IN THE SUPREME COURT OF FLORIDA

MARK ALLEN DAVIS

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC08-1808
L.T. No. 85-8933 CFANO
Death Penalty Case

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

References to the record in this brief are as follows:

References to the direct appeal record on appeal will be designated as (DAR Vol. #/page #).

References to the original postconviction record on appeal will be designated as (PCR Vol. #/page #). The postconviction transcripts will be cited as (PCT Vol. #/page #).

References to the instant successive postconviction record on appeal will be designated as (SPCR Vol. #/page #).

PROCEDURAL HISTORY

Defendant Davis was charged by Indictment filed August 18, 1985, with the first degree murder, robbery and grand theft of victim Orville Landis, occurring on July 1-2, 1985. Davis was convicted of first degree murder, robbery and grand theft. Following the jury's eight to four death recommendation, the trial court found four aggravating factors, no mitigating factors and imposed the death sentence. This Court affirmed the judgment and sentence on direct appeal. *Davis v. State*, 586 So. 2d 1038 (Fla. 1991). The United States Supreme Court vacated judgment and remanded the case for further consideration in light of *Espinosa v. Florida*, 505 U.S. 1079 (1992). *See Davis v. Florida*, 505 U.S. 1216 (1992). On remand, this Court again affirmed the death sentence. *Davis v. State*, 620 So. 2d 152 (Fla. 1993), *cert. denied*, 510 U.S. 1170 (1994).

Prior State Postconviction Proceedings

Davis sought postconviction relief and following an evidentiary hearing, the trial court denied relief. Davis appealed that order and also filed a habeas corpus petition in this Court. The court affirmed the trial court's denial and also denied habeas relief. *Davis v. State/Crosby*, 928 So. 2d 1089 (Fla. 2005), *cert. denied*, 549 U.S. 895 (2006). This Court subsequently denied a successive habeas corpus petition [*Roper v. Simmons* claim]. *Davis v. McDonough*, 933 So. 2d 1153 (Fla. 2006).

The facts are set forth in the opinions of this Court affirming the conviction of January 20, 1987, and death sentence, *Davis v. State*, 586 So. 2d 1038 (Fla. 1991); 620 So. 2d 152 (Fla. 1993), and affirming denial of Defendant's Rule 3.850 Motion to Vacate, after evidentiary hearing. *Davis v. State*, 928 So. 2d 1089 (Fla. 2005).

> Davis was convicted of robbery, grand theft, and the first-degree murder of Orville Landis. See *Davis v. State*, 586 So. 2d 1038, 1039 (Fla. 1991), *vacated*, 505 U.S. 1216, 120 L. Ed. 2d 893, 112 S. Ct. 3021 (1992). The jury, by a vote of eight to four, recommended the death penalty. *See id*. Following that recommendation, the trial judge sentenced Davis to life in prison on the robbery conviction, five years on the grand theft conviction, and death for the first-degree murder conviction. On direct appeal, we affirmed Davis's conviction for first-degree murder and death sentence. *See id.* at 1042. In affirming Davis's conviction and sentence, we detailed the facts surrounding the murder of Landis:
>
> > [Davis] came to St. Petersburg, Florida, during late June 1985, and immediately prior to the murder of Orville Landis apparently had been living in the parking lot of Gandy Efficiency Apartments. On July 1, 1985, Landis was moving into one of the apartments, and [Davis] offered to assist him. Subsequent to moving, the two men began drinking beer together, and [Davis] borrowed money from Landis. Witnesses testified that Landis had approximately $500 in cash that day. [Davis] told Kimberly Rieck, a resident of the apartment complex, that he planned to get Landis drunk and "see what he could get out of him." During approximately the same time, [Davis] told Beverly Castle, another resident, that he was going to "rip him [Landis] off and do him in." Shortly thereafter, Landis and [Davis] were seen arguing about money and they went to Landis' apartment.
> >
> > Landis was last seen alive on July 1, 1985, at approximately 8:30 p.m. Castle testified that [Davis] appeared at her door at about midnight and

> told her that he had to leave town right away, and would not be seen for two or three years. Castle observed [Davis] driving away in Landis' car. During the afternoon of July 2, Castle became concerned and had Landis' apartment window opened, through which she observed him lying on his bed in a pool of blood.
>
> When the police arrived they found Landis' wallet empty of all but a dollar bill. A fingerprint found on a beer can in the apartment was later identified as [Davis's]. The medical examiner testified that the victim sustained multiple stab wounds to the back, chest, and neck; multiple blows to the face; was choked or hit with sufficient force to break his hyoid bone; was intoxicated to a degree that impaired his ability to defend himself; and was alive and conscious when each injury was inflicted. The evidence showed that the slashes to the victim's throat were made with a small-bladed knife, which was broken during the attack, and the wounds to the chest and back were made with a large butcher knife, found at the crime scene.
>
> [Davis] confessed to the police to the killing, as well as to the taking of Landis' money and car. He also told a fellow inmate that he killed Landis but expected to "get second degree," despite his confession, by claiming self-defense.

Id. at 1040.

At the penalty phase, the State presented one witness, Detective Craig Salmon, a police officer in Pekin, Illinois. Salmon provided testimony relating to Davis's prior offense of attempted armed robbery in Illinois in 1980, which was used in part to provide the basis for the prior violent felony aggravator. Davis was the only witness to testify at the penalty phase on his behalf. The jury voted eight to four in favor of the death penalty. *See id.*

In sentencing Davis to death, the trial judge found three aggravating circumstances--that the murder was committed while Davis was under a sentence of imprisonment; that the murder was especially heinous, atrocious, or cruel ("HAC"); and that the murder was committed in a cold, calculated, and premeditated manner

> without any pretense of moral or legal justification ("CCP"). The trial court also found the following aggravators, but considered them collectively as constituting only one aggravating circumstance: that the murder was committed for pecuniary gain, that Davis had previously been convicted of another capital offense or felony involving the use of or threat of violence to some person, [fn1] and that the murder was committed while Davis was engaged in the commission of a robbery. The trial court found no mitigating circumstances.
>
> > [fn1] The trial court specifically noted that Davis had been convicted of the crime of attempted armed robbery when he was sixteen years of age but that he was convicted and sentenced as an adult. Additionally, the trial court noted that Davis was found guilty of robbery in the instant case.

Davis v. State, 928 So. 2d 1089, 1102-03 (Fla. 2005).

Davis then filed a petition for writ of habeas corpus in the United States District Court, Middle District of Florida on April 19, 2007 to which the State filed a motion to dismiss. On or about February 19, 2008, Davis filed a motion to hold his federal habeas proceedings in abeyance pending resolution of a successive motion to vacate filed in the circuit court. On February 27, 2008, the federal court issued an Order granting Davis' motion to hold the proceedings in abeyance.

Davis' successive motion to vacate (SPCR1/1-36), alleging a *Brady/Giglio* violation and that Florida's lethal injection procedures allegedly constitute cruel and unusual punishment, was denied July 3, 2008, (SPCR2/200-309) after a case management conference. (SPCR3/340-405) A timely notice of appeal to this Court was filed. (SPCR2/321-22)

SUMMARY OF THE ARGUMENT

The State contends that where, as here, the pleadings failed to conform to the requirements of Florida Rule of Criminal Procedure 3.851(e)(2)(C) for failing to state the telephone number of the newly discovered witness, a statement that the witness is available to testify at an evidentiary hearing, and why the witness was not previously available, the court properly denied the claim without a hearing. Moreover, because the record established that the witnesses had been available for years, the court correctly found that the evidence was not newly discovered and it would probably not produce an acquittal at trial or a lesser sentence in the penalty phase.

Moreover, the alleged new evidence did not establish either that any material information was withheld or false evidence presented or that counsel was ineffective for failing to discover the statements.

The trial court also properly denied the challenge to the lethal injection protocols as this Court has repeatedly denied similar challenges.

