr. Wright's trial. At trial, the State called FDLE agent Patricia Lasko, who testified that she found a foreign pubic hair in the pubic hair combings from the victim, Ms. Smith (R. 2080-81). The pubic hair combings were identified as having been found in a manilla envelope that was part of the rape kit introduced into evidence as State's Exhibit 56 (R. 2081). Ms. Lasko testified that she compared the foreign pubic hair to Mr. Wright's known pubic hair. She stated, "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" (R. 2082).

Mr. Wright's motion also requested mitochondrial DNA testing of head hairs which were introduced at Mr. Wright's trial. Ms. Lasko testified that two foreign head hairs were found on the maroon dress worn by Ms. Smith at the time of her death (R. 2079). These two hairs were contained in the debris from the maroon dress contained in State's KKK for identification, introduced as State's Exhibit 63 (See R. 793).

Ms. Lasko testified that “those two brown hairs were different from the hairs and head hair standard of Wright and Westberry” (R. 2082).

The State filed its response opposing the motion on September 17, 2003 (3PC-R. 26). On December 19, 2003, the circuit court held a hearing on the motion (3PC-R. 149).

At the hearing, the State argued against DNA testing of the pubic hair because at trial, Ms. Lasko “steadfastly refused to say that the foreign brown hair found in Ms. Smith’s pubic hair combing was in fact a human pubic hair” and therefore “the likelihood that testing would lead to admissible probative evidence is quite limited” (3PC-R. 158-59). Mr. Wright’s counsel pointed out that Ms. Lasko’s written report concluded that the foreign pubic hair was human, but that it lacked sufficient characteristics of a caucasian pubic hair to be compared to Mr. Wright (3PC-R. 167). Regarding the probative value of the foreign pubic hair, Mr. Wright’s counsel argued that the results of the testing would not have to exonerate Mr. Wright but would only have to establish a reasonable probability of a different outcome or undermine confidence in the verdict (3PC-R. 166). Counsel argued that results showing the hair belonged to someone else would meet this standard (3PC-R. 167). Counsel explained that the case against Mr. Wright boiled down

to a credibility battle between Mr. Wright and Mr. Westberry (3PC-R. 169).

As to the head hairs, the State argued that Ms. Lasko testified that "due to the very messy, disheveled nature of the crime scene and the victim's reported lack of self-care in terms of personal hygiene . . . rendered the value of trace evidence, such as the hair on the dress, to be very questionable at best" (3PC-R. 159).

The State also argued that the rape kit contained a semen sample, but Mr. Wright had not requested testing of the semen sample (3PC-R. 160). Mr. Wright's counsel responded that the semen sample had been tested in 1993 or 1994 and that counsel understood that the sample had been destroyed in that testing (3PC-R. 161-62, 169-70). The results of the testing were inconclusive (3PC-R. 166). Counsel had no knowledge as to whether any contamination had occurred. The court asked whether everything should be tested, and the State suggested opening Exhibit 56 to see whether or not a testable semen sample still existed (3PC-R. 171-73). The court and Mr. Wright's counsel pointed out that without an expert to view the contents of Exhibit 56, they would not know what they were looking at (3PC-R. 173). The State continued to insist that the lawyers and the court could look in the exhibit to determine whether it

contained testable material (3PC-R. 174). Mr. Wright's counsel suggested that each side have an expert report on whether the exhibit contained testable material (3PC-R. 175). Mr. Wright's counsel also stated that if the exhibit contained testable material in addition to the hairs (3PC-R. 176); however, he could not make a showing under Rule 3.853 that such testing would produce results that would exonerate Mr. Wright.

Before the court issued any orders regarding the DNA testing, the court's staff attorney sent a letter to the parties stating that the court wished to have a laboratory determine whether or not Exhibit 56 contained a semen sample sufficient for testing (3PC-R. 217-18). The letter stated that the court wanted the parties to agree on a laboratory where the exhibit could be sent (3PC-R. 217).

On April 21, 2004, the State wrote to the staff attorney reporting that the State wanted Exhibit 56 to be examined by the Florida Department of Law Enforcement (FDLE) Crime Laboratory (3PC-R. 224). The letter also reported that Mr. Wright's counsel did not agree to having FDLE conduct the testing (Id.).

On May 3, 2004, Mr. Wright's counsel also filed a letter reporting that the State and Mr. Wright's counsel had been unable to agree on who should conduct the examination and

possible testing of any semen sample (3PC-R. 227-28). Mr. Wright's counsel objected to having FDLE examine Exhibit 56 because "FDLE was involved in this case pre-trial" and "FDLE employees in fact were called as witnesses by the State at Mr. Wright's trial" (3PC-R. 227). The letter noted that during the conference call about this matter, "the State's position was that it would not agree to any examiner other than FDLE" (3PC-R. 228). Mr. Wright's counsel suggested that Orchid Cellmark Diagnostics examine Exhibit 56 for DNA material (Id.). In light of the State's assertions at the December 19, 2003, hearing that the crime scene was contaminated and dirty and that therefore any results of DNA testing would be of no value, the letter from Mr. Wright's counsel requested an evidentiary hearing regarding the contamination of the crime scene (3PC-R. 228, citing Swafford v. State, Fla. Sup. Ct. No. SC03-931 (Fla. Mar. 26, 2004) (ordering an evidentiary hearing on contamination of crime scene)).

On August 17, 2004, the circuit court issued an order permitting mitochondrial DNA testing of the pubic hair and head hairs (3PC-R. 234-36). The court found that results of testing the pubic hair "may create a reasonable probability that the Defendant would be acquitted or would receive a lesser sentence" (3PC-R. 234). The court found that, standing alone, the results

of testing the head hairs would not produce a reasonable probability of acquittal or a lesser sentence, but that "the head hair in conjunction with any other DNA testing results may produce conclusive results" (3PC-R. 235).

The court also ordered that FDLE determine whether or not the semen sample in Exhibit 56 was suitable for testing (3PC-R. 235). If the sample was suitable for testing, the court ordered that FDLE conduct the DNA testing (3PC-R. 235). The court's order further directed that Mr. Wright was entitled to have an outside expert observe FDLE's testing and that FDLE was "directed to announce in advance to defense counsel and any expert that he may designate the time and place where DNA testing is to occur to allow for the designated expert to be present" (3PC-R. 235-36). In a later order, the court directed that the hair samples be sent to MitoTyping Technologies in State College, Pennsylvania, for mitochondrial DNA testing (3PC-R. 274).

