

IN THE SUPREME COURT OF FLORIDA

ANTHONY WAINWRIGHT,

Appellant,

v.

CASE NO. SC07-2005

STATE OF FLORIDA,

Appellee.

\_\_\_\_\_ /

ON APPEAL FROM THE CIRCUIT COURT  
OF THE THIRD JUDICIAL CIRCUIT  
IN AND FOR HAMILTON COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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### CASE SNAPSHOT

This is an appeal from the summary denial of a successive motion for post-conviction relief. In his motion, Wainwright claimed that newly discovered evidence entitles him to a new trial. Alternatively, Wainwright claimed the newly discovered evidence should, at least, entitle him to a new penalty phase.

The newly discovered evidence at issue is an unsworn statement allegedly provided to Wainwright by co-defendant, Richard Hamilton in July 2006. In the statement, Hamilton avers that he, alone, sexually battered Ms. Gayheart.

At trial, the state presented evidence that on April 27, 1994, Wainwright and Hamilton - recent escapees from a North Carolina prison - robbed, kidnapped, sexually battered, and murdered Carmen Gayheart. At the time she was accosted in the parking lot of a Winn Dixie grocery store, Ms. Gayheart, a 23 year old nursing student, was on her way to pick up her two small children from daycare.

Hamilton and Wainwright's motive for the attack was to obtain new transportation. Their vehicle, a Green Cadillac, stolen shortly after their prison break, had begun to overheat. Instead of simply jacking Ms. Gayheart's Bronco; Hamilton and Wainwright kidnapped Ms. Gayheart, took her to an isolated location, sexually battered her, and then murdered her. The

pair were captured in Mississippi, still driving Ms. Gayheart's Bronco.

DNA evidence detected in semen found in the Bronco and Wainwright's admissions to law enforcement and a fellow inmate established Wainwright's personal involvement in the sexual battery.

The collateral court judge summarily denied Wainwright's successive motion. Initially, the court found Wainwright failed to set forth a legally sufficient claim of newly discovered evidence. Alternatively, the collateral court considered and denied Wainwright's motion on the merits.

The collateral court ruled that Hamilton's statement, when considered with all the other evidence introduced at trial, would not have likely produced an acquittal of either first degree murder or sexual battery. The court also found that Hamilton's statement, when considered with all the other evidence at trial and at the penalty phase, would not have eliminated any of the aggravators found to exist nor probably resulted in a life sentence.

**PRELIMINARY STATEMENT**

Appellant, ANTHONY WAINWRIGHT raises two claims in this appeal from the summary denial of his successive motion for post-conviction relief. References to the appellant will be to "Wainwright" or "Appellant". References to the appellee will be to the "State" or "Appellee".

The one volume record on appeal in the instant case will be referenced as "SPCR" followed by the appropriate page number. References from Wainwright's direct appeal will be referred to as "TR" followed by the appropriate volume and page number.

References to the record on appeal from his initial motion for post-conviction relief will be referred to as "PCR" followed by the appropriate volume and page number. References to Wainwright's initial brief will be to "IB" followed by the appropriate page number.

**STATEMENT OF THE CASE AND FACTS**

Anthony Wainwright, born on October 22, 1970, was 23 years old when he, along with Richard Hamilton, murdered Carmen Gayheart. The relevant facts surrounding the April 27, 1994 murder are set forth in this Court's opinion on direct appeal as follows:

... Anthony Wainwright and Richard Hamilton escaped from prison in North Carolina, stole a Cadillac and guns, and drove to Florida. In Lake City, the two decided to steal another car and on April 27, 1994, accosted Carmen Gayheart, a young mother of two, at gunpoint as she loaded groceries into her Ford Bronco in a Winn-Dixie parking lot. They stole the Bronco and headed north on I-75. They raped, strangled, and executed Gayheart by shooting her twice in the back of the head, and were arrested the next day in Mississippi following a shootout with police.

Upon arrest, Wainwright revealed to officers that he had AIDS and in subsequent statements admitted to raping Mrs. Gayheart despite his illness after kidnapping and robbing her. He claimed, however, that it was Hamilton who strangled and shot her. Wainwright was charged with first-degree murder, robbery, kidnapping, and sexual battery, all with a firearm, and at trial fellow prisoners testified that he admitted he was the shooter.

Wainwright v. State, 704 So.2d 511 (Fla. 1997).

Wainwright was convicted, as charged, of first-degree murder on a general verdict form. Wainwright was also convicted, as charged, of kidnapping, sexual battery, and robbery, all with a firearm.

The jury recommended a sentence of death by a vote of twelve to zero (12-0). The trial court followed the jury



recommendation and sentenced Wainwright to death. The trial court found six aggravators: (1) Wainwright committed the murder while under sentence of imprisonment; (2) Wainwright had been convicted of a prior violent felony; (3) the murder was committed during the course of a robbery, kidnapping, and sexual battery; (4) the murder was committed to effect an escape; (5) the murder was especially heinous, atrocious, or cruel; and (6) the murder was committed in a cold, calculated, and premeditated manner. The trial court found no statutory mitigation but concluded that the "defendant's difficulties in school and his social adjustment problems, due in part to his problems associated with bed-wetting do provide some measure of mitigation." Wainwright v. State, 704 So.2d 511 (Fla. 1997). Wainwright appealed.

On November 13, 1997, the Florida Supreme Court affirmed petitioner's conviction and sentence for the first degree murder of Carmen Gayheart. Wainwright v. State, 704 So.2d 511, 512-513 (Fla. 1997). Wainwright timely filed a petition for writ of certiorari in the United States Supreme Court. On May 18, 1998, Wainwright's conviction became final when the Supreme Court denied certiorari review. Wainwright v. Florida, 523 U.S. 1127 (1998).

On May 14, 1999, Wainwright filed an initial motion for post-conviction relief. Wainwright amended his motion on July 27, 2000.

In his amended motion, Wainwright raised fourteen claims.<sup>1</sup> An evidentiary hearing was held on January 23, 2002. On April 12, 2002, the collateral court denied Wainwright's amended motion for post-conviction relief.