ARGUMENT

ISSUE I

THE CIRCUIT COURT PROPERLY SUMMARILY DENIED DAVIS' SUCCESSIVE RULE 3.851 MOTION WHERE THE MOTION FAILED TO COMPLY WITH PLEADING REQUIREMENTS OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.851(E)(2)(C) AND THE CLAIMS PRESENTED WERE REFUTED BY THE RECORD AND/OR UNTIMELY.

Appellant's first claim is that the lower court erred in denying his successive postconviction motion without an evidentiary hearing. The State contends that where, as here, the pleadings failed to conform to the requirements of Florida Rule of Criminal Procedure 3.851(e)(2)(C) for failing to state the telephone number of the newly discovered witness, a statement that the witness is available to testify at an evidentiary hearing, and why the witness was not previously available, the court properly denied the claim without a hearing. Moreover, because the record established that the witnesses had been available for years, the court correctly found that the evidence was not newly discovered and it would probably not produce an acquittal at trial or a lesser sentence in the penalty phase.

A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing is subject to *de novo* review. *Ventura v. State*, 2009 Fla. LEXIS 131, 7-8 (Fla. Jan. 29, 2009) ("postconviction court's decision regarding whether to grant a rule

3.851 evidentiary hearing depends upon the written materials before the court; thus, for all practical purposes, its ruling is tantamount to a pure question of law and is subject to *de novo* review.")

This Court has held that a successive motion for postconviction relief may be summarily denied if conclusively refuted by the record or facially invalid. *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006), quoting *McLin v. State*, 827 So. 2d 948, 954 (Fla. 2002), quoting *Foster v. Moore*, 810 So. 2d 910, 914 (Fla. 2002). A successive motion may be denied for failure to raise the grounds in a prior motion, unless based on newly discovered evidence. *Owen v. Crosby*, 854 So. 2d 182, 187 (Fla. 2003); *Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997). It is the Defendant's "burden of demonstrating why the claim was not raised before." *Riechmann v. State*, 966 So. 2d 298, 305 (Fla. 2007). "A second or successive motion for postconviction relief can be denied on the ground that it is an abuse of process if there is no reason for failing to raise the issues in the previous motion." *Owen v. Crosby* at 187. In *Riechmann*, the Court agreed that the successive claim was procedurally barred and properly summarily denied because the record revealed that trial counsel was aware of the facts on which the successive claim was based. A claim of newly discovered evidence must be filed within one year of discovery or when it could have been discovered with due diligence. *Glock v. Moore*, 776

So. 2d 243, 250-251 (Fla. 2001). In *Riechmann*, at 304, the Court affirmed that the successive Motion was time-barred for failure of Defendant to have exercised due diligence.

The successive motion raised two issues purportedly under the exception for newly discovered evidence. The first concerned witnesses Kimberly Rieck and Beverly Castle and the second challenged Florida's procedures for execution. A claim to vacate a judgment or sentence which is based on newly discovered evidence may be summarily denied when the evidence relied on is not new or probably would not produce acquittal on retrial or yield a less severe sentence. *Diaz v. State*, 945 So. 2d 1136, 1144-45 (Fla. 2006), citing *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991). *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007), citing *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). Newly discovered evidence is defined by this Court as concerning "facts that were 'unknown by the trial court, by the party, or by counsel at the time of trial' and which could not have been discovered by the Defendant or counsel through the use of due diligence." *Downs v. State*, 740 So. 2d 506, 514 (Fla. 1999).

The trial court is to consider only the alleged newly discovered evidence which would be admissible and compare it with the trial testimony. If admissible, the court is to consider whether the newly discovered evidence goes to the merits of the case or is mere impeachment or merely cumulative and whether there

are inconsistencies. *Williamson v. State*, 961 So. 2d 229, 234 (Fla. 2007), citing *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996); *Jones*, 591 So. 2d at 916 and *Jones*, 709 So. 2d at 521; *Tompkins v. State*, 980 So. 2d 451, 457 (Fla. 2007).

The lower court denied the request for an evidentiary hearing explaining:

> **Pleading Requirements of Florida Rule of Criminal Procedure 3.851(e)(2(C)**
>
> The State is correct that the Defendant's pleadings fail to conform to rule 3.851(e)(2)(C) which states that the Defendant, when pleading newly discovered evidence based on Brady v. Maryland, 373 U.S. 83 (1963), or Giglio v. United States, 405 U.S. 150 (1972), must 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."
>
> Not only are no phone numbers provided for Kimberly Rieck and Beverly Castle, contrary to the requirement of rule 3.851(e)(2)(C)(i), but the Defendant fails to allege that the witnesses would be available to testify under oath should an evidentiary hearing be scheduled or provide a statement as to why the witnesses were not previously available. Furthermore, in footnote 9 of the Defendant's motion he further claims that Rosa Greenbaum, Mark McKeown, Jeffrey Walsh, and John White, are more witnesses that support his claim. However, not only are no phone numbers given for these witnesses or statements as to their availability, but no factual basis as to why an evidentiary hearing is sought with regard to these witnesses is provided.

Newly Discovered Evidence

While the Defendant claims that Kimberly Rieck's and Beverly Castle's statements are newly discovered because the Defendant was only recently able to interview the witnesses, the Defendant fails to allege what previous efforts were made to locate and interview them. For the motion to be considered timely, the Defendant is required to have filed the successive rule 3.851 motion within one year of when the claim became discoverable through due diligence.

The Defendant fails to provide an explanation as to why he would have trouble locating the witnesses. The record shows that Kimberly Rieck, Beverly Castle's daughter, testified at trial that they were originally from Pekin, Illinois, the Defendant's home town. See Exhibit A: Jury Trial Transcript, pp. 336, 360, 392 (RAC [fn1] 917, 941, 973). Furthermore, Kimberly Rieck testified at trial that she had met the Defendant twice in Pekin, Illinois, through her boyfriend Carl Kearney, a friend of the Defendant's. See Exhibit A: Jury Trial Transcript, pp. 336-340 (RAC 917-921). And the Defendant testified during the penalty phase that his home town is Pekin, Illinois, and that he had two brothers and two sisters from there. See Exhibit B: Penalty Phase Trial Transcript, pg. 33 (RAC 1518). In addition, at the rule 3.850 evidentiary hearing held on November 5 – 9, 2001, the Defendant's sisters, Shari Uhiman and Candace Lonus, testified that they still lived in Pekin, Illinois. See Exhibit C: 3.850 Evidentiary Hearing Transcript, pp. 208, 237 (RAC 3981, 4010).

Likewise, the Defendant fails to establish that the State withheld material and exculpatory evidence and/or presented false testimony, or that trial counsel was ineffective for failing to reveal to the jury that Kimberly Rieck and Beverly Castle had a motive to lie. The State correctly argues that it is inconsistent for the Defendant to claim that it took him over twenty years to learn of Kimberly Rieck and Beverly Castle having lied at trial but that the Defendant's trial counsel should have discovered it sooner or that the State must have known about it at the time of trial. The allegations do not meet the definition for newly discovered evidence for failure to allege facts of due diligence, making the claim untimely under rule 3.851. The information was not presented within one year of when the information could have been acquired with due diligence, some of the

> information presented is not admissible, and all of the information, even in light of previous proceedings in this case, probably would not produce an acquittal given the trial evidence as well as the evidence evinced at the previous 3.850/3.851 hearing.