On March 1, 2005, MitoTyping Technologies forwarded a report on its analysis of the hairs (3PC-R. 283-85). The report concluded that Mr. Wright, the victim and their maternal relatives were not the contributors of the two tested hairs (3PC-R. 285). The report also concluded that the mitochondrial DNA sequences of the two tested hairs were different and

therefore that the hairs were contributed by two different people (3PC-R. 285).

On April 19, 2005, at 6:42 p.m., FDLE faxed to Mr. Wright's counsel and the State its report dated April 18, 2005 (3PC-R. 291-93). The report stated that the FDLE had extracted samples from "vaginal swabs and slides," "anal swabs and slides," "oral swabs," "head hair pulled," and mouth swabs from Mr. Wright (3PC-R. 292). FDLE submitted these samples to typing at "13 STR loci plus the gender locus amelogenin" (3PC-R. 292). The typing of Mr. Wright's known mouth swabs obtained an STR analysis at all loci tested (3PC-R. 293). The DNA profile obtained from the mouth swabs was consistent with originating from a female (3PC-R. 293). No DNA profile was obtained from the "head hair pulled," but the gender locus amelogenin was consistent with the hair originating from a female (3PC-R. 293). The DNA profile from the "vaginal swabs and slides" matched the DNA profile of Mr. Wright "at all loci tested" (3PC-R. 293). The DNA profile from the "anal swabs and slides" matched the DNA profile of Mr. Wright "at six (6) STR loci plus amelogenin" (3PC-R. 293).

At a hearing the next day, April 20, 2005, the State announced that it had filed the FDLE report (3PC-R. 354-55). Mr. Wright's counsel stated that he had not seen the report

until that morning because it was faxed to him about 7:00 p.m. the night before (3PC-R. 355). Mr. Wright's counsel asked that hearing be continued so that counsel could digest the report, discuss it with Mr. Wright, consult with experts (3PC-R. 355-56). The State insisted that the Rule 3.853 DNA proceedings had been resolved and that the only unresolved matter was Mr. Wright's pending Rule 3.851 motion (*see infra*) (3PC-R. 356-61). Mr. Wright's counsel reiterated that he could not address either the Rule 3.853 motion or the Rule 3.851 motion because he had just received the FDLE report (3PC-R. 361-62). The court recessed the hearing (3PC-R. 362).

At the continuance of the hearing, on May 24, 2005,[16] Mr. Wright's counsel requested permission to have a defense expert conduct DNA testing (3PC-R. 369). Counsel requested that the testing be conducted by Dr. Blake, "the national expert" on DNA (3PC-R. 371, 374). The State argued that Mr. Wright had not given "some reason to believe that the science is flawed or anything of that nature" (3PC-R. 373). The State said it would not object if Mr. Wright could "get an independent result from an accredited lab prior to the time that the motion is set for hearing" (3PC-R. 373). However, the State did object to further

[16]The transcript of this hearing erroneously dates it as occurring in 2004 (3PC-R. 366).

testing “absent some reason to believe that there’s a problem, a technical problem with the prior testing and that additional results need to be done” (3PC-R. 373). The State also objected that under Rule 3.853, any DNA testing would have to be done by an accredited lab (3PC-R. 374-75). Mr. Wright’s counsel continued to request that the testing be conducted by Dr. Blake, but agreed that Dr. Blake did not fall with Rule 3.853 (3PC-R. 376). The State opposed retesting because no good cause had been shown why additional testing was required (3PC-R. 377). Mr. Wright’s counsel argued that when DNA testing had been ordered in 2004, everyone had agreed there was good cause to perform the testing, that Mr. Wright was entitled to a second opinion, that Mr. Wright did not trust FDLE’s results because FDLE is an agent of the State, that Mr. Wright would be entitled to a second opinion if the case was in a pre-trial posture, that Mr. Wright was entitled to have testing conducted by a nationally recognized expert, and that the expert’s lack of an accredited lab should only go to the weight of his opinion (3PC-R. 378-80).

The judge stated that he was required to follow Rule 3.853 and that if the expert was not accredited, he would not be accepted (3PC-R. 380). However, the court permitted Mr. Wright to file a written motion (3PC-R. 380).

On June 7, 2005, Mr. Wright filed a motion for additional DNA testing (3PC-R. 304-05). The motion stated:

> Mr. Wright requests that the materials tested by FDLE now be sent to Forensic Science Associates (FSA), a private forensic lab based in Richmond, CA for additional DNA testing. FSA is headed by Dr. Edward Blake, a preeminent forensic DNA analyst who has conducted DNA testing in over 200 criminal cases around the country (over 150 of those for the prosecution). FSA is noted for its success in obtaining DNA profiles and testable results from old, degraded, and/or limited biological evidence.

(3PC-R. 304). The State responded, opposing the motion for the same reasons it had argued orally (3PC-R. 307-08). Mr. Wright's motion was denied (3PC-R. 404).

On August 5, 2004, Mr. Wright had filed a Rule 3.851 motion presenting two claims. Claim I alleged that new evidence required relief under Brady v. Maryland, 373 U.S. 83 (1963), Strickland v. Washington, 466 U.S. 668 (1984), and/or Jones v. State, 591 So.2d 911 (Fla. 1991) (Supp. 3PC-R. 22-24). Claim I argued that the new evidence must be considered cumulatively with evidence presented at trial and in prior post-conviction proceedings under Kyles v. Whitley, 514 U.S. 419 (1995), and Roberts v. State, 840 So.2d 962 (Fla. 2002) (Supp. 3PC-R. 24). The new evidence presented in Claim I included the following affidavit:

AFFIDAVIT OF IDUS HUGHES

I, IDUS HUGHES, having been duly sworn does hereby say:

1. My name is Idus Hughes. I am over the age of eighteen and competent to testify to the truth of the matters contained herein.

2. I live in Palatka, Florida. I have always lived in Palatka. My family has property on Third Avenue and that is where I have lived all my life. Our property is right up the road from where Ms. Lima Paige Smith used to live before she was killed. I would say we lived about a half-mile down the road.

3. I remember when Ms. Smith was killed. It was a good while ago, some time back in 1983. It was a big news when she was killed. Not only for those of us who stayed in her neighborhood but for most everyone. Palatka is a small town, plus she was a school teacher for a long time so most everyone knew her. I remember the police found her on a Sunday. I think it was in the afternoon, some time after we got home from church.

4. Because I lived right up the street from Ms. Smith I was familiar with her place and the goings on over there. She pretty much kept to herself and was a woman of pattern. She had some dogs and they would always bark and carry on anytime some one went on to her property. Ms. Smith would walk outside when her dogs would bark and if you did not belong on her property she would send you on your way. If it was dark outside she would still come out, but with a flashlight.