On June 14, 2002, Wainwright filed a notice of appeal from the denial of his amended motion for post-conviction relief. He

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<sup>1</sup> In his amended motion Wainwright alleged: (1) trial counsel was ineffective regarding the admission of additional DNA evidence; (2) trial counsel was ineffective regarding Wainwright's statements and admissions; (3) trial counsel was ineffective regarding evidence of Wainwright's out of state crimes; (4) trial counsel was ineffective regarding a microphone discovered in Wainwright's cell; (5) trial counsel was ineffective for failing to object to the penalty phase instructions on the aggravators; (6) trial counsel was ineffective for failing to object to the prosecutor's argument at the guilt and penalty phases; (7) trial counsel was ineffective for failing to maintain a proper attorney-client relationship, failing to ensure that Wainwright received adequate mental health evaluations and failing to investigate and present additional mitigating evidence; (8) trial counsel was ineffective for allowing the victim's family to testify at sentencing; (9) trial counsel was ineffective for failing to object to an alleged Caldwell v. Mississippi, 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985), error; (10) initial counsel, Victor Africano, was ineffective in his pretrial representation of Wainwright; (11) trial counsel was ineffective for failing to be prepared for trial; (12) trial counsel was ineffective for introducing statements of the co-defendant; (13) trial counsel was ineffective for committing an alleged discovery violation; and (14) trial counsel's illness during trial rendered him ineffective.

raised eight issues on appeal.<sup>2</sup> On September 11, 2002, Wainwright filed a petition for a writ of habeas corpus in this Court.

On November 24, 2004, this Court affirmed the trial court's denial of Wainwright's post-conviction motion and denied Wainwright's petition for a writ of habeas corpus. Wainwright v. State, 896 So.2d 695 (Fla. 2004). Wainwright filed a motion for rehearing which this Court denied on March 1, 2005. Mandate issued for both cases on March 17, 2005.

Wainwright sought certiorari review from his post-conviction proceedings. The United States Supreme Court denied review on October 3, 2005. Wainwright v. Florida, 546 U.S. 878 (2005).<sup>3</sup>

On July 10, 2007, Wainwright filed a successive motion for post-conviction relief raising a claim of newly discovered

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<sup>2</sup> This Court found that, of the eight issues that Wainwright raised on appeal, only three merited discussion: (1) whether trial counsel was ineffective regarding the admission of additional DNA evidence; (2) whether trial counsel was ineffective regarding Wainwright's statements and admissions; and (3) whether initial counsel was ineffective in his pretrial representation of Wainwright.

<sup>3</sup> In addition to attacking his conviction and sentence in state court, Wainwright sought federal review of his conviction and sentence when he filed a petition for habeas corpus in the District Court of Appeal for the Middle District of Florida. Wainwright filed his petition six days after AEDPA's one year limitation period expired and the district court dismissed Wainwright's petition as untimely. The Eleventh Circuit affirmed the district court's order. Wainwright's motion for rehearing was denied on December 26, 2007.

evidence. The "new evidence" was an unsworn statement dated July 22, 2006, purportedly signed by Richard Hamilton. The state filed a response on July 24, 2007.

On August 22, 2007, the collateral court held a Huff hearing/case management conference. Both sides presented argument on the issue of whether an evidentiary hearing was warranted on Wainwright's successive claim. At the conclusion of the hearing, both parties were invited to submit a proposed order. (SPCR 36). Counsel for the defendant and the state submitted a proposed order.

On September 19, 2007, the collateral court summarily denied Wainwright's successive motion for a post-conviction relief. (SPCR 36-50). Wainwright filed a notice of appeal on October 23, 2007.

On appeal, Wainwright seeks an order from this Court remanding his newly discovered evidence claim for an evidentiary hearing. Wainwright filed his initial brief on May 13, 2008. This is the State's answer brief.

### SUMMARY OF THE ARGUMENT

In this appeal, Wainwright alleges two things. First, that he is entitled to an evidentiary hearing to prove that his claim is sufficiently pled. Second, that an evidentiary hearing is required to allow the collateral court to determine the potential impact of Hamilton's putative testimony on a new jury. Wainwright claims the trial judge erred in summarily denying the claim because the trial judge cannot speculate what effect Hamilton's new testimony would have on the jury at the penalty phase. (IB 9).

The collateral court properly denied Wainwright's motion without an evidentiary hearing. In order to be entitled to an evidentiary hearing, a defendant must set forth a legally sufficient claim. Conclusory allegations, especially in view of the heightened pleading requirements of a successive motion for post-conviction relief, do not warrant an evidentiary hearing.

In failing to set forth any grounds to support a finding that Hamilton's statement could not have been discovered, with due diligence, well before Wainwright filed his successive motion on July 10, 2007, Wainwright failed to establish his motion was timely filed. Likewise, Wainwright failed to make a prima facie case under Jones v. State, 709 So. 2d 512, 521 (Fla. 1998), because Wainwright failed to set forth, in his successive motion, any factual allegations to demonstrate the substance of

Hamilton's statement could not have been discovered before trial or at the very least, during Wainwright's initial post-conviction proceedings that were pending before the collateral court between May 14, 1999 and April 19, 2002.

Even if this Court were to determine that Wainwright's motion set forth a legally sufficient claim, Wainwright is still not entitled to an evidentiary hearing. The motion, files, and records in the case conclusively show he is entitled to no relief.

In his initial brief, Wainwright makes no claim concerning the guilt phase. Instead, Wainwright claims only that he is entitled to an evidentiary hearing so that the collateral court may thoroughly examine and weigh Hamilton's testimony against all the other evidence at trial, and then evaluate its potential impact on the jury's recommendation during the penalty phase. (IB 9).

In his successive motion, however, Wainwright alleged Hamilton's new testimony would probably produce an acquittal upon retrial. Alternatively, Wainwright alleged the newly discovered evidence likely would produce a life sentence. Wainwright is mistaken.