(SPCR2/203-205)(footnote omitted)

First, Davis admits he failed to comply with the rule requirements for filing a successive motion raising a newly discovered evidence claim by failing to provide the names, numbers and addresses of witnesses he intended to call and a statement as to why the witness or document was not previously available.[1] He contends, however, that he "cured" the failure by providing said

[1] Fla. R. Crim. P. 3.851(e)(2) provides in pertinent part:

> (2) Successive Motion. A motion filed under this rule is successive if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence. A successive motion shall not exceed 25 pages, exclusive of attachments, and shall include:
>
> * * *
>
> (C) if based upon newly discovered evidence, Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), or Giglio v. United States, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972), the following:
>
> (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.

information in his motion for rehearing. This Court recently affirmed, in part, a summary denial of the lethal injection claim presented herein based on the defendant's failure to comply with the pleading requirements of the rule:

> At the outset, Ventura failed to comply with rule 3.851(e)(2)(C) because he never attached any of the relevant lethal-injection documents to his successive postconviction motion and he did not proffer any witnesses to support his claims. For these reasons, Ventura's successive motion is legally insufficient. *See Hunter*, 33 Fla. L. Weekly at S722, S725 (holding that the defendant-appellant failed to comply with rule 3.851(e)(2)(C) because he did not attach relevant documents and did not proffer any expert witnesses to support his claim). However, even if Ventura had attached supporting documents and provided sufficient notice regarding expert witnesses, his lethal-injection claim would nonetheless remain meritless.

Ventura v. State, 2009 Fla. LEXIS 131, 8-9 (Fla. Jan. 29, 2009).

To hold that the failure to comply with the pleading requirement could be "cured" by subsequently providing the information in a motion for rehearing would completely undermine the purpose of the rule and would be a waste of valuable judicial resources. In the instant case, the motion for rehearing was filed six months after the initial motion and four months after the case management conference where defendant was on notice that he had failed to comply with the rules. There can be no good faith basis to assert that it is unfair to hold him to the rules when he made no attempt to supply the information until after relief had been denied.

Davis also contends that the trial court erred by not

accepting the newest version of Rieck and Castle's statements as true, he contends that the court dismissed the allegations not because they were refuted by the record but because they were in conflict with what was already in the record. In fact, the trial court did not decline to accept the affidavits as true. Rather, the court denied the claim because Davis failed to provide an explanation as to why he did not locate the witnesses earlier and because, when viewed as a whole, including conflicts with the evidence, the newly crafted affidavits would probably not produce an acquittal.

In the motion, Davis merely asserted, "Despite previous efforts to locate and interview Rieck and Castle, Mr. Davis was only recently able to interview the witnesses." (SPCR 1/7) Having failed to comply with the rule and present a motion sworn to by the defendant alleging the factual basis for failing to interview the known trial witnesses, counsel asserted during the case management conference that she was entitled to an evidentiary hearing to establish due diligence. (SPCT 1/10) In response to the State's objection to her testifying at the case management conference, counsel subsequently offered to provide evidence of due diligence in a supplemental or amended motion. (SPCT 1/12) No such motion was ever presented to the court. Notably, even the motion for rehearing was nothing more than the same barebones allegations argued at the case management conference that they conducted

computer searches in 2000 and traveled to Illinois to determine the location of Rieck and Castle. The only specifics counsel offered were that they got an address for Castle but could not make contact at that address despite repeated attempts.[2] (SPCR 2/311) A few attempts over the span of a decade does not amount to due diligence.

Beyond that one insufficient explanation, nothing in the motion to vacate, oral argument or the motion for rehearing explains what actions were taken to locate these witnesses in the year immediately preceding the filing of the successive motion, much less the eight years following the filing of the initial motion. It is not enough for Davis to say that they looked in 2000 and could not contact the witnesses and, therefore, they were "off the hook" until they decided to once again look for the witnesses in 2008. To satisfy the time requirements for newly discovered evidence Davis must show that with due diligence the evidence could not have been discovered within one year of the filing of the successive motion. *Glock v. Moore*, 776 So. 2d 243, 250-251 (Fla. 2001) (A claim of newly discovered evidence must be filed within one year of discovery or when it could have been discovered with due diligence.) The motion was properly denied as insufficiently plead and untimely.

[2] Rieck is Castle's daughter and the same address for them was provided in the Successive Motion, as 1013 Charles Street, Pekin, Illinois 61554.

With regard to the impact of the newly crafted version of Rieck and Castle's statements, even accepting the statements as true, the court must still put them in the context of the trial evidence in determining if an evidentiary hearing is warranted under the newly discovered evidence standard. *Henyard v. State*, 992 So. 2d 120, 127-128 (Fla. 2008) (upholding summary denial of "newly discovered" evidence that co-defendant was the shooter); *Tompkins v. State*, 980 So. 2d 451, 458-59 (Fla. 2007) (affidavit contradicting part of the trial testimony, but not providing credible new evidence that another person may have committed the murder, was insufficient to require an evidentiary hearing); *Diaz v. State*, 945 So. 2d 1136, 1145-46 (Fla. 2006) (claim of newly discovered evidence of affidavit of a trial witness who stated he had not heard Diaz say he shot the victim as he testified at trial, but had inferred it from his hand motions properly summarily denied.) The trial court, in the instant case, properly concluded that no hearing was warranted because the evidence probably would not produce an acquittal given the trial evidence as well as the evidence evinced at the previous 3.850/3.851 hearing. (SPCR 2/205)

For all of the foregoing reasons the denial of the evidentiary hearing and the motion should be affirmed.

ISSUE II

THE TRIAL COURT PROPERLY DENIED THE SUCCESSIVE RULE 3.851 CLAIM OF NEWLY DISCOVERED EVIDENCE THAT THE STATE WITHHELD MATERIAL AND EXCULPATORY EVIDENCE AND/OR PRESENTED FALSE TESTIMONY, OR TRIAL COUNSEL WAS INEFFECTIVE IN REPRESENTING DEFENDANT.

Davis next claims that the trial court erred in denying his claim that the affidavits of Beverly Castle and an unnotarized declaration of Kimberly Rieck Kearney, both dated November 9, 2007, was newly discovered evidence which established that the state either withheld information or knowingly presented false evidence or that defense counsel was ineffective.[3] The motion clamed these recent statements were newly discovered because "[d]espite previous efforts to locate and interview Rieck and Castle, Mr. Davis was only recently able to interview the witnesses." (SPCR 1/7)

As previously noted, the allegations do not meet the definition for newly discovered evidence for failure to allege facts of due diligence. The Claim is untimely under Rule 3.851 as not presented within one year of when the information could have

[3] Davis has made a general reference to *Giglio v. United States*, 405 U.S. 150 (1972) but has made no effort to explain how any of the requirements of *Giglio* were met in this case and the trial court found that Davis had failed to argue that the State knew of any false testimony and allowed the witnesses to testify to the contrary. Accordingly, this claim was properly summarily denied. *See Bates v. State*, 2009 Fla. LEXIS 142 (Fla. Jan. 30, 2009)("To the extent that Bates' postconviction motion can be read to also allege a violation of *Giglio v. United States*, [citation omitted], we affirm the summary denial of that claim.")

been obtained with due diligence. Some of the information is not admissible and all of it would not probably produce an acquittal when compared with the trial evidence. Just as the successive motion fails to establish newly discovered evidence, it also fails to establish that the State withheld material and exculpatory evidence and/or presented false testimony, or that trial counsel was ineffective in representing Defendant. It is inconsistent for postconviction defense counsel to claim that it took them over twenty years to learn of Kimberly Rieck's and Beverly Castle's having lied at trial (Motion, at page 7), but trial defense counsel should have discovered it sooner and that the State must have known about it at the time of trial when there is no evidence of either.

The lower court denied relief stating:

> **Brady and Giglio Claims**
>
> With regard to the Defendant's claim of Brady violations, the Defendant has the burden of establishing that the favorable evidence, either exculpatory or impeaching, was willfully or inadvertently suppressed by the State, and because the evidence was material, the Defendant was prejudiced. See Strickler v. Greene, 527 U.S. 263 (1999); Way v. State, 760 So. 2d 903, 910 (Fla. 2000). In order to establish a Giglio violation the Defendant must show that the State presented or failed to correct false testimony, that the State knew that the testimony was false, and that the false evidence was material. See Guzman v. State, 942 So. 2d 1045, 1050 (Fla. 2006); Doorbal v. State, --- So. 2d --- (Fla. Feb. 14, 2008), WL 38274233, Fla. L. Weekly S 107. The Defendant fails to argue that the State knew of any false testimony and allowed the witnesses to testify to the contrary. Furthermore, under Brady the Defendant fails to show prejudice since the nondisclosure of impeachment evidence is material only if there is a reasonable probability that had the evidence been disclosed the

result of the proceeding would have been different. See Ventura v. State, 794 So. 2d 553, 563 (Fla. 2001). Under Giglio, a statement is material if "there is a reasonable probability that the false evidence may have affected the judgment of the jury...." Id. citing Routly v. State, 590 So.2d 397, 400 (Fla.1991). As discussed below, that statements fail to meet the materiality standard.