5. Ms. Smith also had a real messy house. There were all kinds of papers and clothes and all sorts of stuff piled up in her house. It was so crowded in there that sometimes she would sit out in her car and grade the school papers. Every one who lived over there knew about her messy house.

6. I was in town the night before the police found Ms. Smith. It was Saturday night and I did not go home until real late, I’d say around twelve-thirty or quarter to one in the morning. I was driving my car.

There were not any cars out that night. Well, I saw one other car on the main road, which is Highway 19, down by the shopping mall. I saw that car again, driving on Highway 19, after I turned off of 19 and was driving down Third Avenue.

7. I can still remember how I turned off of Highway 19 and onto Third Avenue. Ms. Smith's house was real close to Highway 19. I was going slow and as I drove by Ms. Smith's house I noticed three men standing across the street from her yard. At one point, my headlights were on the men. I recognized one of the men right away; his name is Henry Jackson. And, as I continued to drive, I saw Henry and the other two men step out onto Third Avenue. I also recognized another one of the men but I do not know him by name. However, I do know that he had recently showed up in town, sometime before Ms. Smith's death, and he was hanging around with Henry. I also remember that the man sold a knife to Ms. Smith's brother, Earl, and the police went and got it. The third man was a short guy and I think people called him "Water Tank." However, I do not know his name or where he was staying.

8. Henry and his friend, the man with the knife, were always drinking and looking for money. They were not nice people and ever Henry was with his friend pretty much every day since he showed up in Palatka. I would see them walking through the neighborhood, drinking or trying to get money so they could buy more alcohol. Henry also had himself a knife. I can remember seeing him using it to clean his fingernails.

9. Not only did I get a good look at Henry Jackson and the other men, but I also heard Ms. Smith's dogs barking and barking. They were pacing around and kicking up some dirt. I was looking over at Ms. Smith's house and I did not see her come out. As I was looking around I realized that Henry and the other men had walked up Third Avenue and were near Highway 19. I also remember seeing the car I had seen earlier drive past Third Avenue; the car was still on Highway 19.

10. I then continued driving down to my house and parked my car. Before going into the house I went

> out in the front yard and tended to the hot water heater. Actually, I cut off the pump before going inside and going to bed. I could still hear Ms. Smith's dogs carrying on and barking.
>
> 11. The next day when we got home from church the police were at Ms. Smith's house and it was then that I learned she had been killed. No one ever talked to me about seeing Henry Jackson and the other men that Saturday night. I figured that once the police arrested Jody Wright that there was no need to say anything. However, had the police or an attorney come to my house I would have talked to them and told them about seeing Henry Jackson and the other two men.
>
> 12. A month or so ago I was talking with a friend of mine. His name is Ronald Thomas. Ronald was telling me that he saw an article in the newspaper about Jody Wright and Ms. Smith. I told Ronald about seeing Henry Jackson across from Ms. Smith's house on the Saturday night before they found her dead. Next thing I know, Ronald tells me he got in contact with Jody Wright's lawyers and he thought maybe I should tell them about seeing Henry Jackson. I agreed to do so and talked with an investigator or August 8, 2003. This was the first time I told anyone about seeing Henry.
> FURTHER AFFIANT SAITH NAUGHT.

(Supp. 3PC-R. 13-15). Mr. Wright's motion alleged, "At the time Mr. Wright filed his initial Rule 3.850 motion, he had no indication that Idus Hughes possessed pertinent information. The information that Mr. Hughes has now provided is new within the meaning of Rule 3.851(d)(2)(A)" (Supp. 3PC-R. 15).

The new evidence presented in Claim I also included the following affidavit:

AFFIDAVIT OF RONALD THOMAS

I, RONALD THOMAS, having been duly sworn or affirmed do hereby say:

1. My name is Ronald Thomas. I live in Palatka, Florida.

2. During the summer of 2003, I read a newspaper article about Jody Wright. The article was about his murder case and his being on death row. I read the article in either July or August of 2003.

3. Not long after reading the article I was having conversation with a friend of mine. His name is Idus Hughes. The news article about Jody Wright came up and Idus told me that he saw Henry Jackson and a couple of other people at the woman's house the night she was killed. Idus also told me since no one like the police came and talked to him, he never told anyone about seeing Henry Jackson and the other men near the house of the woman who was killed.

4. I got to thinking that it might be important for some one to know about the things Idus saw that night of the murder. I decided to write a letter to Jody and tell him to have his attorney or some one contact me. I wrote that letter not long after reading the news article and talking to Idus.

5. Not long after I wrote my letter, an investigator working on Jody Wright's case showed up in Palatka. I told him that a friend of mine might have some information that is important. The investigator said he'd like to talk to my friend and so I contacted Idus. Idus said he would talk to the investigator. I then gave Idus' phone number to the investigator.

6. I was in prison when the school teacher was murdered and when Jody Wright and Charles Westberry were arrested. I heard about it from my mother.

7. I was arrested in 1982 and ended up going to prison for armed robbery. I was on parole when I was arrested. I was on parole and living in Palatka.

8. Sometime after Jody Wright and Charles Westberry were arrested for murder I ended up going back to

> Palatka, from Tomoka Correctional Facility, for my parole violation charge. I went back sometime in 1983. At first, I was in the County Jail. One of the guards asked me if I wanted to stay over in the City Jail. I said yes because the food was better and the City Jail was not as crowded. Before I left the County Jail a detective told me that I was going to be put in a cell with Charles Westberry. The detective told me to find out what Charles did with the bloody clothes.
>
> 9. I was put in a cell with Charles Westberry. I tried to talk with Charles about the school teacher who was murdered, but he would only say that he did not want to talk about it. A few days later I went to court on my charge and eventually I was sent to Lake Butler and continued serving my prison sentence.
>
> 10. I've known Charles Westberry all m life. His family lived close to where I lived when I was young. There were plenty of times when we would get together as kids and play. I did not really know Jody Wright. I knew who he was but I never really knew him.
>
> 11. I told the detective, back in 1983, that Charles Westberry would not talk to me about his bloody clothes or what happened the night the school teacher was killed. No one with the sheriff or police department has talked to me about the school teacher or Charles Westberry since I was sent into his cell to get information.
>
> 12. I was never contacted by anyone again until I wrote a letter to Jody Wright in 2003.
>
> FURTHER AFFIANT SAITH NAUGHT.

(Supp. 3PC-R. 15-17). Mr. Wright's motion alleged, "At the time Mr. Wright filed his initial Rule 3.850 motion, he had no indication that Ronald Thomas possessed pertinent information.