Hamilton's statement, even assuming he would testify consistently with his statement, upon retrial, would not disturb

Wainwright's conviction for first degree murder. This is so, for two reasons.

First, Hamilton's statement does nothing to undermine Wainwright's conviction for first degree murder under a theory of premeditated murder. In his successive motion, Wainwright did not even argue that it would.

Likewise, the "new" evidence would not affect Wainwright's conviction under a felony murder theory, even if Hamilton's statement were to convince a new jury to acquit Wainwright of sexual battery. This is so because, in addition to sexual battery, Wainwright was convicted of armed kidnapping and armed robbery. Hamilton's statement would have no impact on the state's evidence supporting these convictions and both felonies are felonies enumerated under Florida's felony murder statute.

Hamilton's statement would not, however, likely result in an acquittal of sexual battery upon retrial. Hamilton's statement was inconsistent with not only his initial statements to law enforcement but the evidence adduced at trial.

Wainwright's semen was found on the backseat of Ms. Gayheart's Bronco. Mixed in this stain was an epithelial fraction (skin cell) consistent with Carmen Gayheart. Moreover, Wainwright confessed to law enforcement and to fellow inmate Gary Gunter that he "had sex" with Ms. Gayheart at the murder scene. Wainwright also told inmate Gary Gunter that he and

Hamilton "made her suck them off." When considered with all the evidence admitted at trial, Hamilton's statement would not likely produce an acquittal upon retrial.<sup>4</sup>

Finally, the newly discovered evidence would not probably result in a life sentence. In his successive motion, Wainwright made no allegation that Hamilton's statements would have any impact on four of the six aggravators found by the trial court, including that the murder was cold, calculated, and premeditated (CCP). Instead, Wainwright based his argument on the assumption the newly discovered evidence would eliminate the "in the course of a felony" and HAC aggravators. Wainwright's assumptions were misplaced.

Wainwright's conviction for kidnapping and robbery would be sufficient to support the "in the course of a felony" aggravator. Accordingly, an acquittal for sexual battery would not eliminate the murder in the course of a felony aggravator.

Hamilton's statement that he, alone, raped Ms. Gayheart would not eliminate the HAC aggravator. While the judge did consider the fact that Wainwright sexually battered Ms. Gayheart as part of his HAC analysis, there was ample other evidence, as noted in the sentencing order, to support the HAC aggravator, including the fact that Wainwright attempted to murder Ms.

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<sup>4</sup> Wainwright was also a principal to sexual battery and could have been convicted under a principal theory of sexual battery.



Gayheart by strangling her. The evidence established that Ms. Gayheart suffered close to two hours of physical and emotional torture at the hands of both Wainwright and his co-defendant.

Lastly, the jury recommendation was not a close call. Wainwright's jury recommended Wainwright be sentenced to death by a unanimous vote of 12-0. In his motion, Wainwright failed to demonstrate that Hamilton's testimony would probably produce an acquittal upon re-trial. Likewise, Wainwright failed to demonstrate that Hamilton's "new" testimony would probably result in a life sentence upon re-trial. This Court should affirm.

**ARGUMENT**

**ISSUE I**

**WHETHER THE COLLATERAL COURT PROPERLY DENIED WAINWRIGHT'S  
NEWLY DISCOVERED EVIDENCE CLAIM AS INSUFFICIENTLY PLED**

In his initial brief, Wainwright alleges the collateral court erred in determining his claim was not sufficiently pled. Wainwright alleges that in cases involving recantation testimony, it is impossible to demonstrate the evidence could have been discovered earlier with due diligence. Wainwright also alleges that he should be granted an evidentiary hearing to prove his claim is legally sufficient. (IB 6). Wainwright's claims are contrary to the well-established case law from this Court.

A. **Applicable law and standard of review**

(1) **Rule 3.851:**

In order to plead a legally sufficient successive motion for post-conviction relief, a defendant must do more than meet the pleading requirements of an initial motion. A successive Rule 3.851 motion must include all of the pleading requirements of an initial motion under subdivision (e)(1). The motion must also include the disposition of all previous claims raised in post-conviction proceedings and the reason or reasons the claim or claims raised in the present motion were not raised in the former motion or motions. If the claim is based on newly

discovered evidence, the defendant must also provide: (i) the names, addresses, and telephone numbers of all witnesses supporting the claim; (ii) a statement that the witness will be available, should an evidentiary hearing be scheduled, to testify under oath to the facts alleged in the motion or affidavit; (iii) if evidentiary support is in the form of documents, copies of all documents shall be attached, including any affidavits obtained; and (iv) as to any witness or document listed in the motion or attachment to the motion, a statement of the reason why the witness or document was not previously available. *Rule 3.851(e)(2), Florida Rules of Criminal Procedure.*

Claims in successive motions may be denied by the collateral court, without an evidentiary hearing, “[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief.” White v. State, 964 So. 2d 1278 (Fla. 2007). On appeal, this Court will affirm a summary denial only if the claims are legally insufficient or refuted by the record. Allen v. State, 854 So. 2d 1255 (Fla. 2003). However, a defendant may not simply file a motion for post-conviction relief containing conclusory allegations and then expect to receive an evidentiary hearing. Id.

(2) **Newly discovered evidence**

In order to be entitled to a new trial on the basis of newly discovered evidence, Wainwright must show (1) the evidence was unknown by the trial court, by the party, or by counsel at the time of trial and the defendant or his counsel could not have known of it by the use of diligence, and (2) the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Jones v. State, 709 So. 2d 512, 521 (Fla. 1998). See also Robinson v. State, 865 So. 2d 1259, 1262 (Fla. 2004). Once a defendant moves into subsequent or successive post-conviction proceedings, a defendant fails to meet Jones' first prong if he fails to set forth any explanation why the allegedly new evidence could not have been discovered when preparing to file his initial motion for post-conviction relief, or through an amendment to the motion. White v. State, 964 So. 2d 1278, 1284 (Fla. 2007).