Ineffective Assistance of Counsel and Prejudice

Even if the statements attached by the Defendant were timely filed, newly discovered evidence, the contents of the statements would probably not produce either an acquittal at trial or a lesser sentence in the penalty phase. The Defendant's confession, as well as the trial testimony of Kimberly Rieck and Beverly Castle, which is consistent with their statements made the day the victim's body was found on July 2, 1985, and was used by the Defendant's trial counsel to impeach them, support the jury's verdict. Accordingly, the Defendant fails to show prejudice of Kim Rieck's or Beverly Castle's statements. See Doorbal v. State, --- So. 2d --- (Fla. Feb. 14, 2008), WL 38274233, Fla. L. Weekly S 107.

The Defendant's trial counsel, John Thor White, testified at the 2001 evidentiary hearing of the Defendant's 3.850 Amended Motion to Vacate that because of the Defendant's detailed confession to law enforcement officers, the facts relating to the guilt phase "were pretty well developed and undisputed." See Exhibit C: 3.850 Evidentiary Hearing Transcript, pg. 507 (RAC 4280). He stated that "[t]here wasn't any question that the victim, Mr. Landis, was stabbed to death by my client...." See Exhibit C: 3.850 Evidentiary Hearing Transcript, pg. 522 (RAC 4295). Trial counsel explained that the defense strategy was to make the confession as credible as possible to support second degree murder by characterizing the Defendant's actions on the victim as frenzied and blame them on the victim's having propositioned and attacked the Defendant homosexually, and to have the Defendant's intoxication in evidence raise doubt about the State's evidence supporting premeditation. See Exhibit C: 3.850 Evidentiary Hearing Transcript, pp. 523-530, 539- 540 (RAC 4296-4303, 4312-4313).

Trial counsel agreed with the Defendant's post-conviction counsel at the rule 3.850 evidentiary hearing that he would have "welcomed evidence that Mr. Davis couldn't form the specific intent necessary for

premeditative or for robbery." See Exhibit C: 3.850 Evidentiary Hearing Transcript, pg. 533 (RAC 4306). He would have "wanted information that indicated that the State felt like they might not be able to establish CCP for instance because Mr. Davis was too drunk or that they were concerned with how drunk he was." See Exhibit C: 3.850 Evidentiary Hearing Transcript, pg. 534 (RAC 4307). Trial counsel felt enough evidence was presented on intoxication. See Exhibit C: 3.850 Evidentiary Hearing Transcript, pg. 534 (RAC 4307). The Florida Supreme Court agreed with this conclusion stating "trial counsel did present evidence of Davis' intoxication on the night of the crime through cross-examination of State witnesses Kimberly Rieck and Beverly Castle." Davis v. State, 928 So. 2d 1089, 1112 (Fla. 2005).

Moreover, during the penalty phase the Defendant admitted his guilt, which was consistent with his initial statement to law enforcement officers when he was apprehended in his hometown of Pekin, Illinois. See Exhibit A: Jury Trial Transcript, 681, 690, 693-701 (RAC 1262, 1271, 1274- 1282); Exhibit B: Penalty Phase Trial Transcript, pp. 33-34 (RAC 1518-1519).

Detective Rhodes and Detective Halliday testified at trial regarding the Defendant's statements to them after being arrested in Pekin, Illinois on August 6, 1985. The Defendant told them that he had been drinking beer all day with the victim and whiskey with the victim at the Golden Arrow Pub and Dave's Aqua Lounge before the victim went home to bed around 11 p.m. The Defendant had borrowed $20 from the victim during the day in exchange for holding the Defendant's tattoo equipment as collateral. After borrowing a pair of socks from Carl Kearney, the Defendant knocked on the victim's door to borrow a small amount of money from the victim told him he would have to do something in return and grabbed the Defendant in the groin. The Defendant hit the victim, knocking him down, and again knocked him down when the victim got back up. They fought into the kitchen where the victim picked up a butcher knife which the Defendant took from him and hit him with it, and with a smaller knife, with which the Defendant cut the victim's throat and stabbed him several times. See Exhibit A: Jury Trial Transcript, pp. 676, 681, 693-700 (RAC 1257, 1262, 1274-1282).

The Defendant related in great detail his putting the knife handle in the kitchen sink where he washed the blood from his hands and both knives before putting the butcher knife in the kitchen trash can, taking $80 to $85

from the victim's wallet, and taking the victim's car. He drove to Tampa where he parked the victim's car at the All Right parking lot, adjacent to the Grey Hound bus station, after seeing a police officer at the bus station. He stayed at the Floridian Motor Hotel in Tampa before taking the bus to Naples, Florida. The Defendant also related in detail his visit family with family in Naples, where he worked for about a week, his hitchhiking trip to New Orleans, his arrest in New Orleans for stealing a bottle of wine, his hitchhiking trip home to Pekin, Illinois, and his stay there with friends before his arrest. The Defendant even provided the Detectives with the receipt from the Floridian Motor Hotel, Greyhound Bus ticket, and the New Orleans arrest affidavit. See Exhibit A: Jury Trial Transcript, pp. 693-700 (RAC 1274-1282).

The Defendant was able to give a detailed recollection of the events of the day, both before and after the murder, including his version of the struggle with the victim. This precluded a legal argument of the Defendant being sufficiently intoxicated to preclude premeditation.

Most importantly, the State correctly points out that the witnesses' testimony at trial was consistent with statements they made to police the night the murder was discovered. Specifically, Beverly Castle's statement to Detective Rhodes on July 2, 1985, and trial testimony in January, 1987, regarding the Defendant's drinking and actions raised no defense or mitigation. Beverly Castle testified at trial that the Defendant arrived at the apartments about four days prior to the victim and had no money, borrowed some from her or her relatives, and had his car impounded. See Exhibit A: Jury Trial Transcript, pp. 374-375 (RAC 955-956). She stated that she heard the Defendant and the victim arguing over money during the evening. She said "Mark was calling Skip a queer and said he was going to rip the old man off." See Exhibit A: Jury Trial Transcript, pp. 380-381 (RAC 961-962). She heard the Defendant tell the victim that the victim had plenty of money and could give him some. See Exhibit A: Jury Trial Transcript, pg. 382 (RAC 963). She had seen the victim pull a large sum of money out of his pocket in front of the Defendant in an attempt to pay her his rent and deposit money of $285, which she refused to accept because it was Carl Kearney's job to receive the rent money. See Exhibit A: Jury Trial Transcript, pp. 38 1-382, 405-406 (RAC 962-963, 986-987). The Defendant

grabbed for the victim's wallet. See Exhibit A: Jury Trial Transcript, pg. 385 (RAC 966).

In addition, on cross-examination, Beverly Castle testified that she had no idea how much the Defendant had to drink the day of the murder, but she saw him with a can of beer throughout the day. See Exhibit A: Jury Trial Transcript, pp. 409-410, 412 (RAC 990-991, 993). She concluded from seeing him and the victim with a beer throughout the day that the Defendant "kept getting, you know, drunk and drunker and drunker" and told the detectives that the victim and the Defendant were both really drunk. See Exhibit A: Jury Trial Transcript, pp. 379-381, 395-397, and 412-413 (RAC 960-962, 976-978, and 993-994).

Beverly Castle's trial testimony was consistent with the transcribed statement she gave to Detective Rhodes on July 2, 1985. See Exhibit D: July 2, 1985 Interview Transcript. Beverly Castle's July 2, 1985 statement refutes her instant claim that she was in a hurry to get out of the interview or to say whatever they wanted to hear from her. Her affidavit, made more than twenty-two years after trial, fails to explain why she testified consistently at trial, under oath, if she knew her interview statement was not true.