The information that Mr. Thomas has now provided is new within the meaning of Rule 3.851(d)(2)(A)" (Supp. 3PC-R. 17).

At the hearing on May 24, 2005, the parties also argued Mr. Wright's pending Rule 3.851 motion. The State argued that the motion was barred because it was successive, had already been addressed by this Court, and did not meet the burden on newly-discovered evidence (3PC-R. 336). According to the State, the motion raised "almost similar and almost identical type of issues . . . that he raised before" (3PC-R. 336). Although the motion presented affidavits from two people who had not previously provided information, the State argued, "all this could have been done years and years ago. There's not even an allegation of due diligence on this" (3Pc-R. 337).

Mr. Wright's counsel argued that there was an allegation of due diligence:

> We didn't get the information until Ronald Thomas wrote a letter and informed Mr. Wright that he had information. . . . I believe he wrote that letter in -- sometime in 2003, and we filed this in August of 2004, within a year of when we got the letter from Ronald Thomas telling us that he had information. We followed it up. We went and we talked to him. We did an affidavit. And based on the information he gave us, then we learned of Idus Hughes.

(3PC-R. 337). The State argued that Idus Hughes "lived at the end of the street, the same street where Ms. Smith lived. And

Ronald Thomas is in close proximity, too" (3PC-R. 337). Mr. Wright's counsel responded:

> There's certainly no requirement on trial counsel to go interview every person living in Palatka in order to find out if every person living in Palatka has information. I don't think that you can pose a greater requirement on collateral counsel to have interviewed everybody living in Palatka or everybody living within a one-mile radius of this house or whatever.
>
> There was no indication that Ronald Thomas had any information until a letter was received from him. There was no indication that Idus Hughes had any information until Ronald Thomas informed us when we talked to him, after receiving a letter, and then we went and talked to Idus Hughes.
>
> I can't help it that Ronald Thomas wrote me a letter or wrote Mr. Wright the letter and Mr. Wright gave me the letter. That happened, and it's happened in other cases. I recognize it -- it frustrates the State's interest in finality. But it's not uncommon.
>
> In other instances, the Florida Supreme Court has recognized when something wholly unexpected comes out because some witness comes forward and says he has information. It still is something to be considered by the Court.

(3PC-R. 338-39). Counsel also pointed out that Ronald Thomas had his conversation with Idus Hughes when Thomas saw a newspaper article about Mr. Wright's case in July or August of 2003 (3PC-R. 390).

The State also argued that the new evidence was not material because it was duplicative of previously presented evidence (3PC-R. 339). Mr. Wright's counsel responded that the

new evidence had “to be evaluated cumulatively with the information that was provided before, and that it tips the scales and requires an evidentiary hearing” (3PC-R. 339).

Finally, the State argued that the DNA results “take care of” Claim I of Mr. Wright’s motion because those results “conclusively show that it was, in fact, Mr. Wright” (3PC-R. 391). Mr. Wright’s counsel argued that reliance upon the DNA results was improper because Mr. Wright had not been permitted to have a second opinion (3PC-R. 391). Counsel argued, “before you can argue anything on the basis of that, the Defense must be given due process, an opportunity to consult with an expert who can examine the evidence and give -- provide an opinion” (3PC-R. 391).

At a later hearing, on June 27, 2005, the State again argued that the DNA results should enter into the prejudice analysis (3PC-R. 407). Mr. Wright’s counsel argued:

> [T]he Brady analysis is a backward looking analysis, where you look at the material [which] wasn’t disclosed, or the newly-discovered evidence, and you look back to the trial and to whether or not it undermines confidence in the outcome of the trial.
>
> It’s not like we’re conducting a new trial now and we’re reaching a conclusion about the new trial and substituting that from the old trial.
>
> The DNA evidence has not been through a trial. I’ve not been given an expert of my choosing to do DNA testing. It seems to me that it’s inappropriate in those circumstances to let the State have the benefit

> of it while I -- if we're at trial, I would have definitely have my own expert, and I don't.

(3PC-R. 407-09). The court denied an evidentiary hearing on Mr. Wright's Rule 3.851 motion (3PC-R. 409).

On March 23, 2006, the court issued a written order denying relief (3PC-R. 310-12). The court first addressed Claim II, which concerned the DNA testing, and concluded, "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" (3PC-R. 311). As to Claim I, the court stated:

> 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, especialy 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**.

(3PC-R. 311-12).

Mr. Wright filed a motion for rehearing, which was denied (3PC-R. 313-20, 328). Mr. Wright filed a notice of appeal (3PC-R. 329).

SUMMARY OF THE ARGUMENT

1. The circuit court erred as a matter of law in denying Mr. Wright's Rule 3.850 motion without an evidentiary hearing. The motion pled facts regarding both the substance of the new facts and Mr. Wright's diligence in ascertaining those facts. Taken as true, those facts show that Mr. Wright is entitled to relief and are not conclusively refuted by the record. However, the trial court failed to take the facts as true, largely ignoring Mr. Wright's allegations in the order summarily denying relief. Further, the lower court's order is wholly conclusory, stating no rationale based upon the record. Finally, the lower court improperly relied upon the FDLE test results to summarily deny both claims, although those test results have never been admitted into evidence or subjected to an adversarial proceeding. This Court should order an evidentiary hearing.

2. New evidence shows that either he State withheld material, exculpatory information from Mr. Wright or trial counsel provided ineffective assistance. The affidavits of Idus Hughes and Ronald Thomas provide additional evidence supporting Mr. Wright's claim of innocence and undercutting Westberry's testimony. Considered cumulatively with all the exculpatory evidence discovered during post-conviction, as well as with the

DNA evidence showing that Mr. Wright and the victim were not the sources of the hairs found on the victim and the DNA evidence showing that the hairs were contributed by two different people, the new evidence undermines confidence in the outcome of Mr. Wright's trial and penalty phase. In summarily denying relief, the lower court did not accept Mr. Wright's allegations as true. This Court should order an evidentiary hearing, a new trial and a new penalty phase.

3. The lower court denied Mr. Wright due process when the court relied upon the FDLE test results to summarily deny Mr. Wright's motion. The FDLE results have never been admitted into evidence and have never been subjected to an adversarial proceeding. Mr. Wright was denied the opportunity to have an independent expert conduct DNA testing, examine FDLE's procedures, or determine whether the samples were contaminated. Mr. Wright was also denied an evidentiary hearing regarding contamination of the crime scene. This Court should reverse and order an evidentiary hearing.