B. **The collateral court's order**

The collateral court found that Wainwright's motion was insufficiently pled. The court found in pertinent part:

Initially, this Court finds that Wainwright's successive motion for post-conviction relief does not state a legally sufficient claim of newly discovered evidence. In order to demonstrate both that his motion is timely and that Hamilton's statement constitutes newly discovered evidence, Wainwright must explain why Hamilton's admission could not have been discovered by diligent efforts either prior to trial or prior to the filing of his initial motion for post-

conviction relief. Wainwright has failed to set forth any requisite explanation, let alone a legally sufficient one. Rule 3.851 (d)(2)(A) and Rule 3.851(e)(2)(C)(iv), Florida Rules of Criminal Procedure. White v. State, 2007 Fla. LEXIS 1224 (Fla. July 12, 2007). Accordingly, Wainwright failed to state a legally sufficient claim of newly discovered evidence. Id.

(SPCR 39-40).

C. **Merits**

Wainwright filed his claim in a successive motion for post-conviction relief on July 10, 2007, nine years after his conviction and sentence became final. Accordingly, Wainwright's motion would be time barred by the one year limitations period outlined in Rule 3.851(d)(1), Florida Rules of Criminal Procedure, unless the motion fell within one of three narrow exceptions to the rule.

In his motion, Wainwright purported, albeit it *sub silentio*, to rely on Rule 3.851(d)(2)(A) to overcome the time bar. This rule provides an exception to the one year limitation period if the "facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by due diligence." Rule 3.851(d)(2)(A), Florida Rules of Criminal Procedure.

However, a defendant does not have unlimited time to bring a claim of newly discovered evidence. Rather, a defendant must bring a claim of newly discovered evidence within one year of

the time he discovered the evidence or with due diligence could have discovered it. Glock v. Moore, 776 So. 2d 243, 251 (Fla. 2001) ("Any claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence.").

In accord with Glock, in order to overcome the time bar, Wainwright had to set forth facts which would allow the collateral court to determine that Hamilton's statement could not have been discovered, even with due diligence until July 22, 2006, when Hamilton purportedly recanted his previous statements to law enforcement that both he and Wainwright raped Ms. Gayheart. Wainwright failed to set forth any requisite explanation, let alone a legally sufficient one, to overcome the one year time bar. (SPCR 1-8). The collateral court correctly found that Wainwright had failed to overcome the time bar set forth in Rule 3.851(d)(2)(A) and Rule 3.851(e)(2)(C)(iv), Florida Rules of Criminal Procedure.

Wainwright's motion was also legally insufficient because Wainwright failed to set forth any basis upon which the collateral court could find that Hamilton's admission could not have been discovered years ago. In failing to do so, Wainwright failed to make a prima facie showing of the first prong of the Jones test. Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)

(first prong of newly discovered evidence claim is not met unless the defendant demonstrates the allegedly newly discovered evidence could not have been discovered by the use of diligence); White v. State, 964 So. 2d 1278, 1284 (Fla. 2007) (affirming the collateral court's summary denial and finding White failed to meet first prong of the Jones test because White failed to set forth any explanation why the allegedly new evidence could not have been discovered when preparing to file his initial motion for post-conviction relief, or through an amendment to the motion).

Purportedly, Wainwright was aware that Hamilton, alone, raped Carmen Gayheart. Wainwright and Hamilton have been housed together on death row for over a dozen years.

Wainwright did not assert, in his motion, that he informed collateral counsel that only Hamilton raped Ms. Gayheart. Nor did he assert that he or his collateral counsel, at any time prior to May 1999 when Wainwright filed his initial motion for post-conviction relief, tried and failed to extract a statement from Hamilton. Indeed, Wainwright offered no explanation at all why Hamilton's admission could not have been discovered with diligent efforts prior to trial, in preparation of his initial motion for post-conviction relief, before Wainwright amended his motion in July 2000, before his evidentiary hearing in January 23, 2002, or before the collateral court denied his motion in

April 2002. (SPCR 1-8). Accordingly, the collateral court correctly concluded that Wainwright failed to state a legally sufficient claim of newly discovered evidence. White v. State, 964 So. 2d 1278, 1285 (Fla. 2007) (affirming summary denial when White failed to specifically explain why his proposed witness, Frank Marasa, could not have been discovered by diligent efforts either prior to trial, in preparation of his 1983 post-conviction motion, or through an amendment to his 1983 post-conviction motion).<sup>5</sup>

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<sup>5</sup> Wainwright attempts to distinguish White from the instant case because a new witness, Frank Massara, allegedly heard the co-defendant's inculpatory statement before trial. (IB 5). However, assuming Hamilton's statement was true, Wainwright also knew, before trial, that Hamilton was the lone rapist. Even so, the holding in White does not turn on the fact the co-defendant's inculpatory statement was actually made to a potential witness before trial. Instead, White stands for the notion that in order to state a legally sufficient claim of newly discovered evidence in a case where the defendant had already filed one previous motion for post-conviction relief, a defendant must set forth sufficient facts demonstrating that the so called "newly discovered evidence" could not have been discovered by diligent efforts either prior to trial, in preparation of his initial post-conviction motion, or through an amendment to his initial motion.

In this case, the collateral court found, and the records supports, that like Mr. White, Wainwright failed to set forth any grounds upon which the collateral court could find that the evidence could not have been discovered years earlier with due diligence.



## ISSUE II

WHETHER THE COLLATERAL COURT ERRED IN DETERMINING THAT  
WAINWRIGHT'S NEWLY DISCOVERED EVIDENCE CLAIM PROBABLY WOULD  
NOT RESULT IN A DIFFERENT OUTCOME

### A. Standard of Review

The standard of review is an abuse of discretion. A trial court's ruling on a post-conviction motion based on newly discovered evidence, including a motion premised on a witness's recanted testimony, will not be reversed on appeal unless an abuse of discretion is shown. Kormondy v. State, 32 Fla. L. Weekly S 627 (Fla. October 11, 2007).