Likewise, Kimberly Rieck's testimony at trial is consistent with her July 2, 1985 transcribed statement. At trial she testified that the Defendant borrowed ten dollars from David Keamey, her live-in boyfriend, on the Friday before the victim moved in. The day the victim moved in the Defendant told her "that he was going to take the old man for what he could." See Exhibit A: Jury Trial Transcript, pp. 346-347, 359, 367 (RAC 927-928, 940, 948). "He said get him drunk and see what he could get out of him too." See Exhibit A: Jury Trial Transcript, pg. 347 (RAC 928). This is consistent with the statement she gave Detective Rhodes on July 2, 1985. See Exhibit E: Transcript of July 2, 1985 Interview with Kimberly Rieck.

Kimberly Rieck further testified at trial that saw the victim and the Defendant drinking beer during the day, but did not know how much either one had to drink. See Exhibit A: Jury Trial Transcript, pp. 345-346, 361, 363, 367 (RAC 926-927, 942, 944, 948). About 4:30 or 5 p.m. that day, the Defendant drove Kimberly Rieck and Carl to get Carl's car. He had no trouble driving, his speech was not slurred during the day, and he was not staggering or otherwise appeared impaired to her. See Exhibit A: Jury Trial Transcript, pp. 349-350, 367-368

(RAC 930-93 1, 948-949). The Defendant took the money she and Carl gave the Defendant to get dinner at McDonald's for the three of them and they ate dinner with him at around 6 p.m. See Exhibit A: Jury Trial Transcript, pp. 351, 368 (RAC 932, 949). She last saw the Defendant about 11:30 p.m. or midnight when he came over asking to borrow a pair of socks and saying he would see them in a couple of years. He did not appear intoxicated at that time. See Exhibit A: Jury Trial Transcript, pp. 353-354 (RAC 934-935).

The declaration of Kimberly Rieck attached to the Defendant's motion now claims that the Defendant "had to have been very drunk" when he came to get the socks around 11:30 or midnight because "he had been drinking all day." However, she does not mention riding with the Defendant who drove her and Carl to pick up Carl's car about 4:30 to 5:00 p.m., or giving him money to get dinner for them at McDonald's, or eating with the Defendant at around 6:00 p.m. Kimberly Rieck does not retract her trial testimony or state that she lied but concludes now, more than twenty years later, that the Defendant must have been very drunk because she had seen him drinking all day. The State correctly points out that such speculation is not admissible evidence. The same supposition was in her taped statement, which the Defendant's trial counsel used to impeach her at trial. Kimberly Rieck told Detective Rhodes that when the Defendant asked her for a pair of socks she did not ask him why because she figured he was drunk. This was known to trial counsel and is not newly discovered evidence.

On cross-examination, Kimberly Rieck agreed with trial counsel that her recollection was more accurate at the time she gave her statement to Detective Rhodes than it was by the time of trial, a year and a half later. See Exhibit A: Jury Trial Transcript, pg. 363 (RAC 944). She does not explain why now, over twenty-two years after her July 2, 1985 statement to Detective Rhodes, she can recall better than she claimed she could at trial in January, 1987.

Kimberly Rieck states that she only testified at trial to prevent her boyfriend from remaining in jail. This reason does not explain why she gave a consistent statement to Detective Rhodes in 1985. The State argues that Carl Kearney was in jail as a hostile witness due to his own refusal to be a witness. Accordingly, Kimberly Rieck's statement that she did not want to testify but felt she had no choice is logical since she would have assumed that she would also be arrested as a hostile

> witness if she did not testify. The State further correctly notes that Ms. Rieck's current statement that she was uncomfortable with her testimony because she was uncertain of the facts and circumstances is vague, nonspecific and is consistent with her trial testimony that she was more certain of her recollection when she gave her statement to Detective Rhodes on July 2, 1985. See Exhibit A: Jury Trial Transcript, pg. 363 (RAC 944). Kimberly Rieck's and Beverly Castle's statements are not newly discovered evidence for lack of due diligence. The statements do not demonstrate false evidence known to the State. Moreover, they do not amount to evidence which would probably produce an acquittal on retrial, or mitigate the Defendant's sentence. Even if the statements were admissible their content does not go to the merits of the case. Williamson v. State, 961 So. 2d 229 (Fla. 2007). Specifically, the argument that the State suppressed statements about the Defendant's intoxication was denied after an evidentiary hearing on the prior Motion to Vacate and affirmed for lack of prejudice. Davis v. State, 928 So. 2d 1089, 1115 (Fla. 2005). Accordingly, this claim is denied.

(SPCR 2/205-10)

As the following will show, the trial court properly denied the claim.

"To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence (2) was willfully or inadvertently suppressed by the State and, (3) because the evidence was material, the defendant was prejudiced." *Kelley v. State*, 2009 Fla. LEXIS 38, 3-4 (Fla. Jan. 22, 2009), quoting, *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *see also Way v. State*, 760 So. 2d 903, 910 (Fla. 2000). "To meet the materiality prong, the defendant must demonstrate a reasonable probability that, had the suppressed evidence been disclosed, the jury would have reached a different verdict. *Strickler*, 527 U.S. at 289. 'A reasonable

probability is a probability sufficient to undermine confidence in the outcome.' *Way*, 760 So. 2d at 913 (emphasis omitted) (quoting *United States v. Bagley*, 473 U. S. 667 (1985)); *see also Strickler*, 527 U.S. at 290." *Kelley* at 4. Davis has failed to establish any of the foregoing.

First, Davis has to establish that the evidence is favorable, i.e. admissible exculpatory or impeachment evidence. Davis does not explain how the new statements are admissible. Assuming *arguendo*, they could be used to impeach the witnesses' own testimony, as the following will show, and as the lower court found, the evidence is not material as required by *Brady*.

Further, the Motion makes no allegation of the State's having actually suppressed or withheld anything beyond a suggestion that the witnesses were motivated to testify because Carl Kearney was arrested as a hostile witness. Nothing in either affidavit suggests that the police were asking them to testify untruthfully or even to give a particular testimony or that the arrest of Kearney as a hostile witness was unlawful or unknown to the parties.[4] As noted by this Court in *Doorbal v. State*, 983 So. 2d 464 (Fla. 2008), no relief is warranted where the defense has failed to show that the State knew of any false testimony and allowed a witness to testify to the contrary.

[4] In fact to the contrary, the record shows it was discussed in open court and that defense counsel had been able to depose the witness. (DAR 7/897)

Additionally, the Court found that Davis had failed to show prejudice. "Under *Brady*, nondisclosure of impeachment evidence is material if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *See Ventura v. State*, 794 So. 2d 553, 563 (Fla. 2001)."[5] Even if the affidavit and declaration were timely presented for newly discovered evidence, which they are not, the contents would not probably produce either an acquittal at trial or a lesser sentence in the penalty phase and do not satisfy the materiality standard of *Brady*. Defendant's confession and the testimony of these witnesses at trial in 1987, which was consistent with their pretrial statements, given on the day the body was found on July 2, 1985, and as used by defense counsel for their impeachment, preclude a different outcome. As in *Doorbal*, Defendant cannot show prejudice of Castle or Rieck's statements having affected the jury verdict.

During the evidentiary hearing in 2001 on Defendant's Amended Motion to Vacate, trial counsel John Thor White testified that because of Defendant's detailed confession to law enforcement, "the facts were pretty well developed and undisputed." (Evidentiary hearing transcript, (EV) 507; PCR 44/4280). "There wasn't any

[5] "Under *Giglio*, false testimony is material if there is a reasonable probability that the false evidence affected the judgment of the jury." *Doorbal v. State*, 983 So. 2d 464, 481 (Fla. 2008).

question that the victim, Mr. Landis, was stabbed to death by my client....” (EV 522; PCR 44/4295). The defense strategy had been to make the confession as credible as possible to support the lesser degree of murder by characterizing Defendant’s actions on the victim as frenzied and blame them on the victim’s having propositioned and attacked him homosexually, and to have Defendant’s intoxication in evidence to raise doubt about the State’s evidence supporting premeditation. (EV 523-530, 539-540; PCR 44/4296-4303, 4312-13).