4. DNA testing of hairs found on Ms. Smith's clothing and in pubic hair combings established that the hairs were not contributed by Mr. Wright or Ms. Smith. The testing also showed that the head hairs were contributed by two different people. Considered cumulatively with other evidence, the DNA evidence

undermines confidence in the outcome of Mr. Wright's trial. This Court should order an evidentiary hearing and a new trial.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's factfindings. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001). The lower court denied an evidentiary hearing, and therefore the facts presented in this appeal must be taken as true. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DENYING MR. WRIGHT'S RULE 3.850 MOTION WITHOUT AN EVIDENTIARY HEARING.

The law attendant to the granting of an evidentiary hearing in a postconviction proceeding is oftstated and well settled: "[u]nder rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999). *Accord* Patton

v. State, 784 So. 2d 380, 386 (Fla. 2000); Arbelaez v. State, 775 So. 2d 909, 914-15 (Fla. 2000). Additionally, a trial court denying a Rule 3.850 motion without an evidentiary hearing is required either to "state[] a rationale based on the record" or "to attach those specific parts of the record that directly refute each claim raised." Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990).

The rules are the same for a successive postconviction motion, where allegations of previous unavailability of new facts, as well as diligence of the movant, warrant evidentiary development if disputed or if a procedural bar does not "appear[] on the face of the pleadings." Card v. State, 652 So. 2d 344, 346 (Fla. 1995). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996). In Mr. Wright's case, the lower court erroneously failed to grant an evidentiary hearing despite allegations regarding the substance of the new evidence, the constitutional claims based upon the new evidence, and Mr. Wright's diligence in attempting to unearth the new evidence.

As to both claims of Mr. Wright's motion, the trial court failed either to "state[] a rationale based on the record"

or "to attach those specific parts of the record that directly refute each claim raised." Hoffman v. State, 571 So. 2d at 450. The court's order is conclusory and cites to nothing which is "of record." Further, the order does not describe or cite any rules or caselaw regarding the legal standards which the court applied. The order is therefore insufficient, requiring reversal.[17]

The court's order also did not accept Mr. Wright's allegations as true. Claim I of Mr. Wright's Rule 3.850 motion pled that new evidence from Idus Hughes and Ronald Thomas established violations of Brady v. Maryland and/or Strickland v. Washington, or, alternatively, constituted newly discovered evidence under Jones v. State (*see* Argument II, *infra*). The claim specifically pled the new facts upon which the claim was based (Supp. 3PC-R. 13-17), as well as facts regarding Mr. Wright's diligence in learning these facts (Supp. 3PC-R. 15-17). In oral argument, Mr. Wright's counsel explained that Mr. Wright had exercised diligence in uncovering the new facts, as is detailed in the Statement of the Case and Facts.

Without accepting Mr. Wright's allegations as true, the circuit court denied this claim, stating without explanation

[17]The only specific item cited in the order is the FDLE's DNA report. However, as explained infra, this report was not "of record" and did not constitute evidence.

that the claim was "procedurally barred" (3PC-R. 311). The court did not mention Mr. Wright's allegations regarding due diligence and mentioned the words "due diligence" only in connection with the alternative newly discovered evidence allegation (Id.). Mr. Wright's motion and his oral arguments in the circuit court alleged that he did not discover Ronald Thomas until Thomas wrote to Mr. Wright in 2003 and did not discover Idus Hughes until after talking to Thomas. The Thomas and Hughes affidavits themselves explain in detail how and when Thomas learned that Hughes possessed relevant information, how and when Thomas contacted Mr. Wright, and how and when an investigator contacted Thomas and, through him, Hughes. These allegations are sufficient, at the least, to require an evidentiary hearing regarding Mr. Wright's diligence. *See* Lightbourne v. State, 742 So. 2d 238, 245-46 (Fla. 1999).

The circuit court judge also denied Claim I because he concluded that Mr. Wright had made "no showing of prejudice to meet the required standard for consideration by this Court" (3PC-R. 311-12). The court did not state what this "standard" was. More importantly, the order is simply conclusory, does not accept Mr. Wright's allegations as true, and indicates no cumulative consideration of the facts presented at trial or in the prior post-conviction proceeding. The portion of the order

denying Claim I did not even mention that the DNA hair testing produced exculpatory results. The order states that Mr. Wright has not met a "heavy burden" but does not describe this "burden" or the legal standards attendant to it.

The only specific item cited in the court's discussion of Claim I is the FLDE DNA results (3PC-R. 312). These test results have never been admitted into evidence or subjected to an adversarial proceeding. The results are thus not part of the "record" upon which a trial court may rely in summarily denying Rule 3.850 relief. The question before the court was whether the files and records in the case, i.e., the record developed at trial, conclusively refuted the allegations in the Rule 3.851 motion. Lemon v. State, 498 So. 2d 923 (Fla. 1986); McClain v. State, 629 So. 2d 320 (Fla. 1st DCA 1993) ("We consider the state's admitted inability to refute the facially sufficient allegations of ineffective assistance of counsel without recourse to matters outside the record, warrants reversal of that portion of the order which denied appellant's ineffective assistance of counsel claims"). The lower court thus erred in relying upon matters outside the record to deny Claim I.

Moreover, Mr. Wright had sought to have an expert of his choosing examine the work of FDLE, conduct testing on behalf of Mr. Wright, determine to what extent the contamination of the

rape kit swab had occurred as the evidence was transported repeatedly throughout the history of the case, and determine the reliability of FDLE's work in this case. The lab that Mr. Wright sought to use is the very same lab that produced results which caused the Hillsborough County State Attorney's Office to release a man convicted of rape in 1982. State v. Crotzer, 13th Jud. Cir., Case No. 81-6616. In fact, on January 24, 2006, the charges against Mr. Crotzer were dropped, and he was released a free man on the basis of the DNA results obtained by Forensic Science Associates in California after FDLE was unable to find sufficient material to test. If Mr. Crotzer had not been permitted to have additional testing conducted by Forensic Science Associates, and if FDLE's conclusion that there was insufficient material to test had been taken as the last word, Mr. Crotzer would still be in prison for a crime he did not commit. Forensic Science Associates is the lab that Mr. Wright sought to have evaluate the evidence in his case.

Further, the FDLE results have not been subjected to the crucible of an adversarial testing. Despite the repeated delays by FDLE in producing results, despite the suspicious refusal to share its results in advance of a hearing before the circuit court in order to allow Mr. Wright's counsel time to seek assistance from experts, despite questions of contamination

arising from prior efforts at DNA testing, despite the clearly poor crime scene collection techniques used in this case, despite the failure to ever provide Mr. Wright with the opportunity to confront and cross-examine FDLE personnel, as well as crime scene technicians, regarding the methodology employed in Mr. Wright's case, despite the defnial of basic due process rights guaranteed by the Sixth and Fourteenth Amendments, the circuit court rejected Mr. Wright's Claim I on the basis of FDLE results which have never been admitted into evidence at any proceeding against Mr. Wright. If the circuit court was going to rely upon the FDLE test results, due process required that Mr. Wright be given a fair opportunity to challenge those results in an adversarial proceeding. Under the circumstances here, it was error for the circuit court to rely on the FDLE results to deny an evidentiary hearing on Claim I.