### B. The collateral court's ruling

The collateral court denied Wainwright's successive motion without an evidentiary hearing. In a lengthy order, the collateral court found, in pertinent part:

**Guilt Phase** <sup>6</sup>

As to the guilt phase, Wainwright cannot satisfy the second prong of the Jones test.<sup>7</sup> First, even if

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<sup>6</sup> The collateral court's citations to the record were to the actual page numbers found in the upper right side of each volume of the trial transcript. In its brief, the State cited to the same pages but cited to the actual page number of the record as paginated and numbered by the Clerk of the Court when he prepared the record on appeal.

<sup>7</sup> Wainwright fails to set forth any basis in his successive motion that would allow this court to determine whether Wainwright has satisfied the first prong of the Jones test. This court's finding however that Wainwright failed to meet the

Hamilton's statement, that Wainwright did not personally sexually batter Ms. Gayheart, were true, the evidence still overwhelmingly supports Wainwright's conviction for first degree murder.

Hamilton's statement clearly does nothing to disturb Wainwright's conviction on a premeditated murder theory and Wainwright does not even suggest it does. It also does nothing to undermine Wainwright's conviction under a felony murder theory.

In addition to armed sexual battery, Wainwright was convicted of armed kidnapping and armed robbery. Both felonies are qualifying felonies under Florida's felony murder statute. *Section 782.04(1)(a)(2)(d) and (2)(f), Florida Statutes.*

At trial, there was overwhelming evidence to support Wainwright's conviction for both of these qualifying felonies. Even assuming, for the sake of argument, that Hamilton's statement would result in Wainwright's acquittal on the sexual battery charge upon re-trial, Wainwright is still guilty of first degree murder. Hamilton's statement does not weaken the first degree murder case against the defendant so as to give rise to a reasonable doubt as to his culpability. There is no doubt, let alone a reasonable doubt, about Wainwright's culpability for the first degree murder of Carmen Gayheart.

The record also shows Wainwright is not entitled to relief from his conviction for sexual battery. Hamilton's statement, when considered and weighed in light of all the other evidence presented at trial would not probably result in an acquittal for sexual battery upon retrial. This is so for two independent reasons, either of which is sufficient, standing alone, to defeat Wainwright's claim.

First, the evidence established that at a minimum, Wainwright was a principal to sexual battery. Section 777.011, Florida Statutes provides that any person who aids or abets an offense to be committed is a principal in the first degree and may be charged,

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second prong of Jones makes a merits review of the first prong unnecessary.

convicted, or punished as if he had personally committed the crime. Staten v. State, 519 So. 2d 622 (Fla.1988).

In this case, both Hamilton and Wainwright kidnapped Carmen Gayheart from the parking lot of a Winn-Dixie grocery store. Because they initially had two vehicles (a stolen and overheating green Cadillac and Ms. Gayheart's Bronco), Wainwright drove one vehicle and Hamilton the other. Both Wainwright and Hamilton abandoned the green Cadillac and continued together to the location where they would terrorize, strangle, and eventually shoot Ms. Gayheart to death. As found by this court in its sentencing order, at one point, Hamilton raped Ms. Gayheart while Wainwright drove. (TR Vol. VII 1172).

Even if Hamilton alone sexually battered Ms. Gayheart, Wainwright actively participated in the entire chain of events whereby Ms. Gayheart was robbed, kidnapped, sexually assaulted and brutally murdered. Wainwright's presence at the scene and his actions in facilitating Hamilton's sexual assault establishes that Wainwright is guilty as a principal of sexual battery. See e.g. Fryer v. State, 102 So. 2d 41 (a lookout man actively participates in the crime and is guilty of the charged crime as a principal).

Second, when considering and weighing Hamilton's statement against all the evidence presented to Wainwright's jury, there is no reasonable possibility, let alone probability, that Wainwright would have been acquitted of sexual battery. Hamilton's claim, made more than a dozen years after the murder, is inherently incredible because it is not only inconsistent with his previous statements, it is inconsistent with the evidence produced at trial, including forensic evidence and Wainwright's own admissions to law enforcement and to fellow inmate, Gary Gunter.<sup>8</sup>

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<sup>8</sup> A jury would be entitled to consider, in weighing the credibility of this new evidence, that Hamilton consistently, before trial, stated that both he and Wainwright sexually battered Ms. Gayheart. They would also be entitled to consider the fact that Hamilton is a convicted felon and waited some

At trial, the state called two DNA experts to testify. Dr. DeGuglielmo, testified that DNA testing revealed that Wainwright's semen was found on a portion of a seat-cover from the back of Carmen Gayheart's Bronco. Mixed in this stain was an epithelial fraction (skin cell) consistent with Carmen Gayheart. (TR Vol. XXIV 1575).

Likewise, Dr. James Pollack, a forensic serologist with the Florida Department of Law Enforcement, testified that RFLP DNA testing revealed that Wainwright's sperm was found on a cutting from the rear seat of Carmen Gayheart's Bronco. (TR Vol. 1482-1494). Dr. Pollack told the jury that the chance of anyone other than Wainwright being the donor of the sperm was one in six billion Caucasians. (TR Vol. XXIII 1497).<sup>9</sup>

Moreover, Wainwright told Gary Gunter that both he and Hamilton "had sex" with Carmen Gayheart. (TR Vol. XXI 1075). Wainwright also told Gunter he and Hamilton "made her suck them off." (TR Vol. XXI 1075).

Wainwright also confessed to Sheriff Reid he "had sex" with Ms. Gayheart. (TR Vol. XX 989). Wainwright told Sheriff Reid that after he and Hamilton had gotten off the interstate and found a wooded area - the area he described as the murder scene - he made Ms. Gayheart get into the back of the Bronco. Wainwright told Sheriff Reid he raped her and had sex with her while she was naked. (TR Vol. XX 989). Sheriff Reid told the jury that Wainwright made this admission to him in the presence of Wainwright's defense counsel, Victor Africano. (TR Vol. XX 989).

In light of the evidence that was introduced at trial, including the DNA evidence and his own admissions, Wainwright has failed to show Hamilton's "confession", when weighed against all the evidence

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twelve years after their conviction to come forward. The jury would also be entitled to weigh Hamilton's credibility in light of both the forensic evidence and Wainwright's own admissions to Gary Gunter and Sheriff Reid that he personally sexually battered Ms. Gayheart.