Mr. White agreed with defense counsel at the evidentiary hearing that he would “have welcomed evidence that Mr. Davis couldn’t form the specific intent necessary for premeditate [sic] or for robbery.” (EV 526; PCR 44/4299). He would “have wanted information that indicated that the State felt like they might not be able to establish CCP for instance because Mr. Davis was too drunk or that they were concerned with how drunk he was.” (EV 533; PCR 44/4306). Mr. White felt he had enough evidence on intoxication. (EV 534; PCR 44/4307).

During his testimony in the penalty phase, Defendant admitted his guilt, as he had in his initial statement to law enforcement when apprehended in his hometown of Pekin, Illinois. (DAR 9/1262, 1271, 1274-1282, 1290-1291, 1298-1299, 1518-1519, 1521).

Both Detective Rhodes and Detective Halliday testified as to the statement Defendant gave them in Pekin, Illinois after being

arrested there on August 6. Defendant told them of drinking beer all day with the victim and whiskey with him at the Golden Arrow Pub and Dave's Aqua Lounge before the victim went home to bed about 11 p.m. Davis had borrowed $20 from the victim during the day and gave him his tattoo equipment as collateral.

After borrowing a pair of socks from Carl Kearney, Defendant knocked on the victim's door to borrow a small amount of money but the victim told him he would have to do something in return and grabbed him in the groin. Defendant hit the victim, knocking him down, and again knocked him down when the victim got back up. They fought into the kitchen where the victim picked up a butcher knife which Defendant took from the victim and began hitting him with it, on the bed, and with a smaller knife, with which he cut the victim's throat and stabbed him several times.

Defendant related in great detail his actions thereafter, of putting the knife handle in the kitchen sink where he washed the blood from his hands and both knives before putting the butcher knife in the kitchen trash can, taking $80 to $85 from the victim's wallet and taking the victim's car to Tampa where he parked it at the All Right parking Lot, adjacent to the bus station, after seeing a police officer at the bus station. On finding the bus station locked, Defendant first went to Rosie's Diner but soon left after getting into an argument with an old man. Defendant took a taxi from there to the Floridian Motor Hotel where he registered as

Allen Davidson and left a wake-up call for 5 A.M. At 5 A.M., he returned to the bus station and purchased a bus ticket to Naples, went to Naples, and threw the victim's car keys away in Naples. Defendant told the law enforcement officers of cutting off his pants leg because it had blood on it. He also had blood on his shirt but did not know what he had done either with the shirt or pants leg. At Naples he went to a pet store and asked Joy Krantz, his aunt, about Grace Krantz. Because Joy told him he had been drinking, she would give him only Grace's phone number but not her address. After talking with Grace on the phone, Defendant went to a bar and drank before spending the night at transient housing called the Animal House, right off the Tamiami Trail in Naples. The next day he went to Grace's house and borrowed $5.00. From there he went to a labor pool located on Davis Street and worked there, registered with them under his own name, staying at night in an abandoned GTO behind the labor pool location, staying about a week before leaving, and hitchhiked for New Orleans, going through Pensacola on the way there. He spent one night in New Orleans at a Baptist mission under the name of Timothy Sunday, before being arrested the next day and spending fifteen days in jail for stealing a bottle of wine. He got out on August 3rd or 4th and hitchhiked home to Pekin, Illinois, where he stayed with Trent Dean and Lisa Bush, where he was soon arrested by Pekin police.

Defendant still had, and provided Pekin Detective Greg Salmon

with, receipts from the Greyhound Bus and Floridian Motel and the New Orleans arrest affidavit. Defendant said he had received a cut on his right forefinger during his struggle with the victim, but it was no longer visible to the officers. (DAR 9/1262, 1271, 1274-1282, 1290-1291, 1298-1299).

Defendant's detailed recollection of the events of the day, both before and after the murder, including his version of the struggle with the victim, and what he did the next few days thereafter, precluded any legal argument of his being sufficiently intoxicated to obviate premeditation or for the mental health expert to have testified to mitigation.

Beverly Castle's statement to Detective Rhodes on July 2, 1985, and trial testimony in January 1987 about Defendant's drinking and actions similarly raised no defense or mitigation. Castle testified that Davis arrived at the apartments about 4 days prior to the victim and had no money, borrowed some from her or her relatives, and had his car impounded. (DAR 7/955-956). She testified that she heard Davis and the victim arguing over money during the evening. She said "Mark was calling Skip a queer and said he was going to rip the old man off." (DAR 7/961-962). She heard Davis tell the old man that he had plenty of money and could give him some. (DAR 7/963). She had seen the victim pull a lot of money out of his pocket in front of Davis, while offering to pay her his rent and deposit money of $285, which she refused because

it was Carl Kearney's job to receive the rent moneys. (DAR 7/962-963, 986-987). Davis even made a grab for the man's wallet. (DAR 7/966).

Beverly Castle testified on cross-examination that she had no idea how much Davis had to drink the day of the murder, but saw him with a can of beer throughout the day, but not at night. (DAR 7/990-991, 993). She responded to defense counsel's impeachment of her from her statement to Detective Rhodes that she had told the detective that "Mark just kept getting, you know, drunk and drunker and drunker" by her having drawn that conclusion from seeing him and the victim with a beer from morning to night. (DAR 7/960-961, 976-977, 993). Based on this she had told the detectives that both the victim and Davis were real, or bad, drunk. (DAR 7/994, 978, 981, 994).

Castle last saw Davis shortly before midnight when he knocked on her door to tell her he was leaving and would see her in two or three years. She then saw him drive off twenty to thirty minutes later in the victim's little red car. (DAR 7/966-968). She and Carl Kearney found the victim's body the next evening and saw the blood everywhere. (DAR 7/969-970).

Her trial testimony was consistent with the lengthy transcribed statement she gave Detective Rhodes on July 2, 1985. The statement refutes her claim, made over twenty-two years later, that she was in any hurry to get out of the interview or to say

whatever they wanted to hear. Castle's affidavit does not explain why she testified the same way at trial, under oath, if she knew her interview statement was not true.

Rieck testified that Davis had borrowed ten dollars from her live-in boyfriend Carl Kearney on Friday before the victim moved in a few days later. The day the victim moved in, Davis told her "that he was going to take the old man for what he could." (DAR 7/927-928,940, 948). "He said get him drunk and see what he could get out of him too." (DAR 7/928).

She saw both Davis and the victim drinking beer during the day, but did not know how much either had to drink. (DAR 7/926-927, 930, 942, 944, 948). About four-thirty or five o'clock that day, Davis had driven her and Carl to get Carl's car, and had no trouble driving, his speech was not slurred during the day, and he was not staggering or otherwise appeared impaired to her. (DAR 7/930-931, 948-949). Davis took money she and Carl gave him to go to McDonald's for dinner for the three of them and they ate the dinner with him about 6 P.M. (DAR 7/932, 949). She had last seen Davis about 11:30 or 12:00 that night when he came over asking to borrow a pair of socks and saying he would see them in a couple of years. He did not appear or sound intoxicated at that time. (DAR 7/934-935).

Rieck's unnotarized Declaration, declared under penalty of perjury, now claims that Mark "had to have been very drunk" when he

came to get socks about 11:30 or 12 at night because “he had been drinking all day.” Her declaration does not mention riding with Mark driving them in Mark’s car to go pick up Carl’s car about 4:30 to 5:00 P.M., or giving him money to go get McDonald’s for their dinner and eating with him. Rieck does not retract any of her trial testimony nor say she lied but merely surmises now, over twenty years later, that Mark must have been very drunk because she had seen him drinking all day. Such speculation is not admissible evidence, as was her testimony of what she actually observed. The same supposition was in her taped statement, which defense counsel had used to impeach her at trial. When defendant asked for a pair of socks she said in her statement that they had not asked him why, figuring he was drunk. This information was known to defense counsel and not newly discovered evidence.