The court summarily denied Claim II solely based upon the FDLE testing results (3PC-R. 311). The court acknowledged that "DNA testing was completed on the pubic hairs and these results determined that none matched the Defendant" (3PC-R. 311). However, in its analysis, the court did not take the DNA testing of the hairs into account, even though the pubic hairs had been admitted into evidence at Mr. Wright's trial, along with expert testimony that Mr. Wright might have been the source

of those hairs. Thus, despite the exculpatory nature of the results of the DNA testing of the hairs, the circuit court solely relied upon the FDLE testing. As is explained above, reliance upon the FDLE test results, which were not of record and have never been admitted into evidence or subjected to an adversarial proceeding was error requiring reversal.

Mr. Wright's Rule 3.850 motion pled facts regarding the merits of his claims and regarding his diligence which must be accepted as true. These facts are set forth in the Statement of the Facts, *supra*, and in the discussion of the individual claims below. *See* Arguments II, III. When these facts are accepted as true, it is clear that the files and records in the case do not conclusively rebut Mr. Wright's claims and that an evidentiary hearing is required.

ARGUMENT II

MR. WRIGHT WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE EITHER THE STATE FAILED TO DISCLOSE EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE AND/OR DEFENSE COUNSEL UNREASONABLY FAILED TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE, AND/OR THE PROSECUTOR VIOLATED GIGLIO AND/OR NEW EVIDENCE ESTABLISHES MANIFEST INJUSTICE.

The United States Supreme Court has explained:

> ... a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), *quoting* Brady v. Maryland, 373 U.S. 83, 87 (1963). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where either or both fail in their obligations, a new trial is required if confidence is undermined in the outcome. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986). Moreover, the Florida Supreme Court has recognized a manifest injustice exception that required reconsideration of collateral claims previous heard when manifest injustice was demonstrated. State v. McBride, 848 So. 2d 287 (Fla. 2003).

Here, Mr. Wright was denied a reliable adversarial testing. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the available evidence favorable to Mr. Wright. The United States Supreme Court specifically indicated that information impeaching "the reliability of the investigation"

was evidence favorable to the accused within the meaning of Brady. Kyles v. Whitley, 514 U.S. 419, 446 (1995). Thus, evidence demonstrating a shoddy or negligent investigation by law enforcement must be disclosed by the prosecution in order to comply with due process. Kyles, 514 U.S. at 447. Here, confidence must be undermined in the outcome since the jury did not hear the evidence. Rogers v. State, 782 So.2d 373 (Fla. 2001). Though error may arise from individual instances of nondisclosure and/or deficient performance, proper constitutional analysis requires consideration of the cumulative effect of the individual nondisclosures in order to insure that the criminal defendant receives "a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434. The proper analysis cannot be conducted when suppression of exculpatory evidence continues or when, despite due diligence, the evidence of the prejudicial effect of the nondisclosure does not surface until later. The analysis must be conducted when all of the exculpatory evidence which the jury did not know becomes known.

New evidence that was previously unavailable to Mr. Wright has now been ascertained that requires this Court to revisit Mr. Wright's previously presented claims that he did not receive an adequate adversarial testing in order to conduct a

cumulative evaluation of the favorable evidence that was not heard by his jury, but that undermines confidence in the reliability of the outcome. State v. Gunsby, 670 So.2d 920 (Fla. 1996). This new evidence includes the following affidavit:

AFFIDAVIT OF IDUS HUGHES

I, IDUS HUGHES, having been duly sworn does hereby say:

1. My name is Idus Hughes. I am over the age of eighteen and competent to testify to the truth of the matters contained herein.

2. I live in Palatka, Florida. I have always lived in Palatka. My family has property on Third Avenue and that is where I have lived all my life. Our property is right up the road from where Ms. Lima Paige Smith used to live before she was killed. I would say we lived about a half-mile down the road.

3. I remember when Ms. Smith was killed. It was a good while ago, some time back in 1983. It was a big news when she was killed. Not only for those of us who stayed in her neighborhood but for most everyone. Palatka is a small town, plus she was a school teacher for a long time so most everyone knew her. I remember the police found her on a Sunday. I think it was in the afternoon, some time after we got home from church.

4. Because I lived right up the street from Ms. Smith I was familiar with her place and the goings on over there. She pretty much kept to herself and was a woman of pattern. She had some dogs and they would always bark and carry on anytime some one went on to her property. Ms. Smith would walk outside when her dogs would bark and if you did not belong on her property she would send you on your way. If it was dark outside she would still come out, but with a flashlight.

5. Ms. Smith also had a real messy house. There were all kinds of papers and clothes and all sorts of stuff piled up in her house. It was so crowded in there that sometimes she would sit out in her car and grade the school papers. Every one who lived over there knew about her messy house.

6. I was in town the night before the police found Ms. Smith. It was Saturday night and I did not go home until real late, I'd say around twelve-thirty or quarter to one in the morning. I was driving my car. There were not any cars out that night. Well, I saw one other car on the main road, which is Highway 19, down by the shopping mall. I saw that car again, driving on Highway 19, after I turned off of 19 and was driving down Third Avenue.

7. I can still remember how I turned off of Highway 19 and onto Third Avenue. Ms. Smith's house was real close to Highway 19. I was going slow and as I drove by Ms. Smith's house I noticed three men standing across the street from her yard. At one point, my headlights were on the men. I recognized one of the men right away; his name is Henry Jackson. And, as I continued to drive, I saw Henry and the other two men step out onto Third Avenue. I also recognized another one of the men but I do not know him by name. However, I do know that he had recently showed up in town, sometime before Ms. Smith's death, and he was hanging around with Henry. I also remember that the man sold a knife to Ms. Smith's brother, Earl, and the police went and got it. The third man was a short guy and I think people called him "Water Tank." However, I do not know his name or where he was staying.

8. Henry and his friend, the man with the knife, were always drinking and looking for money. They were not nice people and ever Henry was with his friend pretty much every day since he showed up in Palatka. I would see them walking through the neighborhood, drinking or trying to get money so they could buy more alcohol. Henry also had himself a knife. I can remember seeing him using it to clean his fingernails.