<sup>9</sup> Wainwright is a Caucasian male.

actually introduced at Wainwright's trial would probably produce an acquittal of either first degree murder or sexual battery.

Accordingly, his claim of newly discovered evidence as to the guilt phase is **DENIED**.

### **Penalty Phase**

Wainwright asserts that even if Hamilton's claim would not create a likelihood of acquittal upon re-trial, he probably would receive a life sentence upon re-trial if the evidence demonstrated he did not personally participate in the sexual battery. Wainwright also suggests that an acquittal of sexual battery would preclude a finding of the "in the course of a felony" and heinous, atrocious or cruel (HAC) aggravators. This court disagrees.

#### **(a) Murder in the course of a felony**

Hamilton's statement would not have any impact on this court's conclusion that the murder was committed in the course of an enumerated felony. In addition to sexual battery, Wainwright was convicted of armed robbery and armed kidnapping. Conviction for either felony supports a finding by both the jury and the trial court that the murder was committed in the course of an enumerated felony. *Section 782.04(1)(a)(2)(d) and (2)(f), Florida Statutes*. Wainwright's claim that Hamilton's admission would eliminate the "murder in the course of a felony" aggravator is wholly without legal merit.

#### **(b) HAC**

Wainwright is also mistaken when he alleges Hamilton's confession, that he alone sexually battered Ms. Gayheart, would eliminate the HAC aggravator upon re-trial. In his sentencing order, this trial court did consider the evidence establishing that both defendants sexually battered Ms. Gayheart.

However, even if true, Hamilton's admission would do nothing to eliminate several other circumstances considered by the trial court in determining the murder was especially heinous, atrocious, or cruel,

including: (1) the victim was made to ponder her fate for at least one and one quarter to one and one half hours enroute to the kill site, (2) Hamilton sexually battered Ms. Gayheart while Wainwright drove, (3) the victim cried and asked to be released but instead was murdered, (4) Wainwright strangled the victim, an act, if done with deadly force, would take approximately 30 seconds to render her unconscious, (5) Ms. Gayheart's resisted her death by strangulation. She shook while Wainwright attempted to strangle her to death, a reaction that caused Wainwright to describe the victim during the strangulation as being like "a puppy when you hit it in the head, (6) Ms. Gayheart endured another thirty minutes of terror at the hands of Hamilton and Wainwright at the kill site before they murdered her. (R. Vol. VII at 1173).

Just strangulation alone would have been sufficient to establish the murder was HAC. Johnson v. State, 32 Fla. L. Weekly S 445 (Fla. July 5, 2007)(strangulation of a conscious victim is HAC); Huggins v. State, 889 So. 2d 743, 770 (Fla. 2004)(HAC supported when there is no evidence the victim was unconscious when she was strangled); Conde v. State, 860 So. 2d 930 (Fla. 2003), cert. denied, 541 U.S. 977, 158 L. Ed. 2d 475, 124 S. Ct. 1885 (2004); Barnhill v. State, 834 So. 2d 836, 849-50 (Fla. 2002); Bowles v. State, 804 So. 2d 1173, 1178 (Fla. 2001) ("Strangulation of a conscious murder victim evinces that the victim suffered through the extreme anxiety of impending death as well as the perpetrator's utter indifference to such torture.").

In addition to the evidence of strangulation, the state presented evidence that Ms. Gayheart suffered close to two hours of physical and emotional torture at the hands of both Wainwright and his co-defendant. Wainwright's deliberate indifference to the unimaginable horror and anxiety Ms. Gayheart suffered would, standing alone, warrant a finding the murder was HAC. Walker v. State, 957 So. 2d 560 (Fla. 2007)(A finding of HAC can be supported by the physical or mental torture suffered by the victim prior to death. Murder was HAC when the victim was forced to endure fear, emotional strain, terror, torture and pain for several hours before death); Owen v. State, 862 So. 2d 687 (Fla. 2003)(unimaginable

anxiety and fear noted in court's determination the murder was HAC).

Finally, as discussed more fully above, the evidence, even when weighed with Hamilton's unsworn statement, overwhelmingly supports a finding that Wainwright personally sexually battered Ms. Gayheart. Both his admissions and the DNA evidence point conclusively to the fact that Wainwright was a full and active participant in the kidnapping, robbery, and sexual battery of Carmen Gayheart. Accordingly, Wainwright has failed to show Hamilton's allegation that he alone sexually battered Ms. Gayheart would likely result in the elimination of the HAC aggravator at re-trial.

(c) **Probability of a life sentence**

In weighing and considering Hamilton's statement, along with all the other evidence actually admitted at trial, this court concludes there is no reasonable probability of a life sentence upon re-trial. The jury in this case unanimously recommended that Wainwright be sentenced to death. This court found, and the Florida Supreme Court did not disturb, six weighty aggravators and weighed them against minimal mitigation. All six aggravators are fully supported by the evidence even if one takes away Wainwright's personal participation in the sexual battery. The evidence established that Wainwright was a full and active participant in the series of events leading up to the murder of Carmen Gayheart. Wainwright failed to establish Hamilton's statement would probably result in a life sentence upon re-trial. See Lightbourne v. State, 841 So. 2d 431,442 (Fla. 2003).

Wainwright's claim of newly discovered evidence as to the penalty phase is **DENIED**.

(SPCR 40-50).

C. **Applicable Law**

In order to be entitled to a new trial on the basis of newly discovered evidence, Wainwright must show: (1) the

evidence was unknown by the trial court, by the party, or by counsel at the time of trial and the defendant or his counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Jones v. State, 709 So. 2d 512, 521 (Fla. 1998). See also Robinson v. State, 865 So. 2d 1259, 1262 (Fla. 2004).