Rieck agreed with defense counsel on cross-examination that her recollection was more accurate at the time she gave her statement to Detective Rhodes than it was by the time of trial, a year and a half later. (DAR 7/944). Her declaration dated November 9, 2007, over twenty-two years after her statement to Detective Rhodes on July 2, 1985, does not explain why she can now recall better than she claimed she could at trial in January of 1987.

Rieck’s excuse that she did not want to testify at trial and only did to prevent her boyfriend Carl Kearney from sitting in jail, ignores that she had given the same statement to Detective

Rhodes in 1985. Kearney's being in jail as a hostile witness was for his own refusal to be a witness. (DAR 7/897) Rieck's statement that she did not want to testify but felt she had no choice is logical, since she could have assumed that she, too, would be arrested as a hostile witness if she did not testify. Her statement that she was uncomfortable with her testimony for being uncertain of the facts and circumstances is nonspecific. Which facts and which circumstances? It is also consistent with her concession when pressed on cross examination by trial counsel that she was more certain of her recollection when she gave her statement to Detective Rhodes on July 2, 1985. (DAR 7/944)

Rieck's declaration and Castle's affidavit do not meet the newly discovered evidence standard as Davis has not established due diligence. They do not demonstrate false evidence known to the State. They do not amount to evidence which would probably produce an acquittal on retrial, or mitigate Defendant's death sentence. Nor do they establish prejudice or deficient performance on the part of defense counsel.

This claim was properly denied and should be affirmed by this Court.

ISSUE III

THE TRIAL COURT PROPERLY DENIED DAVIS' CHALLENGE TO THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION.

Davis' primary claim asserts that the court below should not have rejected his argument that Florida's current procedures for judicial execution by lethal injection violate the Eighth Amendment prohibition against cruel and unusual punishment. Davis acknowledges that the Unites States Supreme Court's decision in *Baze v. Rees*, 128 S. Ct. 1520 (2008) and this Court's decision in *Tompkins v. State*, 994 So. 2d 1072 (Fla. 2008) "foreclose relief on this claim" but that it is being raised for the purpose of preservation. As the following will show, the trial court properly denied the claim as untimely and without merit.

The circuit court denied the instant claim stating:

> The Defendant alleges that the existing procedure that the State of Florida utilizes for lethal injection violates the Eight Amendment to the United States Constitution as it constitutes cruel and unusual punishment. Specifically, the Defendant argues that the events surrounding the execution of Angel Diaz on December 13, 2006, support his claim that the lethal injection protocol in place in Florida carries a substantial risk of pain and constitutes cruel and unusual punishment. Accordingly, the Defendant argues that he should be permitted a hearing of this matter in order to present witnesses who did not testify in the Lightbourne hearing, to wit, Florida Department of Corrections (DOC) attorney Sara Dyehouse, former DOC Secretary James McDonough, Gretl Plessinger, Dr. David Varlotta, an anesthesiologist who was on the Governor's

Commission on the Administration of Lethal Injection put together after the Angel Diaz execution.

The evidence upon which this claim is based includes DOC lethal injection procedures made public in October 2006, complications occurring in the execution of death row inmate Angel Diaz in December 2006, evidence presented to the Governor's Commission on the Administration of Lethal Injection and the Commission's subsequent findings, revised DOC lethal injection procedures effective May 2007, DOC's most recent revised lethal injection procedures, which became effective in August 2007, evidence presented at the Fifth Circuit evidentiary hearing on a similar or identical claim in the case of Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), and the grant of certiorari in Baze v. Reese, 128 S. Ct. 34 (2007).

In its response the State contends that the Defendant's motion is untimely as it was filed more than one year after the December 13, 2006 execution of Angel Diaz. The State correctly points out that any *per se* challenge to lethal injection is procedurally barred as it became the method of execution in 2000. See Schwab v. State, 969 So. 2d 318, 321-322 (Fla. 2007); Sims v. State, 754 So. 2d 657, 668 (Fla. 2000). The State points out that the specific issues raised by the Defendant and the proposed testimony of witnesses were recently carefully considered by the Florida Supreme Court and found to be without merit. The Florida Supreme Court specifically addressed whether the current procedures are sufficient to ensure proper training and qualification of execution team members, and found that the procedures do so. See Lightbourne v. McCollum, 969 So. 2d 326, 349-352 (Fla. 2007). The Court also discussed at length the procedures for assessing and monitoring consciousness of the inmate and intravenous access, also finding the current procedures sufficient in these regards. Id. at 349-352.

Since the Defendant's motion and the State's response were filed, the United States Supreme Court issued its opinion in Baze v. Rees, 128 S. Ct. 1520; 21 Fla. L. Weekly Fed. S 164 (April 16, 2008)(affirming judgment of the Kentucky Supreme Court that the three-drug protocol used in lethal injection does not violate Eighth Amendment ban on cruel and unusual punishments), and, most recently, the Florida Supreme Court issued its opinion in Schwab v. State, --- So. 2d ----, 2008 WL 2553999 (Fla., June 27, 2008)(finding that Florida's procedures are substantially similar to Kentucky's three-

> drug protocol and finding no evidence that this protocol creates a demonstrated risk of severe pain).
>
> This Court is bound by the decisions in Baze v. Rees, 128 S. Ct. 1520; 21 Fla. L. Weekly Fed. S 164 (April 16, 2008), Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), Schwab v. State, 969 So. 2d 318 (Fla. 2007), and Schwab v. State, --- So. 2d ----, 2008 WL 2553999 (Fla., June 27, 2008). In Baze, the United States Supreme Court found that a lethal injection protocol substantially similar to Kentucky's does not constitute cruel and unusual punishment. The Florida Supreme Court, post-Baze, has considered the constitutionality of the Florida lethal injection protocol and found it constitutional under the Eighth Amendment. See Schwab v. State, --- So. 2d ---, 2008 WL 2553999 (Fla., June 27, 2008), Lehron [sic] v. State, 33 Fla. L Weekly S294 (Fla. May 1, 2008), Woodel v. State, 33 Fla. L Weekly S290, (Fla. May 1, 2008), Griffin v. State, Slip Copy, 2008 WL 2415856 (Fla. June 2, 2008). Accordingly, the Defendant's claim is denied, as the Defendant does not raise any claims that have not been considered and rejected by the United States and Florida Supreme Courts.

(SPCR 2/210-11)

As this Court most recently said in *Ventura v. State*, 2009 Fla. LEXIS 131, 9-10 (Fla. Jan. 29, 2009), "We have repeatedly and consistently rejected Eighth Amendment [fn4] challenges to Florida's current lethal-injection protocol. *See Tompkins v. State*, 994 So. 2d 1072, 1080-82 (Fla. 2008); *Power v. State*, 992 So. 2d 218, 220-21 (Fla. 2008); *Sexton v. State*, 33 Fla. L. Weekly S686, S691 (Fla. Sept. 18, 2008); *Schwab v. State*, 995 So. 2d 922, 924-33 (Fla. 2008); *Woodel v. State*, 985 So. 2d 524, 533-34 (Fla. 2008), *cert. denied*, 129 S. Ct. 607, 172 L. Ed. 2d 465 (2008); *Lebron v. State*, 982 So. 2d 649, 666 (Fla. 2008); *Schwab v. State*, 982 So. 2d 1158, 1159-60 (Fla. 2008); Lightbourne v. McCollum, 969 So. 2d 326, 350-53 (Fla. 2007)." (footnote omitted)

The claims presented by Davis mirror those argued by the recently executed Wayne Tompkins. Upon rejecting the argument, this Court explained:

> We first address and reject Tompkins's claim that he was deprived of his due process rights of notice, opportunity to be heard, and presentation of evidence on his challenge to Florida's lethal injection procedures. Although Tompkins acknowledges that these issues were litigated in the emergency all writs petition filed in *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007), *cert. denied*, 128 S. Ct. 2485, 171 L. Ed. 2d 777 (2008), he claims that the trial court erred in denying him the opportunity to present his own witnesses in support of his challenge to the procedures. [fn5] Specifically, Tompkins sought to present the following evidence to the trial court that he claimed was not presented in *Lightbourne*: (1) testimony from Sara Dyehouse concerning the memorandum she wrote in 2006 on the revisions to the lethal injection protocol; (2) testimony from DOC Secretary McDonough regarding the Dyehouse memorandum; (3) testimony from Gretl Plessinger concerning the Dyehouse memorandum; and (4) testimony from Dr. David Varlotta, an anesthesiologist who was a member of the Governor's Commission on Administration of Lethal Injection ("the Commission") that was created after the Diaz execution to investigate and make recommendations to the Governor.
>
> Florida Rule of Criminal Procedure 3.851 governs the filing of postconviction motions in capital cases. Rule 3.851(d)(1) generally prohibits the filing of a postconviction motion more than one year after the judgment and sentence become final. An exception permits filing beyond this deadline if the movant alleges that "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 the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2)(A). As the State acknowledges, Tompkins's challenge to the lethal injection protocol satisfies the rule 3.851(d)(2) exception because it was based on the allegedly botched December 13, 2006, execution of Angel Diaz. Rule 3.851 also provides certain pleading requirements for initial and successive postconviction motions. Fla. R. Crim. P. 3.851(e)(1)-(2). For example, the motion must state the nature of the

relief sought, Fla. R. Crim. P. 3.851(e)(1)(C), and must include "a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought." Fla. R. Crim. P. 3.851(e)(1)(D).

Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends on the written materials before the court; therefore, for all intents and purposes, its ruling constitutes a pure question of law and is subject to de novo review. *See, e.g., Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008). In reviewing a trial court's summary denial of postconviction relief, this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. *See Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006).

Although Tompkins's fourth successive postconviction motion met the pleading requirements of rule 3.851, we conclude that the trial court did not err in summarily denying his lethal injection claims. This Court has repeatedly rejected appeals from summary denials of Eighth Amendment [fn6] challenges to Florida's August 2007 lethal injection protocol since the issuance of *Lightbourne*. *See Power v. State,* 33 Fla. L. Weekly S717, S718 (Fla. Sept. 25, 2008); *Sexton v. State*, 33 Fla. L. Weekly S686, S691 (Fla. Sept. 18, 2008); *Henyard v. State*, 33 Fla. L. Weekly S629, S631-32 (Fla. Sept. 10, 2008), *cert. denied*, 171 L. Ed. 2d 930 (2008)*; Schwab v. State,* 33 Fla. L. Weekly S431, S431-34 (Fla. June 27, 2008), *petition for cert. filed,* No. 08-5020 (U.S. June 30, 2008); *Woodel v. State,* 985 So. 2d 524, 533-34 (Fla. 2008), *petition for cert. filed,* No. 08-6527 (U.S. Sept. 24, 2008); *Lebron v. State*, 982 So. 2d 649, 666 (Fla. 2008); *Schwab v. State*, 982 So. 2d 1158, 1159-60 (Fla. 2008)*; Lightbourne,* 969 So. 2d at 350-53. [fn7] As this Court stated in *Schwab v. State,* 969 So. 2d 318 (Fla. 2007), "Given the record in *Lightbourne* and our extensive analysis in our opinion in *Lightbourne v. McCollum*, we reject the conclusion that lethal injection as applied in Florida is unconstitutional." *Id.* at 325. Moreover, there have been two developments since we issued our opinion in *Lightbourne* that support our conclusion that Florida's lethal injection protocol does not constitute cruel and

unusual punishment under the Eighth Amendment. The first development was the decision of the Supreme Court of the United States in *Baze v. Rees*, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008), finding this same method of execution, consisting of lethal injection through the same three-drug combination under similar protocols, to be constitutional. Moreover, we have rejected contentions that *Baze* set a different or higher standard for lethal injection claims than *Lightbourne*. *See, e.g., Henyard*, 33 Fla. L. Weekly at S631-32 (rejecting Henyard's argument that *Baze* sheds new light on this Court's decisions because the standard for reviewing Eighth Amendment challenges was changed and noting that "[w]e have previously concluded in *Lightbourne* and *Schwab* that the Florida protocols do not violate any of the possible standards, and that holding cannot conflict with the narrow holding in *Baze*"). The second development was the performance of two executions in Florida, those of Mark Dean Schwab and Richard Henyard, with no subsequent allegations of any newly discovered problems with Florida's lethal injection process, such as the problems giving rise to the investigations following the Diaz execution.

Further, the trial court did not err in not allowing Tompkins to present additional witnesses because the proposed testimony of these witnesses does not support a departure from this Court's precedent, since it has already been considered by this Court. The Dyehouse memorandum was addressed by this Court in Lightbourne:

> With regard to the Dyehouse memorandum recommending the use of a BIS monitor to more accurately assess the level of consciousness of the inmate, it might be beneficial to incorporate a device that could monitor the inmate's level of sedation to ensure the inmate will not experience subsequent pain of execution. However, the Court's role regarding the executive branch in carrying out executions is limited to determining whether the current procedures violate the constitutional protections provided for in the Eighth Amendment.

969 So. 2d at 352. Further, as Tompkins admits, Plessinger already testified in the *Lightbourne* evidentiary hearing and her testimony was before this Court in *Lightbourne*. Finally, in our previous decisions, we fully considered the report and recommendations of the

Commission, of which Dr. Varlotta was a member, and the implementation of the report and recommendations by the DOC. *See Schwab*, 969 So. 2d at 324; *Lightbourne*, 969 So. 2d at 329-30. Based on the foregoing, we conclude that the trial court did not err in summarily denying relief on this claim. [fn8]

[fn5] Tompkins was a member of the group of death row inmates who filed an emergency all writs petition in *Lightbourne*, requesting that this Court address whether Florida's lethal injection procedures violate the Eighth Amendment in the wake of the allegedly "botched" execution of Angel Diaz in December 2006. See *id.* at 328-29. This Court dismissed the claims of all of the petitioners except petitioner Lightbourne without prejudice. *Lightbourne* v. McCollum, No. SC06-2391 (Fla. order dated February 9, 2007).

[fn6] The Florida Constitution's prohibition against "cruel or unusual punishment" "shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution." Art. I, § 17, Fla. Const.

[fn7] This Court also rejected this claim in *Marquard v. State*, No. SC08-148, 2008 Fla. LEXIS 1837 (Fla. order dated Sept. 24, 2008).

[fn8] We also reject Tompkins's claim that his due process rights were violated by an ex parte communication between the trial judge and the prosecutor concerning the need for an evidentiary hearing on Tompkins's lethal injection claim. The ex parte communication was not improper because it did not constitute a substantive discussion on the merits of Tompkins's case. *See Jimenez v. State*, 33 Fla. L. Weekly S805, S809 (Fla. June 19, 2008) (finding ex parte communication between judge and prosecutor not improper where the record established that the judge engaged in the conversation for strictly administrative reasons and the communication did not constitute a substantive discussion concerning the merits of the case); *see also* Fla. Code of Jud. Conduct, Canon 3B(7).

Tompkins v. State, 994 So. 2d 1072, 1080-82 (Fla. 2008)

The lower court properly summarily denied this claim as untimely and without merit.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the State respectfully requests that this Court AFFIRM the denial of Davis' successive motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE has been furnished U.S. mail to Linda McDermott, Esq., McClain & McDermott, P.A., 141 N.E. 30th Street, Wilton Manors, Florida 33334-1064 and to Douglas E. Crow, Assistant State Attorney, P.O. Box 5028, Clearwater, Florida 33758-5028, this 27th day of February, 2009.

CERTIFICATE OF FONT COMPLIANCE

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

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