9. Not only did I get a good look at Henry Jackson and the other men, but I also heard Ms. Smith's dogs barking and barking. They were pacing around and kicking up some dirt. I was looking over at Ms. Smith's house and I did not see her come out. As I was looking around I realized that Henry and the other men had walked up Third Avenue and were near Highway 19. I also remember seeing the car I had seen earlier drive past Third Avenue; the car was still on Highway 19.

10. I then continued driving down to my house and parked my car. Before going into the house I went out in the front yard and tended to the hot water heater. Actually, I cut off the pump before going inside and going to bed. I could still hear Ms. Smith's dogs carrying on and barking.

11. The next day when we got home from church the police were at Ms. Smith's house and it was then that I learned she had been killed. No one ever talked to me about seeing Henry Jackson and the other men that Saturday night. I figured that once the police arrested Jody Wright that there was no need to say anything. However, had the police or an attorney come to my house I would have talked to them and told them about seeing Henry Jackson and the other two men.

12. A month or so ago I was talking with a friend of mine. His name is Ronald Thomas. Ronald was telling me that he saw an article in the newspaper about Jody Wright and Ms. Smith. I told Ronald about seeing Henry Jackson across from Ms. Smith's house on the Saturday night before they found her dead. Next thing I know, Ronald tells me he got in contact with Jody Wright's lawyers and he thought maybe I should tell them about seeing Henry Jackson. I agreed to do so and talked with an investigator or August 8, 2003. This was the first time I told anyone about seeing Henry.

FURTHER AFFIANT SAITH NAUGHT.

At the time Mr. Wright filed his initial Rule 3.850 motion, he had no indication that Idus Hughes possessed pertinent

information. The information that Mr. Hughes has now provided is new within the meaning of Rule 3.851(d)(2)(A).

This new evidence includes the following affidavit:

AFFIDAVIT OF RONALD THOMAS

I, RONALD THOMAS, having been duly sworn or affirmed do hereby say:

1. My name is Ronald Thomas. I live in Palatka, Florida.

2. During the summer of 2003, I read a newspaper article about Jody Wright. The article was about his murder case and his being on death row. I read the article in either July or August of 2003.

3. Not long after reading the article I was having conversation with a friend of mine. His name is Idus Hughes. The news article about Jody Wright came up and Idus told me that he saw Henry Jackson and a couple of other people at the woman's house the night she was killed. Idus also told me since no one like the police came and talked to him, he never told anyone about seeing Henry Jackson and the other men near the house of the woman who was killed.

4. I got to thinking that it might be important for some one to know about the things Idus saw that night of the murder. I decided to write a letter to Jody and tell him to have his attorney or some one contact me. I wrote that letter not long after reading the news article and talking to Idus.

5. Not long after I wrote my letter, an investigator working on Jody Wright's case showed up in Palatka. I told him that a friend of mine might have some information that is important. The investigator said he'd like to talk to my friend and so I contacted Idus. Idus said he would talk to the investigator. I then gave Idus' phone number to the investigator.

6. I was in prison when the school teacher was murdered and when Jody Wright and Charles Westberry were arrested. I heard about it from my mother.

7. I was arrested in 1982 and ended up going to prison for armed robbery. I was on parole when I was arrested. I was on parole and living in Palatka.

8. Sometime after Jody Wright and Charles Westberry were arrested for murder I ended up going back to Palatka, from Tomoka Correctional Facility, for my parole violation charge. I went back sometime in 1983. At first, I was in the County Jail. One of the guards asked me if I wanted to stay over in the City Jail. I said yes because the food was better and the City Jail was not as crowded. Before I left the County Jail a detective told me that I was going to be put in a cell with Charles Westberry. The detective told me to find out what Charles did with the bloody clothes.

9. I was put in a cell with Charles Westberry. I tried to talk with Charles about the school teacher who was murdered, but he would only say that he did not want to talk about it. A few days later I went to court on my charge and eventually I was sent to Lake Butler and continued serving my prison sentence.

10. I’ve known Charles Westberry all m life. His family lived close to where I lived when I was young. There were plenty of times when we would get together as kids and play. I did not really know Jody Wright. I knew who he was but I never really knew him.

11. I told the detective, back in 1983, that Charles Westberry would not talk to me about his bloody clothes or what happened the night the school teacher was killed. No one with the sheriff or police department has talked to me about the school teacher or Charles Westberry since I was sent into his cell to get information.

12. I was never contacted by anyone again until I wrote a letter to Jody Wright in 2003.

FURTHER AFFIANT SAITH NAUGHT.

At the time Mr. Wright filed his initial Rule 3.850 motion, he had no indication that Ronald Thomas possessed pertinent information. The information that Mr. Thomas has now provided is new within the meaning of Rule 3.851(d)(2)(A).

These recent statements constitute new evidence impeaching Westberry's trial testimony. State v. Mills, 788 So.2d 249 (Fla. 2001). This evidence could not be previously discovered. Further, this new evidence demonstrates that the State previously failed to provide the defense with evidence favorable to the defendant. As a result, it requires reconsideration of Mr. Wright's Brady and ineffective assistance of counsel claims. Either the State failed to disclose or trial counsel failed to investigate and elicit this evidence. Since Brady and ineffectiveness claims must be evaluated cumulatively, the matter must now be revisited in light of this new evidence so that the proper cumulative consideration can be conducted. Roberts v. State, 840 So.2d 962, 972 (Fla. 2002). In light of this testimony, the claims must be revisited.

Alternatively, if neither the State nor the defense counsel failed in their constitutional duties, the evidence constitutes newly discovered evidence under the standard recognized in Jones v. State, 591 So.2d 911 (Fla. 1991). Where

neither the prosecutor nor the defense attorney violated their constitutional obligations in relationship to evidence the existence of which was unknown at trial, a new trial is warranted if the previously unknown evidence would probably have produced an acquittal or a life sentence had the evidence been known by the jury. Where such evidence of innocence would probably have produced a different result, a new trial is required. Impeachment evidence may qualify under Jones v. State as evidence of innocence that may establish a basis for Rule 3.850 relief. See State v. Robinson, 711 So.2d 619, 623 (Fla. 2d DCA 1998). Evidence which qualifies under Jones v. State as a basis for granting a new trial must be considered cumulatively in deciding whether in fact a new trial is warranted. State v. Gunsby, 670 So.2d 920 (Fla. 1996).

Mr. Wright's previously presented claims under Brady and Giglio and his ineffective assistance of counsel claims must be evaluated cumulatively with new evidence not previously available that impeaches Westberry, the crucial witness upon whom the State's case rests. The crux of the State's case was the testimony of Mr. Westberry. When all of the exculpatory evidence that the jury did not hear is considered, it is clear that Mr. Wright did not receive an adequate adversarial testing under State v. Gunsby, Lightbourne v. State and State v. Mills.