Even if a defendant's "newly discovered evidence" would not disturb the defendant's conviction, a defendant is entitled to a new penalty phase if he meets the first prong of the Jones standard and demonstrates the newly discovered evidence is of such a nature that it would probably result in a life sentence. Rutherford v. State, 926 So. 2d 1100, 1108 (Fla. 2006); Robinson v. State, 865 So. 2d 1259, 1262 (Fla. 2004); Ventura v. State, 794 So. 2d 553, 571 (Fla. 2001) (quoting Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992)). In determining whether the evidence compels a new trial or new penalty phase, the collateral court must consider all newly discovered evidence which would be admissible and evaluate the weight of both the newly discovered evidence and the evidence which was actually introduced at the trial. Glock v. Moore, 776 So. 2d 243, 250 (Fla. 2001).



Recantation testimony, like the evidence offered here, may qualify as newly discovered evidence.<sup>10</sup> However, this Court has observed that recanted testimony is exceedingly unreliable. Accordingly, this Court has admonished trial courts to deny a defendant's post-conviction motion for a new trial if it is not satisfied that the new testimony is true. Kormondy v. State, 32 Fla. L. Weekly S 627 (Fla. October 11, 2007).

D. **Merits**

(1) **Guilt Phase**

In his successive motion for post-conviction relief, Wainwright alleged Hamilton's admission that he was the lone rapist, if heard by a jury upon re-trial, probably would produce an acquittal of first degree murder. (PCR 7). Wainwright's assertion is not supported in law or logic.

First, Wainwright was convicted of first degree murder on a general verdict form. (TR Vol. VII 1136). The jury was instructed it could find Wainwright guilty under a theory of premeditated murder, felony murder, or both. (TR Vol. XXVII 3627-3629). Hamilton's admission that he is the lone rapist would do nothing to disturb Wainwright's conviction for first degree murder under a premeditated murder theory. Accordingly,

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<sup>10</sup> This is not typical recantation evidence because Hamilton did not testify at Wainwright's trial. Instead, Hamilton's statements to police came into evidence before Wainwright's jury because Wainwright, himself, introduced them into evidence.

Hamilton's admission would not probably result in an acquittal of first degree murder. Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)(ruling that a new trial is warranted only if the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial).

Hamilton's admission would not even disturb Wainwright's conviction for first degree murder on a felony murder theory. In addition to sexual battery, Wainwright was convicted of armed kidnapping and armed robbery. (TR Vol. VII 1137). Both armed robbery and armed kidnapping are underlying felonies to felony murder. *Section 782.04(1)(a) (2)(d) and (2)(f), Florida Statutes*. Accordingly, even if Wainwright were to be acquitted of sexual battery at a new trial based on Hamilton's statement, Wainwright is still guilty of first degree felony murder.

However, Hamilton's admission would not likely result in an acquittal of sexual battery upon re-trial because Wainwright is still guilty of sexual battery as a principal. *Section 777.011, Florida Statutes (1994)*. *Section 777.011, Florida Statutes* provides that any person who aids or abets an offense to be committed is a principal in the first degree and may be charged, convicted, or punished as if he had personally committed the crime. Staten v. State, 519 So. 2d 622 (Fla.1988).

In this case, both Hamilton and Wainwright kidnapped Carmen Gayheart, a mother of two, from the parking lot of a Winn-Dixie

grocery store. Because they initially had two vehicles (a stolen and overheating green Cadillac and Ms. Gayheart's Bronco), Wainwright drove one vehicle and Hamilton the other. Both Wainwright and Hamilton ditched the green Cadillac and continued together to the location whether they would terrorize, strangle, and eventually shoot Ms. Gayheart to death. As found by the court in the sentencing order, Hamilton raped Ms. Gayheart while Wainwright drove. (TR Vol. VII 1172).

Even if Hamilton alone raped Ms. Gayheart, Wainwright actively participated in the entire chain of events whereby Ms. Gayheart was robbed, kidnapped, sexually assaulted and brutally murdered. At the very least, Wainwright aided and abetted the sexual battery when he drove the vehicle while Hamilton sexually battered Ms. Gayheart.

Wainwright's presence at the scene, his active participation in the kidnapping, robbery and murder, and his actions in facilitating Hamilton's sexual assault, including acting as a lookout/driver, establishes that Wainwright is guilty as a principal of sexual battery. Fryer v. State, 102 So. 2d 41 (Fla. 1<sup>st</sup> DCA 1958) (a lookout man actively participates in the crime and is guilty of the charged crime as a principal). Hamilton's admission he was the lone rapist would not probably result in Wainwright's acquittal of sexual battery upon re-trial.

Finally, Wainwright is entitled to no relief, in any event, because Hamilton's affidavit does not rise to the level of evidence that would probably result in an acquittal upon re-trial for at least two reasons. First, if Hamilton testified consistently with his July 22, 2006 statement, he would be impeached with evidence introduced at Wainwright's trial, that Hamilton admitted to Officer Bobby Kinsey and Sheriff Harrell Reid that both he and Wainwright raped Ms. Gayheart. (TR Vol. XXVI 3493, 3505).<sup>11</sup> Second, Hamilton's claim he was the lone rapist is inconsistent with the evidence produced at trial including DNA evidence and Wainwright's own admissions to law enforcement and to a fellow inmate.

At trial, the state called two DNA experts to testify. Dr. DeGuglielmo testified that DNA testing revealed that Wainwright's semen was found on a portion of a seat-cover from the back of Carmen Gayheart's Bronco. Mixed in this stain was an epithelial fraction (skin cell) consistent with Carmen Gayheart. (TR Vol. XXIV 3234).

Likewise, Dr. James Pollack, a forensic serologist with the Florida Department of Law Enforcement (FLDE), testified that RFLP DNA testing revealed that Wainwright's sperm was found on a cutting from the rear seat of Carmen Gayheart's Bronco. (TR

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<sup>11</sup> DNA evidence linked both Hamilton and Wainwright to the sexual battery.

Vol. XXIII 3155, 3158). Dr. Pollack told the jury that the chance of anyone other than Wainwright being the donor of the sperm was one in six billion Caucasians. (TR Vol. XXIII 3158).