Confidence is undermined in the outcome of the trial and the sentence of death. Moreover, even if Mr. Wright is held to a higher burden of proof, the evidence that the jury did not hear establishes that a different result would have probably resulted. Jones v. State. When all of the evidence is considered, a manifest injustice is demonstrated. State v. McBride. Evidentiary development is required, and thereafter Rule 3.850 relief must issue.

ARGUMENT III

THE TRIAL COURT ERRED IN RELYING UPON RESULTS OF DNA TESTING TO DENY MR. WRIGHT'S CLAIMS WHEN THE FDLE REPORT WAS NOT IN EVIDENCE AND HAD NEVER BEEN THE SUBJECT OF AN ADVERSARIAL PROCEEDING AND WHEN MR. WRIGHT WAS DENIED THE OPPORTUNITY TO HAVE AN EXPERT CONDUCT INDEPENDENT TESTING AND TO REVIEW FDLE'S TESTING, CONTRARY TO DUE PROCESS AND THE EIGHTH AMENDMENT.

Mr. Wright sought and obtained permission to conduct DNA testing on the hair introduced into evidence. According to the circuit court, "DNA testing was completed on the pubic hairs and these results determined that none matched the Defendant" (3PC-R. 311). The court also ordered FDLE to conduct DNA testing on semen samples allegedly contained in the rape kit. According to the circuit court, "The DNA results of the semen samples show[] a match of the semen collected from the vagina and anus of the victim to the DNA of the Defendant" (3PC-R. 311).

The court relied upon the FDLE results to deny both of Mr. Wright's claims. The court did not factor the hair results into its analysis. The court's reliance upon the FDLE results violated Mr. Wright's due process rights under the Sixth and Fourteenth Amendments, as well as under the Eighth Amendment.

The FDLE test results have never been admitted into evidence or subjected to an adversarial proceeding. The results are thus not part of the "record" upon which a trial court may rely in summarily denying Rule 3.850 relief. The question before the court was whether the files and records in the case, i.e., the record developed at trial, conclusively refuted the allegations in the Rule 3.851 motion. Lemon v. State, 498 So. 2d 923 (Fla. 1986); McClain v. State, 629 So. 2d 320 (Fla. 1st DCA 1993) ("We consider the state's admitted inability to refute the facially sufficient allegations of ineffective assistance of counsel without recourse to matters outside the record, warrants reversal of that portion of the order which denied appellant's ineffective assistance of counsel claims"). The lower court thus erred in relying upon matters outside the record to summarily deny Mr. Wright's motion.

Moreover, Mr. Wright had sought to have an expert of his choosing examine the work of FDLE, conduct testing on behalf of Mr. Wright, determine to what extent the contamination of the

rape kit swab had occurred as the evidence was transported repeatedly throughout the history of the case, and determine the reliability of FDLE's work in this case. The lab that Mr. Wright sought to use is the very same lab that produced results which caused the Hillsborough County State Attorney's Office to release a man convicted of rape in 1982. State v. Crotzer, 13th Jud. Cir., Case No. 81-6616. In fact, on January 24, 2006, the charges against Mr. Crotzer were dropped, and he was released a free man on the basis of the DNA results obtained by Forensic Science Associates in California after FDLE was unable to find sufficient material to test. If Mr. Crotzer had not been permitted to have additional testing conducted by Forensic Science Associates, and if FDLE's conclusion that there was insufficient material to test had been taken as the last word, Mr. Crotzer would still be in prison for a crime he did not commit. Forensic Science Associates is the lab that Mr. Wright sought to have evaluate the evidence in his case.

Further, the FDLE results have not been subjected to the crucible of an adversarial testing. Despite the repeated delays by FDLE in producing results, despite the suspicious refusal to share its results in advance of a hearing before the circuit court in order to allow Mr. Wright's counsel time to seek assistance from experts, despite questions of contamination

arising from prior efforts at DNA testing, despite the clearly poor crime scene collection techniques used in this case, despite the failure to ever provide Mr. Wright with the opportunity to confront and cross-examine FDLE personnel, as well as crime scene technicians, regarding the methodology employed in Mr. Wright's case, despite the denial of basic due process rights guaranteed by the Sixth and Fourteenth Amendments, the circuit court rejected Mr. Wright's Claim I on the basis of FDLE results which have never been admitted into evidence at any proceeding against Mr. Wright. If the circuit court was going to rely upon the FDLE test results, due process required that Mr. Wright be given a fair opportunity to challenge those results in an adversarial proceeding. Under the circumstances here, it was error for the circuit court to rely on the FDLE results to deny an evidentiary hearing on Mr. Wright's motion.

ARGUMENT IV

THE RESULTS OF DNA TESTING ESTABLISH MR. WRIGHT'S ENTITLEMENT TO A NEW TRIAL.

Mr. Wright sought and obtained permission to conduct DNA testing on the pubic and head hairs introduced into evidence at his trial. At trial, the State presented an expert witness to testify that the hairs might have come from Mr. Wright.

The hair testing showed that the pubic hairs and the head hairs did not come from Mr. Wright or the victim. The hair testing also showed that the head hairs came from two different people.

This Court recognized in Jones v. State, 591 So.2d 911 (Fla. 1991), that where neither the prosecutor nor the defense attorney violated their constitutional obligations in relationship to evidence the existence of which was unknown at trial, a new trial is warranted if the previously unknown evidence would probably have produced an acquittal had the evidence been known by the jury. Where such evidence of innocence would probably have produced a different result, a new trial is required.

The results of the DNA testing provide evidence that qualifies as newly discovered evidence which may be presented in a Rule 3.850 motion. Had the jury known of this evidence it would have had a reasonable doubt regarding Mr. Wright's guilt.

But, of course, the results of the DNA testing are not to be analyzed in a vacuum. The other exculpatory evidence that the jury did not hear should also be considered. That analysis and evidence is discussed in the Statement of the Case and Facts, as well as in Argument II, *supra*, and is incorporated into this argument. When the wealth of unpresented favorable

evidence is considered cumulatively, it is clear that an evidentiary hearing, a new trial and a new penalty phase are required.

CONCLUSION

In light of the foregoing arguments, Mr. Wright requests that this matter be remanded to the circuit court for a full and fair evidentiary hearing and for other relief as set forth in this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Barbara C. Davis, Assistant Attorney General, Office of Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, Florida 32118, this 30th day of April, 2007.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
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