Moreover, Wainwright told Gary Gunter that both he and Hamilton "had sex" with Carmen Gayheart. (TR Vol. XXI 2742). Wainwright told Gunter he and Hamilton "made her suck them off." (TR Vol. XXI 2742).

Wainwright also confessed to Sheriff Reid he "had sex" with Ms. Gayheart. (TR Vol. XX 2656). Wainwright told Sheriff Reid that after he and Hamilton had gotten off the interstate and found a wooded area, the area Wainwright described as the murder scene, he made Ms. Gayheart get into the back of the Bronco. Wainwright told Sheriff Reid he raped her and had sex with her while she was naked. (TR Vol. XX 2656). Sheriff Reid told the jury that Wainwright made this admission to him in the presence of Wainwright's defense counsel, Victor Africano. (TR Vol. XX 2656). None of this testimony has been recanted.

Given the evidence that was introduced at trial, including the DNA evidence and his own admissions, Wainwright has failed to show Hamilton's "confession" would probably produce an acquittal of either first degree murder or sexual battery. Accordingly, the denial of his claim of newly discovered evidence as to the guilt phase should be affirmed.

(2) **Penalty Phase**

In his successive motion, Wainwright asserted that even if the newly discovered evidence would not create a likelihood of acquittal upon re-trial, eliminating consideration of the sexual battery would probably result in a life sentence if a new penalty phase was ordered. (SPCR 7). Wainwright also suggested that elimination of the sexual battery charge would preclude a finding of the "in the course of a felony" and HAC aggravators. (SPCR 6-8).

(a) **Murder in the course of a felony**

Even assuming a jury upon re-trial would acquit Wainwright of sexual battery (which the state does not believe would be the case), the jury, as well as the sentencing judge, would find the murder was committed in the course of a felony. In addition to sexual battery, Wainwright was convicted of armed robbery and armed kidnapping. (TR Vol. VII 1137). Conviction for either felony supports a finding by both the jury and the trial court that the murder was committed in the course of an enumerated felony. *Section 782.04(1)(a)(2), Florida Statutes*. Wainwright's suggestion that an acquittal of the sexual battery charge would eliminate the "murder in the course of a felony" aggravator is without merit.

(b) HAC

Wainwright is also mistaken when he alleges an acquittal of sexual battery would eliminate the HAC aggravator upon re-trial. In his sentencing order, the trial court considered evidence that both defendants sexually battered Ms. Gayheart.

However, as found by the collateral court, Hamilton's affidavit would do nothing to eliminate several other circumstances considered by the trial court in determining the murder was especially heinous, atrocious, or cruel, including: (1) the victim was made to ponder her fate for at least one and one quarter to one and one half hours en route to the kill site; (2) Hamilton sexually battered Ms. Gayheart while Wainwright drove; (3) the victim cried and asked to be released but instead was murdered; (4) Wainwright strangled the victim, an act, if done with deadly force, would take approximately 30 seconds to render her unconscious; (5) Ms. Gayheart's body shook while resisting death causing Wainwright to describe the victim during the strangulation as being like "a puppy when you hit it in the head; and (6) Ms. Gayheart endured another thirty minutes of terror at the hands of Hamilton and Wainwright at the kill site before they murdered her. (TR Vol. VII 1173).

Just strangulation alone would have been sufficient to establish the murder was HAC. Johnson v. State, 969 So. 2d 938 (Fla. 2007)(strangulation of a conscious victim is HAC); Huggins

v. State, 889 So. 2d 743, 770 (Fla. 2004)(HAC supported when there is no evidence the victim was unconscious when she was strangled); Conde v. State, 860 So. 2d 930 (Fla. 2003); Barnhill v. State, 834 So. 2d 836, 849-50 (Fla. 2002); Bowles v. State, 804 So. 2d 1173, 1178 (Fla. 2001) ("Strangulation of a conscious murder victim evinces that the victim suffered through the extreme anxiety of impending death as well as the perpetrator's utter indifference to such torture.").

In addition to the evidence of strangulation, the state presented evidence that Ms. Gayheart suffered close to two hours of physical and emotional torture at the hands of both Wainwright and his co-defendant. Wainwright's deliberate indifference to the unimaginable horror and anxiety Ms. Gayheart suffered would, standing alone, warrant a finding the murder was HAC. Walker v. State, 957 So. 2d 560 (Fla. 2007)(A finding of HAC can be supported by the physical or mental torture suffered by the victim prior to death. Murder was HAC when the victim was forced to endure fear, emotional strain, terror, torture and pain for several hours before death); Owen v. State, 862 So. 2d 687 (Fla. 2003)(unimaginable anxiety and fear noted in court's determination the murder was HAC).

Wainwright has failed to show Hamilton's allegation that he was the lone rapist would probably a result in the elimination of the HAC aggravator at re-trial. The collateral court



properly found that Hamilton's admission would not undermine confidence in the court's finding the murder was especially heinous, atrocious or cruel.

(c) Acquittal of sexual battery would persuade the jury to recommend life

Finally, the trial court properly determined that Hamilton's admission would not likely result in a life sentence upon re-trial. In his successive motion, Wainwright presented no "new evidence" that would have any impact on four of the aggravators found by the trial court, including that the murder was cold, calculated, and premeditated and Wainwright is simply wrong when he claims that Hamilton's admission would eliminate HAC and the murder was committed in the course of an enumerated felony aggravator. At trial, Wainwright offered little mitigation evidence and he offered nothing more, in mitigation, during his initial post-conviction proceedings. (PCR Vol. III). The jury in this case recommended Wainwright die by a vote of 12-0.

The collateral court's finding that Hamilton's admission would not probably result in a life sentence is supported by the record before this Court. This Court should affirm.

**CONCLUSION**

Based upon the foregoing, the State requests respectfully that this Court affirm the summary denial of Wainwright's successive motion for post-conviction relief.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Joseph Hobson, Esq., Hobson Law Firm, P.A., 28100 US 19N Suite 509, Clearwater, Florida 3376 this 21st of May 2008.

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MEREDITH CHARBULA  
Assistant Attorney General

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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MEREDITH CHARBULA  
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